



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

DECISIONS FILED

JULY 25, 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
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_____	600	CAF 24 00747	Mtr of MAYHON P. I.

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

525/24

CA 23-00514

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

RONALD ORSZULAK, PLAINTIFF-APPELLANT,

V

ORDER

ANDREW HITCHCOCK, DEFENDANT-RESPONDENT.

LAW OFFICES OF MICHAEL W. COLE, PLLC, ALDEN (MICHAEL W. COLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF MICHAEL A. BENSON, SPRINGVILLE (MICHAEL A. BENSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered March 21, 2023. The order, insofar as appealed from, denied that part of plaintiff's motion seeking summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 21 and June 25, 2025,

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

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-01858

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER DAVIS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered October 26, 2022. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

We reject defendant's contention that County Court erred in refusing to suppress a handgun seized after it fell from a pocket of his sweatshirt while he was being pursued by a police officer. Based on defendant's physical and temporal proximity to the scene of a reported armed robbery and the fact that defendant was walking with someone whose physical characteristics and clothing matched the description of one of the individuals purportedly involved in the robbery, we conclude that the police officer had a founded suspicion that criminal activity was afoot, justifying his initial common-law inquiry of defendant and his companion (*see People v Atkinson*, 185 AD3d 1438, 1439 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]; *People v McKinley*, 101 AD3d 1747, 1748 [4th Dept 2012], *lv denied* 21 NY3d 1017 [2013]; *see generally People v De Bour*, 40 NY2d 210, 223 [1976]).

We further conclude that the court properly determined that the officer thereafter had the requisite reasonable suspicion to pursue and detain defendant based on the combination of the aforementioned specific circumstances indicating that defendant may have been engaged in criminal activity and his flight in response to the approach by the officer (*see Atkinson*, 185 AD3d at 1439; *People v Harvey*, 70 AD3d 1454, 1455 [4th Dept 2010], *lv denied* 15 NY3d 750 [2010]; *People v*

Martinez, 59 AD3d 1071, 1072 [4th Dept 2009], *lv denied* 12 NY3d 856 [2009]). Contrary to defendant's further contention, despite some inconsistencies, the officer's testimony was not so "incredible or improbable as to warrant disturbing the . . . court's determination of credibility," which is entitled to great deference (*People v Addison*, 199 AD3d 1321, 1322 [4th Dept 2021] [internal quotation marks omitted]; see *People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016]; see generally *People v Prochilo*, 41 NY2d 759, 761 [1977]).

Defendant also contends that the court erred in denying his request to proceed pro se. We reject that contention. "It is well settled that a criminal defendant's constitutional right to counsel concomitantly includes the right to refuse appointed counsel" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 384-385 [2011]; see *Faretta v California*, 422 US 806, 817 [1975]; *People v McIntyre*, 36 NY2d 10, 15 [1974]; see generally US Const Amend VI; NY Const, art I, § 6). In other words, there is a constitutional right "to self-representation at trial, . . . and [a] corresponding—and sometimes competing—requirement that the state provide [a] defendant competent counsel to conduct [their] defense" (*People v Stone*, 22 NY3d 520, 525 [2014]). Indeed, the Court of Appeals has recognized that there is an "inherent conflict between a defendant's right to counsel and the right of self-representation" (*People v Arroyo*, 98 NY2d 101, 102 [2002]). "In light of the multifaceted problems generated by a motion to proceed pro se, the task of the trial court is exceedingly difficult" (*McIntyre*, 36 NY2d at 14 [emphasis omitted]). The right to self-representation is therefore "subject to certain restrictions," which serve "to promote the orderly administration of justice and to prevent subsequent attack on a verdict claiming a denial of fundamental fairness" (*id.* at 17). Consequently, "[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" (*id.* [emphasis omitted]).

As relevant here, before trial defendant informed the court that he did not want his assigned attorney from the public defender's office (assigned counsel) to represent him, and he subsequently requested that he be assigned new counsel. The court thereafter engaged defendant in an extensive colloquy, during which defendant repeatedly expressed that he did not want assigned counsel to defend him because he believed that assigned counsel, the court, the previous County Court Judge, and the two prior public defenders assigned to the case were conspiring together to sabotage his defense in order to protect the arresting officer. When the court responded that it would not assign substitute counsel, defendant stated—repeatedly—that he would represent himself and not permit assigned counsel to continue to represent him if the court did not assign substitute counsel. The court denied the request for substitute counsel, and the trial continued with assigned counsel representing defendant.

Under these facts, we conclude that defendant did not unequivocally request to proceed pro se inasmuch as he only "ask[ed] to proceed pro se as an alternative to receiving new counsel," thereby seeking to "leverage his right of self-representation in an attempt to compel the court to appoint another lawyer" (*People v Lewis*, - NY3d -, -, 2025 NY Slip Op 03011, *3-4 [2025]; see *People v Gillian*, 8 NY3d 85, 88 [2006]; *People v LaValle*, 3 NY3d 88, 104-107 [2004]). Indeed, defendant repeatedly "made clear that he did not wish to proceed pro se," and "couched [his requests] as a means to secure new counsel" (*Lewis*, - NY3d at -, 2025 NY Slip Op 03011, *4), including by stating that he had "no choice" but to represent himself if the court did not assign new counsel, and that he "d[id]n't want to represent [him]self" but would do so if the court refused to appoint another attorney (see *Gillian*, 8 NY3d at 88; *LaValle*, 3 NY3d at 105; cf. *Lewis*, - NY3d at -, 2025 NY Slip Op 03011, *3-4). Defendant made no "standalone request to proceed pro se" (*Lewis*, - NY3d at -, 2025 NY Slip Op 03011, *4); rather, all of his "requests to proceed pro se were made in the alternative; he sought to represent himself only because [the court] refused to replace . . . assigned counsel who had displeased him" (*Gillian*, 8 NY3d at 88). A request to proceed pro se is equivocal where, as here, "it 'does not reflect an affirmative desire for self-representation' and instead shows that 'self-representation was reserved as a final, conditional resort' " (*People v Dixon*, 42 NY3d 609, 618 [2024], quoting *Kathleen K.*, 17 NY3d at 387; see *Gillian*, 8 NY3d at 88; *LaValle*, 3 NY3d at 104-107). Inasmuch as defendant's requests consisted of "equivocal and hesitant statements about proceeding pro se" (*Lewis*, - NY3d at -, 2025 NY Slip Op 03011, *4; see *Gillian*, 8 NY3d at 88; *LaValle*, 3 NY3d at 104-107), the court's duty to "make a searching inquiry . . . to determine whether [the] request[s] w[ere] knowing, voluntary, and intelligent" was not triggered (*Lewis*, - NY3d at -, 2025 NY Slip Op 03011, *1; see generally *McIntyre*, 36 NY2d at 17).

Defendant further contends that the court abused its discretion in refusing to assign substitute counsel. We reject that contention. "Whether counsel is substituted is within the 'discretion and responsibility' of the trial judge . . . , and a court's duty to consider such a motion is invoked only where a defendant makes a 'seemingly serious request[]' " supported by "specific factual allegations of 'serious complaints about counsel' " (*People v Porto*, 16 NY3d 93, 99-100 [2010]; see *People v Sides*, 75 NY2d 822, 824 [1990]). "If such a showing is made, the court must make at least a 'minimal inquiry,' and discern meritorious complaints from disingenuous applications by inquiring as to 'the nature of the disagreement or its potential for resolution' " (*Porto*, 16 NY3d at 100, quoting *Sides*, 75 NY2d at 825). Upon conducting that inquiry, "counsel may be substituted only where 'good cause' is shown" (*id.*; see *People v Gibson*, 126 AD3d 1300, 1301-1302 [4th Dept 2015]).

Here, the alleged conflict of interest defendant raised with respect to assigned counsel—which resulted from a federal civil rights action that defendant had brought against, inter alia, the public defender's office—related to defendant's belief that assigned counsel

was conspiring with the court and the prior assigned public defenders to sabotage defendant's case in order to protect the arresting officer from perjury charges. The court allowed defendant to raise and explain that issue, and then addressed it, repeatedly, noting that "there was no conspiracy" and "no grand design" against defendant. On this record, we conclude that the court "properly balanced defendant's request for substitute counsel against the need for the expeditious and orderly administration of justice and did not abuse its discretion when it ordered defense counsel to continue to represent him throughout the trial" (*People v Lewis*, 228 AD3d 1226, 1227 [4th Dept 2024], *lv granted* 42 NY3d 1080 [2025] [internal quotation marks omitted]; *see People v Hunter*, 171 AD3d 1534, 1535-1536 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019]).

We reject defendant's contention that he was denied effective assistance of counsel. To establish ineffective assistance of counsel, "it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). We conclude that defendant failed to meet that burden. Instead, "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of representation, reveal that [assigned counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Ruiz*, 234 AD3d 1329, 1330 [4th Dept 2025]; *People v Rogers*, 70 AD3d 1340, 1340 [4th Dept 2010], *lv denied* 14 NY3d 892 [2010], *cert denied* 562 US 969 [2010]).

Defendant additionally contends that the court abused its discretion in failing to order, *sua sponte*, a competency examination pursuant to CPL 730.30 (1) inasmuch as, prior to trial, the court commented on defendant's mental state after he asserted that public defenders and court personnel were conspiring against him. We reject that contention. Preliminarily, we note "that the issue of competency to stand trial may be raised on appeal despite the absence of any objection to the . . . court's failure to cause the defendant to be examined" (*People v Winebrenner*, 96 AD3d 1615, 1615 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012] [internal quotation marks omitted]). With respect to the merits, we note that, although a defendant in a criminal proceeding "is presumed to be competent" (*People v Tortorici*, 92 NY2d 757, 765 [1999], *cert denied* 528 US 834 [1999]), a court "must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person" (CPL 730.30 [1]). The determination whether to order a competency examination, either *sua sponte* or upon defense counsel's request, lies within the sound discretion of the court (*see People v Morgan*, 87 NY2d 878, 879-880 [1995]). Here, we conclude that the court did not abuse its discretion by failing to order a competency examination (*see People v Robinson*, 225 AD3d 1266, 1267 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]; *People v Thorpe*, 218 AD3d 1124, 1124-1125 [4th Dept 2023]). Specifically, the record establishes that, despite defendant's brief comments espousing a belief in a conspiracy against him, he "demonstrated an understanding of the proceedings and had the ability

to assist in his own defense," and that his comments about the purported conspiracy, arising out of his mistrust and frustration with regard to the criminal justice system, were "indicative of obstinance rather than incompetency" (*Thorpe*, 218 AD3d at 1125; see *Robinson*, 225 AD3d at 1267; cf. *People v Arnold*, 113 AD2d 101, 106 [4th Dept 1985]).

With respect to defendant's contention that the court erred in denying his applications pursuant to *Batson v Kentucky* (476 US 79 [1986]), defendant "failed to object to the court's procedure for determining his *Batson* challenge[s] and thus . . . failed to preserve his contention for our review" (*People v Scott*, 81 AD3d 1470, 1471 [4th Dept 2011], *lv denied* 17 NY3d 801 [2011]; see *People v McPherson*, 213 AD3d 1261, 1263 [4th Dept 2023], *lv denied* 39 NY3d 1112 [2023]; *People v Lewis*, 192 AD3d 1532, 1534 [4th Dept 2021], *lv denied* 37 NY3d 993 [2021]). 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]).

Viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that an acquittal would have been reasonable, we do not conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*). To the extent that there were "inconsistencies in [a witness's] testimony, [the inconsistencies] were properly considered by the jury[,] and there is no basis for disturbing its determinations" (*People v Cirino*, 203 AD3d 1661, 1663 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022] [internal quotation marks omitted]; see *People v Wiggins*, 225 AD3d 1305, 1307 [4th Dept 2024]; see generally *People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005]).

Finally, the sentence is not unduly harsh or severe.

All concur except CURRAN, J.P., and HANNAH, J., who dissent and vote to reverse in accordance the following memorandum: We respectfully dissent and vote to reverse the judgment and grant a new trial because we agree with defendant that County Court erred in denying his unequivocal requests to proceed pro se at trial without conducting the requisite searching inquiry to determine whether defendant was knowingly and intelligently waiving his right to counsel (see *People v Taylor*, 237 AD3d 1543, 1545 [4th Dept 2025]). It is well settled that "the right to represent oneself at trial is guaranteed under both the New York State and Federal Constitutions" (*People v Crespo*, 32 NY3d 176, 178 [2018], *cert denied* – US –, 140 S Ct 148 [2019]; see *People v Arroyo*, 98 NY2d 101, 103 [2002]). Indeed, "even in cases where the accused is harming [themselves] by insisting on conducting [their] own defense, respect for individual autonomy requires that [they] be allowed to go to jail under [their] own banner if [they] so desire[] and if [they] make[] the choice with eyes open" (*People v McIntyre*, 36 NY2d 10, 14 [1974] [internal quotation marks omitted]). A defendant may invoke the right to proceed pro se

under certain conditions: "(1) the request [must be] unequivocal and timely asserted, (2) there [must have] been a knowing and intelligent waiver of the right to counsel, and (3) the defendant [must] not engage[] in conduct which would prevent the fair and orderly exposition of the issues" (*Crespo*, 32 NY3d at 178; see *McIntyre*, 36 NY2d at 17).

As the Court of Appeals recently clarified, a request to proceed pro se is equivocal where it is made "as an alternative to receiving new counsel," that is, where the request is essentially an attempt to "leverage [a defendant's] right of self-representation in an attempt to compel the court to appoint another lawyer" (*People v Lewis*, — NY3d —, —, 2025 NY Slip Op 03011, *3-4 [2025]). Moreover, as relevant here, the Court reiterated, that a defendant "may assert their right to self-representation for a variety of reasons, including *dissatisfaction with counsel*" (*id.* at —, 2025 NY Slip Op 03011, *2 [emphasis added]; see *McIntyre*, 36 NY2d at 16; cf. *People v Alexander*, 109 AD3d 1083, 1084 [4th Dept 2013]). Indeed, the Court of Appeals had previously stated that even to the extent that some requests of a defendant may be read as "conditioning a request for [a] new attorney[] with a request for self-representation[, that] does not necessarily make the latter request equivocal" (*People v LaValle*, 3 NY3d 88, 107 [2004]). Ultimately, in *Lewis*, the Court emphasized that "*McIntyre* plainly requires only a single unequivocal and timely request to trigger the court's duty to inquire" (*Lewis*, — NY3d at —, 2025 NY Slip Op 03011, *4).

Here, unlike the majority, we conclude that defendant satisfied the condition that his request to represent himself be unequivocal because his requests to the court "demonstrate[d] an actual fixed intention and desire to proceed without professional assistance in his defense" (*People v Silburn*, 31 NY3d 144, 150 [2018]; cf. *People v Griffin*, 209 AD3d 1299, 1300 [4th Dept 2022]). Specifically, defendant stated, among other things, that he would prefer to represent himself and that he was "comfortable" doing so and added: "I'd rather represent myself . . . and I'm making that clear." Even if there were other instances where defendant's requests to represent himself were expressly phrased as an alternative to his request for new counsel (see *Lewis*, — NY3d at —, 2025 NY Slip Op 03011, *3-4), the aforementioned statements satisfied the requirement that there be at least one unequivocal request to proceed pro se (see *id.* at —, 2025 NY Slip Op 03011, *4). Indeed, to conclude otherwise with respect to the statements identified above would be to refuse to take defendant's requests "at face value" and to engage in the contextual approach plainly rejected by the Court of Appeals in *Lewis* (*id.* at — n 6, 2025 NY Slip Op 03011, *4 n 6). Ultimately, like the majority, we read *Lewis* as providing the guiding principles for our determination on whether defendant's requests were unequivocal; however, we view the facts of the case differently and conclude that they warrant reversal and a new trial.

We agree with the majority that many of defendant's requests to represent himself were voiced only *after* the court made clear that it

would not grant his request for substitute counsel. Specifically, the record reflects that the court made that determination at the very beginning of its colloquy with defendant, repeatedly informed him—throughout the colloquy—that it would not appoint him new counsel, and inquired directly whether defendant wished to represent himself. Indeed, in response to defendant's complaints about defense counsel, the court specifically informed him that his "only other real option at this point [was] to represent [himself]." Thus, the relevant colloquy between the court and defendant was framed from the very start with the court advising defendant that he must either proceed to trial with assigned defense counsel or represent himself.

Given how the colloquy unfolded, we therefore disagree with the majority that defendant only "ask[ed] to proceed pro se as an alternative to receiving new counsel" (*id.* at —, 2025 NY Slip Op 03011, *3), inasmuch as the court had already removed the possibility of assigning new counsel as an alternative. In other words, it was the court that framed the choice before defendant as either proceeding to trial with his current defense counsel or representing himself. Under those circumstances, defendant did not "couch[] [his requests] as a means to secure new counsel" (*id.* at —, 2025 NY Slip Op 03011, *4). Rather, instead of trying to actually secure new assigned counsel—an option clearly foreclosed by the court—defendant was merely responding to the court's explanation that he could either proceed with current counsel or represent himself.

Importantly, we note that the majority does not assert that defendant's "self-representation request[s]" were " 'overshadowed' by requests for other relief" (*id.* at —, 2025 NY Slip Op 03011, *7 [Singas, J., dissenting]). That is consistent with the fact that the court gave defendant two divergent choices—either proceed to trial with his third assigned counsel or represent himself. Just as importantly, the majority also does not conclude that defendant's repeated requests to represent himself "lacked the indicia of genuineness" (*id.*) or were "fleeting or unserious" (*id.* at —, 2025 NY Slip Op 03011, *8 [Singas, J., dissenting]). Simply put, on the record before us, when viewed through the lens of the analysis in *Lewis*, we conclude that at least one of defendant's repeated and clear requests to represent himself was sufficiently unequivocal to require the court to conduct an inquiry to "ensure that defendant's waiver of counsel was 'made competently, intelligently, and voluntarily' " (*id.* at —, 2025 NY Slip Op 03011, *4).

Additionally, we conclude that a new trial is warranted because, to the extent the court considered defendant's request to proceed pro se, it failed to conduct the required inquiry to determine whether defendant was knowingly and intelligently waiving his right to counsel (see generally *People v Crampe*, 17 NY3d 469, 481 [2011], *cert denied* 565 US 1261 [2012]; *Taylor*, 237 AD3d at 1545). Rather, in denying defendant's request, the court's primary rationale was its perception that defendant did not have the necessary legal skills to represent himself. It is well settled, however, that "[m]ere ignorance of the law cannot vitiate an effective waiver of counsel as long as the defendant was cognizant of the dangers of waiving counsel at the time

it was made" (*People v Hall*, 49 AD3d 1180, 1181 [4th Dept 2008] [internal quotation marks omitted]; see *People v Ryan*, 82 NY2d 497, 507-508 [1993]; *McIntyre*, 36 NY2d at 17-18).

We also reject the People's contention that defendant "abandoned any request to proceed pro se . . . [by] acquiesc[ing] to continued representation by counsel at subsequent proceedings" (*People v Couser*, 210 AD3d 1513, 1514 [4th Dept 2022], *lv denied* 39 NY3d 1071 [2023] [internal quotation marks omitted]). Specifically, as discussed above, under *Lewis*, all that is required is a "single unequivocal and timely request to trigger the court's duty to inquire" (*Lewis*, - NY3d at -, 2025 NY Slip Op 03011, *4), and therefore defendant was not required to make a new application to represent himself at any subsequent appearances in order not to abandon his request to proceed pro se. Regardless, there is no evidence to show abandonment of that request because, even after the court told defendant that it would not appoint substitute counsel or allow defendant to proceed pro se, defendant stated that he did not "want to talk to [defense counsel] . . . I don't want him to represent me. I don't want him." Indeed, defense counsel characterized the situation as one in which the court "force[d him] to represent [defendant]." In short, at no point did defendant ever expressly withdraw his request to proceed pro se (*cf. People v Dublino*, 229 AD3d 1075, 1076 [4th Dept 2024], *lv denied* 42 NY3d 1052 [2024]). Moreover, we note that this is not a case where a defendant acquiesced to counsel, abandoning any request to proceed pro se, following the court's appointment of new assigned counsel—the court never appointed substitute counsel, despite defense counsel's request that the court do so if it denied defendant's request to proceed pro se (*cf. People v Gillian*, 8 NY3d 85, 88 [2006]; *People v Dunn*, 229 AD3d 1220, 1222 [4th Dept 2024]; *Couser*, 210 AD3d at 1514).

Alternatively, and also contrary to the majority's conclusion, we agree with defendant that the court erred in denying his request for substitute counsel, because it failed to conduct a sufficient inquiry into his complaints regarding a serious breakdown in his relationship with defense counsel. A court's duty to consider a motion to substitute counsel is invoked when "a defendant makes a seemingly serious request[]" for new counsel (*People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]; see *People v Sides*, 75 NY2d 822, 824 [1990]). If a defendant makes "specific factual allegations of serious complaints about counsel," then "the court must make at least a minimal inquiry" into "the nature of the disagreement or its potential for resolution" (*Porto*, 16 NY3d at 100 [internal quotation marks omitted]; see *People v Gibson*, 126 AD3d 1300, 1301-1302 [4th Dept 2015]), and the court may substitute counsel where good cause is shown (see *Porto*, 16 NY3d at 100; *Sides*, 75 NY2d at 824; *Gibson*, 126 AD3d at 1302).

Here, we conclude that defendant made the requisite "seemingly serious request[]" (*Porto*, 16 NY3d at 100) for substitute counsel based on a breakdown in communication and potential conflict of interest between defendant and defense counsel. Defendant repeatedly told the court that he did not want defense counsel to represent him because of his belief that defense counsel was part of a conspiracy to

sabotage his case, and he filed a civil lawsuit in federal court against, inter alia, defense counsel. Defense counsel's comments to the court also indicated that the relationship between him and defendant had broken down. He noted a near-total lack of communication between him and defendant and indicated that defendant's "animosity and hostility towards [defense counsel] and [his] office[] [was] going to be an issue." We therefore conclude on this record that "[d]efendant's request on its face suggested a serious possibility of irreconcilable conflict with his lawyer, as evidenced by the acknowledgment of counsel that a complete breakdown of communication and lack of trust had developed in their relationship" (*Sides*, 75 NY2d at 824-825).

"[W]here[, as here,] potential conflict is acknowledged by counsel's admission of a breakdown in trust and communication, the trial court is obligated to make a minimal inquiry" (*Porto*, 16 NY3d at 101; see *People v Darwish*, 195 AD3d 1515, 1517 [4th Dept 2021]; *People v Tucker*, 139 AD3d 1399, 1400 [4th Dept 2016]). The court failed to fulfill that obligation here. It did not ask defendant any questions about his relationship with defense counsel—indeed, the court did not ask defense counsel any questions about the representation, even after defense counsel raised his own concerns about continuing with the representation and requested that there be a substitution. Further, the court made no serious inquiry into defendant's civil case against defense counsel, and we conclude that, "although there is no rule requiring that a defendant who has filed a [civil case] against [their] attorney be assigned new counsel, the court was required to make an inquiry to determine whether defense counsel could continue to represent defendant in light of the [civil suit]" (*People v McCullough*, 83 AD3d 1438, 1440 [4th Dept 2011], *lv denied* 17 NY3d 798 [2011]; see *Tucker*, 139 AD3d at 1400). "[H]ad the court conducted that inquiry, it might well have determined that, despite . . . defendant's allegedly having filed a [civil suit], [that action] was merely a delaying tactic or that . . . defense counsel was, despite the [civil suit], fully capable of providing . . . defendant with effective representation" (*Tucker*, 139 AD3d at 1400-1401 [internal quotation marks omitted]). The court could not, however, summarily dismiss the request (see *Sides*, 75 NY2d at 825; *Darwish*, 195 AD3d at 1517-1518).

Ann Dillon Flynn

Entered: July 25, 2025

Clerk of the Court

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

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KA 23-00735

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

OMAR ANWAR, DEFENDANT-APPELLANT.

JAMES OSTROWSKI, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Theodore H. Limpert, J.), entered February 28, 2023. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is reversed on the law and the matter is remitted to Onondaga County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals by permission of this Court from an order summarily denying his motion pursuant to, inter alia, CPL 440.10 seeking to vacate a judgment convicting him upon a jury verdict of, among other things, rape in the first degree (Penal Law former § 130.35 [1]). We agree with defendant that County Court erred in its determination that defendant's claim that he was denied effective assistance of counsel was procedurally barred pursuant to CPL 440.10 (2) (a) (*see People v Franklin*, 206 AD3d 1610, 1611-1612 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]). Although on direct appeal we rejected defendant's contention that he was denied effective assistance of counsel (*People v Anwar*, 151 AD3d 1628, 1629 [4th Dept 2017], *lv denied* 30 NY3d 947 [2017]), we conclude that his present contentions are properly raised by way of a CPL 440.10 motion because they concern matters outside the record that was before us on his direct appeal (*see Franklin*, 206 AD3d at 1611-1612). Defendant's motion contained sufficient evidence, including "sworn allegations . . . by . . . defendant or by another person or persons" (CPL 440.30 [1] [a]), demonstrating that a hearing is necessary to determine whether trial counsel's waiver of an interpreter for defendant adversely affected defendant's right to meaningfully participate in his own defense (*see People v Maull*, 218 AD3d 1236, 1240 [4th Dept 2023]; *see generally People v Ramos*, 26 NY2d 272, 274 [1970]; *People v Perez*, 198 AD2d 446, 447 [2d Dept 1993], *lv denied* 82 NY2d 929 [1994]). Specifically, defendant submitted evidence that, although he

was able to navigate conversational topics in English, he required the assistance of an interpreter when discussing more technical or esoteric topics and that he had in fact utilized the assistance of an interpreter at all but one court appearance prior to his trial counsel waiving such services for defendant just prior to trial. "Although the evidence in support of the motion does not 'conclusively substantiate[] by unquestionable documentary proof' that vacatur is required due to a violation of defendant's right to [effective assistance of] counsel . . . , it is nonetheless suggestive of that fact" (*Mauil*, 218 AD3d at 1241). Defendant is therefore entitled to a hearing "on his entire claim of ineffective assistance of counsel inasmuch as such a claim constitutes a single, unified claim that must be assessed in totality" (*People v Ross*, 197 AD3d 905, 907 [4th Dept 2021] [internal quotation marks omitted]; see *People v Mack*, 195 AD3d 1601, 1601-1602 [4th Dept 2021]). Thus, we reverse the order and remit the matter to County Court for such a hearing.

We have reviewed the other contentions raised by defendant and conclude that they do not require a different result.

All concur except BANNISTER and KEANE, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. We agree with the majority that County Court erred in its determination that defendant's ineffective assistance of counsel claim was procedurally barred pursuant to CPL 440.10 (2) (a) (see *People v Franklin*, 206 AD3d 1610, 1611-1612 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]). Nonetheless, we would have affirmed the order. We agree with the court that defendant's motion alleging, inter alia, ineffective assistance of counsel "is both legally and factually insufficient to warrant the relief requested." We therefore disagree with the majority that defendant's motion contained sufficient evidence demonstrating that a hearing is necessary to determine whether defense counsel's waiver of an interpreter for defendant adversely affected defendant's right to meaningfully participate in his own defense.

The initial determination that defendant did not need a translator was made sua sponte by the court at the final pretrial conference. Defense counsel acquiesced, responding that, "in speaking to [defendant], for the record, he is not requesting an interpreter." Defendant made no protest to the court or defense counsel with respect to the determination that he did not need a translator. Defendant thereafter testified at trial without the necessity of, or a request for, a translator. In offering his testimony, defendant demonstrated that he has conversational English skills, which belies any assertion that he needed a translator.

"In order '[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" (*People v Jackson*, 132 AD3d 1304, 1306 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; see *People v Rivera*, 71 NY2d 705, 709 [1988]), and defense counsel is not ineffective for failing to make an application with little or no chance of success

(see *People v Cox*, 75 AD3d 1136, 1136 [4th Dept 2010], *lv denied* 15 NY3d 919 [2010]). Although defense counsel waived any request for a translator after purportedly conferring with his client, he did so only after the court issued a sua sponte ruling that defendant did not need a translator, leading us to conclude that any request for an interpreter by defense counsel would have had little or no chance of success.

Moreover, defendant's posttrial motion was filed over 10 years after his 2012 trial and conviction. Thus, he chose to proceed to trial and, only after obtaining an unfavorable verdict, contends that he was denied effective assistance of counsel as a result of, *inter alia*, defense counsel's waiver of any request for a translator. "Where . . . a defendant is adequately represented by competent counsel, and despite numerous opportunities to do so, fails to inform the court about any inability to understand the English language, he cannot be heard to complain in a collateral attack that his conviction was secured without due process of law" (*People v Ramos*, 26 NY2d 272, 274 [1970]; see *People v Ramos*, 25 AD2d 791, 791 [3d Dept 1966]; see also *People v Hernandez*, 8 NY2d 345, 348 [1960], *cert denied* 366 US 976 [1961]). "Otherwise, it would be possible for a defendant to remain silent throughout the trial, and take a chance of a favorable verdict—failing in which, he could secure a new trial upon the ground that he did not understand the language in which the testimony was given. The absurdity of such a proposition is self-evident" (*Ramos*, 26 NY2d at 275).

In our minds, and on these facts, the court did not err in denying without a hearing the motion with respect to defendant's claim that defense counsel was ineffective for waiving any request for a translator inasmuch as that claim lacks the requisite support in the motion papers (see CPL 440.30 [4] [b]; see also *People v Reyes*, 158 AD2d 626, 627 [2d Dept 1990], *lv denied* 77 NY2d 965 [1991]).

We have reviewed 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

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KA 23-01657

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

LOUIE HARRIS [LOUIS HARRIS-HORNSBY],
DEFENDANT-RESPONDENT.

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

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (PAUL C. CURTIN OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Susan M. Eagan,
J.), dated September 28, 2023. The order granted the motion of
defendant and dismissed the indictment.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: On appeal from an order granting defendant's motion to dismiss the indictment on statutory speedy trial grounds, the People contend that County Court erred in concluding that their certificate of compliance was improper, thus rendering their statement of readiness illusory, and that the court further erred in granting defendant's motion on that basis without accounting for periods of excludable time. Where a defendant brings a CPL 30.30 motion and the certificate of compliance is deemed improper and the readiness statement stricken as illusory, the case will be dismissed if the time chargeable to the People exceeds the applicable CPL 30.30 period (*see People v Bay*, 41 NY3d 200, 213 [2023]). Although an illusory statement of readiness is "insufficient to stop the running of the speedy trial clock" (*People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]), a court must still consider which periods of prereadiness time are chargeable to the People for speedy trial purposes (*see CPL 30.30 [4]; People v Brown*, 28 NY3d 392, 406 [2016]; *People v Lawrence*, 231 AD3d 1497, 1501 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]; *People v Jordan*, 220 AD3d 1187, 1188 [4th Dept 2023]). Here, the court failed to calculate any periods of excludable time for speedy trial purposes. Thus, even assuming, arguendo, that the People's certificate of compliance was improper and that the statement of readiness was therefore illusory, we do not address the People's contention that the time chargeable to them did not exceed six months because the court did not rule on the excludable time (*see People v Concepcion*, 17 NY3d 192, 195 [2011];

People v LaFontaine, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *see generally* CPL 470.15 [1]; *People v Anderson*, 188 AD3d 1699, 1701 [4th Dept 2020], *lv denied* 36 NY3d 1055 [2021]). We therefore hold the case, reserve decision, and remit the matter to County Court to determine whether the People were ready within the requisite six-month time period (*see* CPL 30.30 [1] [a]; *People v Baker*, 229 AD3d 1324, 1328 [4th Dept 2024]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-00065

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONATHAN SPINKS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), rendered December 22, 2022. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), arising from allegations that he shot and killed a coworker, Lysaun Curry, on October 2, 2020 (Curry indictment). In appeal No. 2, 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]), assault in the first degree (§ 120.10 [1]), two counts of burglary in the first degree (§ 140.30 [1], [2]), and three counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), arising from allegations that he engaged in a shootout with an acquaintance, Day'Janique Cooper, on October 10, 2020 (Cooper indictment).

Contrary to defendant's initial contention in both appeals, Supreme Court did not abuse its discretion in consolidating the indictments. "[T]he decision to consolidate separate indictments under CPL 200.20 (subd 4) is committed to the sound discretion of the Trial Judge in light of the circumstances of the individual case, and the decision is reviewable on appeal . . . only to the extent that there has been an abuse of that discretion as a matter of law" (*People v Lane*, 56 NY2d 1, 8 [1982]; see CPL 200.20 [5]; *People v Brown*, 254

AD2d 781, 782 [4th Dept 1998], *lv denied* 92 NY2d 1029 [1998]).

Here, we conclude that the court properly exercised its discretion in granting consolidation pursuant to CPL 200.20 (2) (b) because there is significant common evidence supporting both indictments. Most importantly, the same weapon was involved in the events underlying both indictments, and—indeed—is the critical piece of evidence supporting both (see *People v Burton*, 134 AD2d 269, 270 [2d Dept 1987], *lv denied* 70 NY2d 1004 [1988]). Jointly trying the two cases more securely connects defendant to the gun used in the underlying criminal incidents charged in the indictments inasmuch as, with respect to the Curry indictment, evidence in the Cooper case would show that defendant intentionally possessed and used a common weapon in close temporal proximity to the fatal shooting. Had the cases been tried separately, however, with respect to the Curry indictment, defendant's only connection to the gun would have been that it had been found in his mother's home. Additional evidence gathered in support of the Cooper indictment buttresses that point. For instance, the gun is visible in a doorbell camera video showing defendant carrying it into his mother's home—the same home that was ultimately searched by the police in connection with the Cooper indictment. Additionally, the search warrant executed on the mother's home in connection with the Cooper indictment permitted the police to collect shoes and clothing that the People argued matched the shoes and clothing worn by the individual in the surveillance footage depicting the shooting of Curry. In short, inasmuch as there is significant overlapping evidence admissible to support both indictments, the court did not err in concluding that the indictments were joinable under CPL 200.20 (2) (b) (see *People v Byrd*, 214 AD3d 1321, 1322 [4th Dept 2023], *lv denied* 40 NY3d 927 [2023]; *People v Davey*, 134 AD3d 1448, 1451 [4th Dept 2015]).

We further conclude that the court properly exercised its discretion in granting consolidation of the indictments on the additional basis that they charged offenses that are "defined by the same or similar statutory provisions" (CPL 200.20 [2] [c]). In addition to the crimes mentioned above, both indictments also charge defendant with criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Thus, "[t]here [can be] no dispute that joinder of the offenses under [CPL 200.20 (2) (c)] was proper in the first instance" (*People v Mero*, — NY3d —, —, 2024 NY Slip Op 06385, *2 [2024]). We reject defendant's contention that there is "[s]ubstantially more proof" (CPL 200.20 [3] [a] [emphasis added]) against defendant with respect to the Cooper indictment than there is with respect to the Curry indictment inasmuch as the quantum of proof offered in connection with the latter vastly exceeds the proof offered in connection with the former and is independently persuasive as to defendant's actions. In other words, the People's case concerning the Curry indictment is thorough—i.e., they do not merely rely on the strength of the evidence from the Cooper indictment as an indirect way to demonstrate defendant's criminal propensity (see *People v McCune*, 210 AD2d 978, 978-979 [4th Dept 1994], *lv denied* 85 NY2d 864 [1995]).

In opposing joinder, defendant failed to meet the statutory

standard of showing that he had "a genuine need to refrain from testifying . . . [to] satisf[y] the court that the risk of prejudice is substantial" (CPL 200.20 [3] [b]). Defendant's allegation that testifying in connection with the Curry indictment would force him to admit that he had disagreed with Curry and that they had joked around by shooting each other with Airsoft guns, does not "make a convincing showing that he had . . . a genuine need to refrain from" admitting those facts (*People v Cooper*, 128 AD3d 1431, 1433 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]; see *People v Bankston*, 63 AD3d 1616, 1617 [4th Dept 2009], *lv denied* 14 NY3d 885 [2010]). Thus, we conclude that defendant failed to demonstrate "that he had 'both important testimony to give concerning one [offense] and a genuine need to refrain from testifying on the other' " (*People v Rogers*, 245 AD2d 1041, 1041 [4th Dept 1997], quoting CPL 200.20 [3] [b]; see *People v Lane*, 56 NY2d 1, 5 [1982]).

We further conclude that defendant's contention that the court erred in failing to provide the jury with the promised limiting instruction to minimize any prejudice stemming from consolidation (see e.g. CJI2d[NY] Multiple Separate Transactions of Same Crime), is unpreserved for our review (see generally CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

To the extent that defendant preserved for our review his contention in appeal No. 1 that the conviction of murder in the second degree is not supported by legally sufficient evidence (see generally *People v Gray*, 86 NY2d 10, 19 [1995]), that contention lacks merit (see *People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). The testimony of the prosecution witnesses was not " 'so unworthy of belief as to be incredible as a matter of law' " (*People v Woods*, 26 AD3d 818, 819 [4th Dept 2006], *lv denied* 7 NY3d 765 [2006]), and we see no reason to disturb the jury's resolution of credibility issues (see generally *Bleakley*, 69 NY2d at 495).

Defendant's contention in appeal No. 1 that the court erred in failing to instruct the jury on wholly circumstantial evidence is not preserved for our review (see generally CPL 470.05 [2]; *People v Robinson*, 88 NY2d 1001, 1001-1002 [1996]). We decline to exercise our power to review that issue as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We reject defendant's related contention in appeal No. 1 that defense counsel was ineffective for failing to request a circumstantial evidence charge. Even assuming, arguendo, that defendant was entitled to such a charge, we conclude that the "single error in failing to request such a charge [would] not constitute ineffective representation as it was not so serious as to compromise defendant's right to a fair trial" (*People v Griffin*, 203 AD3d 1608, 1611 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022] [internal quotation marks omitted]).

Defendant's challenge in appeal No. 1 to the restitution order is not preserved for our review (*see generally* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We have reviewed defendant's contentions in both appeals that he was deprived of effective assistance of counsel and conclude that they are without merit. Viewing the evidence, the law, and the circumstances of this case in their totality at the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally* *People v Baldi*, 54 NY2d 137, 147 [1981]).

In both appeals, the sentence is not unduly harsh or severe.

We have reviewed defendant's remaining contentions in both appeals and conclude that none warrants modification or reversal of the judgments.

We note, however, that the uniform sentence and commitment form erroneously indicates that defendant was sentenced at a term of Monroe County Court, and it must be amended to reflect that he was sentenced at a term of Supreme Court, Monroe County (*see generally* *People v Daniqua S.D.*, 92 AD3d 1226, 1227 [4th Dept 2012]).

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully disagree with the majority that Supreme Court properly consolidated the two indictments and instead conclude that consolidation was an abuse of discretion as a matter of law (*see* *People v Lane*, 56 NY2d 1, 7 [1982]). I would therefore reverse the judgment in each appeal and grant a new trial of each indictment.

As noted by the majority, this conviction arises from two shootings in October 2020. In the first incident, defendant's coworker Lysaun Curry was shot and killed on October 2, 2020. There were no witnesses to the shooting. In the second incident, which took place on October 10, 2020, defendant and an acquaintance, Day'Janique Cooper, were both shot while inside Cooper's home. Cooper alleged that defendant shot her after entering her home without permission and that she fired back in self-defense. Defendant was charged in two separate indictments, one encompassing the crimes surrounding and including Curry's murder (Curry indictment) and the other encompassing the crimes surrounding and including the Cooper assault (Cooper indictment).

The People moved to consolidate the indictments, alleging that a 9 millimeter handgun was recovered during a search of defendant's residence and that ballistics testing showed that the handgun had been used in both shootings. They first contended that consolidation was proper pursuant to CPL 200.20 (2) (b) because proof regarding defendant's possession of the gun during the assault on Cooper and its recovery from defendant's residence would be material and admissible in the trial of the Curry indictment. They further contended that

consolidation was proper pursuant to CPL 200.20 (2) (c) because the two indictments charged offenses that are the same or similar in law. Finally, they contended that consolidation was proper because it would promote judicial economy due to "significant overlap of witnesses, evidence, and testimony," specifically the handgun, ballistics expert, and officers involved in the search of defendant's home. Defendant opposed consolidation, contending that he would be significantly prejudiced by joinder because there was substantially more evidence of his guilt on the Cooper indictment and because consolidation would impact his decision to testify.

Supreme Court granted consolidation pursuant to CPL 200.20 (2) (b), determining that there was substantial evidence "common to both indictments" that would be material and admissible at the consolidated trial. It further found that the indictments were properly consolidated pursuant to CPL 200.20 (2) (c), given that both indictments charge offenses under the murder statute and the criminal possession of a weapon statute. The court noted that "[u]ndue prejudice, if any, can be remedied by a strong curative instruction given to the finder of fact."

On a motion to consolidate, "the applicant must demonstrate . . . not only that the offenses charged in the separate indictments are joinable in accordance with the statutory criteria set forth in CPL 200.20 (subd 2) but also that combination for a single trial is an appropriate exercise of discretion" (*Lane*, 56 NY2d at 7). I agree with defendant that the People failed to make the necessary showing here, and that the court abused its discretion in granting the motion.

Initially, I conclude that the court erred in granting consolidation pursuant to CPL 200.20 (2) (b). Under that provision, "two offenses, even though based on separate and distinct criminal transactions, may be joined in the discretion of the trial court if they are of such a nature that proof of either offense would be material and admissible as evidence-in-chief upon the trial of the other" (*People v Bongarzone*, 69 NY2d 892, 895 [1987]; see CPL 200.20 [2] [b]). "[E]vidence may be deemed material and admissible within the meaning of CPL 200.20 (2) (b) if such proof would be admissible under any of the recognized *Molineux* exceptions" (*People v Bryant*, 200 AD3d 1483, 1487-1488 [3d Dept 2021], *appeal dismissed* 38 NY3d 1158 [2022] [internal quotation marks omitted]; see *People v Marcano*, 213 AD3d 1258, 1258-1259 [4th Dept 2023], *lv denied* 40 NY3d 951 [2023]; *People v Morman*, 145 AD3d 1435, 1437 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]). Here, the People failed to make a showing that evidence of the details of the Cooper assault would be material and admissible at a trial on the Curry murder (see generally *People v Cass*, 18 NY3d 553, 560 [2012]) and thus failed to show that the statute is applicable. Although the same gun had been used in both crimes, the Curry murder is neither "so unique" nor so similar to the Cooper assault "as to allow admission of evidence of the second crime on the theory of the similarity of the modus operandi" (*People v Condon*, 26 NY2d 139, 144 [1970]). I agree with the majority to the extent that "evidence tending to establish that defendant was in possession of the" handgun that was used to murder Curry on the night

of the Cooper assault - including the doorbell camera video showing defendant carry it into his mother's home - would be "relevant and thus admissible on the issue of the defendant's identity" at trial on the Curry indictment (*id.*). However, all the identity evidence linking defendant to the Curry murder could be "adduced at the trial without the necessity of revealing the details of the" burglary and assault alleged in the Cooper indictment (*id.*). The mere fact that defendant "intentionally possessed and used a common weapon" in another, unrelated crime is precisely the type of criminal disposition evidence that the Court of Appeals has previously rejected as inadmissible under *Molineux*, because "the introduction of this damaging evidence could only have improperly allowed the jury to base their finding of guilt on the impermissible ground of criminal disposition" (*id.*; see generally *People v Weinstein*, 42 NY3d 439, 444, 455-458 [2024]; *People v Mountzouros*, 206 AD3d 1706, 1707 [4th Dept 2022]).

Nor were the indictments properly consolidated pursuant to CPL 200.20 (2) (c). That paragraph permits discretionary consolidation of offenses "defined by the same or similar statutory provisions" (CPL 200.20 [2] [c]; see *Lane*, 56 NY2d at 7). That is the most permissive provision of the joinder statute, and it must be read together with CPL 200.20 (3) to balance the potential for undue prejudice that necessarily accompanies consolidation. That subdivision states that, when offenses are joined solely because they are defined by the same or similar statutory provisions, the court may decline to join them "in the interest of justice and for good cause shown" (CPL 200.20 [3]). The statute provides two examples of "good cause" why offenses that would otherwise be joinable under CPL 200.20 (2) (c) must be tried separately, and defendant established his entitlement to denial of the consolidation motion under both those paragraphs.

First, the offenses should not be joined "where there is . . . [s]ubstantially more proof on one . . . than on others" and "a substantial likelihood that the jury would be unable to consider" the joined offenses separately (CPL 200.20 [3] [a]). In his opposition to the consolidation motion, defendant discussed the "dramatic[] differen[ce]" in the strength of the evidence on the two indictments and how consolidation would therefore "cause [him] an unfair disadvantage." Specifically, in addition to evidence that Cooper knew defendant and identified him by name as her assailant, defendant's DNA was present at the scene of the Cooper shooting, and video evidence showed defendant arriving at his residence soon after that shooting holding an object that could have been a handgun. By contrast, defendant contended that the evidence identifying him as the perpetrator of the murder in the Curry indictment is "much weaker," given that there were no eyewitnesses and all the evidence linking defendant to the crime is circumstantial. Due to the "substantial disparity in the evidence tying . . . defendant to the offenses contained in [two] separate indictments," and to avoid the "strong possibility that the jury [would] convict[] . . . defendant of the offenses charged in [the weaker] indictment . . . by reason of the cumulative effect of the evidence" (*People v Martinez*, 165 AD3d 1288, 1290 [2d Dept 2018]; see *People v Stanley*, 81 AD2d 842, 843 [2d Dept

1981]; *cf. People v Mero*, – NY3d –, –, 2024 NY Slip Op 06385, *2-3 [2024]), the indictments should not have been consolidated.

Second, the offenses should not be joined where there is “[a] convincing showing that a defendant has both important testimony to give concerning one count and a genuine need to refrain from testifying on the other” (CPL 200.20 [3] [b]). In his opposition, defendant contended that he needed to testify at the trial of the Cooper indictment to explain “why he was [in Cooper’s home], how he got inside the location, that it was not a burglary, that he knew [Cooper], and why he acted in the manner he did.” However, he would not testify at the trial of the Curry indictment because such testimony would require, *inter alia*, “admitting to a prior disagreement [with Curry] and to previously shooting [Curry] with rubber bullets,” which would “offset the otherwise weak evidence in the case.” Defendant concluded that consolidation would force him into the unfair position of choosing to “[t]estify and advance his defense on one indictment and be questioned on the other, or not to testify at all.” Defendant provided a detailed and reasoned basis for his concerns, and went far beyond the “speculative fears” or “conclusory generalities” that have been rejected previously under this statute (*Lane*, 56 NY2d at 10 [internal quotation marks omitted]; see *People v Peterkin*, 12 AD3d 1026, 1027 [4th Dept 2004], *lv denied* 4 NY3d 766 [2005]; *People v Burrows*, 280 AD2d 132, 135-136 [4th Dept 2001], *lv denied* 96 NY2d 826 [2001]). Instead, he “articulate[d] in concrete terms” good cause that the indictments should not be consolidated (*Lane*, 56 NY2d at 10) and met the “convincing showing” standard set forth in the statute (CPL 200.20 [3] [b]). Even assuming *arguendo* that defendant did not meet the statutory standard for severance under the statute, that standard is not applicable on motions to consolidate. Indeed, on a motion to consolidate, the sole consideration is the court’s “sound discretion . . . in light of the circumstances of the individual case,” and the statute simply provides guidance as to the factors to be considered in exercise of that discretion (*Lane*, 56 NY2d at 8).

I further conclude that the court failed to properly balance judicial economy against the potential for undue prejudice (see generally *People v Mahboubian*, 74 NY2d 174, 183 [1989]). Although the People generally asserted in the consolidation motion that “multiple witnesses would have to be recalled to give identical testimony in two separate trials,” they failed to identify such witnesses other than the ballistics expert and the officers who executed the search warrant at defendant’s residence. Indeed, a review of the trial transcript demonstrates that only a limited number of the numerous witnesses at trial testified as to the charges in both indictments, and several of those who did provided only brief chain of custody testimony. In short, “any economy gained through the consolidated trial was insignificant, at best” (*People v Davis*, 225 AD3d 62, 76 [1st Dept 2024]).

Moreover, the undue prejudice to defendant was not cured by a limiting instruction, as the court failed to follow through on its promise to instruct the jurors that the evidence must be considered

separately. That error was further compounded by the People, who repeatedly conflated the charges from the two indictments during summation. By "continually referr[ing] to the [two indictments] together," the prosecutor "improperly combined" incidents that should have been considered separately (*People v Caparella*, 83 AD3d 730, 731 [2d Dept 2011]). Although defendant failed to preserve any contention with respect to the court's failure to give a limiting instruction, under the facts of this case, I conclude that the error was fundamental and should be addressed in the interest of justice because "it cannot be fairly said that 'the evidence was easily segregable in the minds of the jurors' . . . where the trial court failed to give a limiting instruction to that effect" (*Davis*, 225 AD3d at 75; see generally *People v Pichardo*, 34 AD3d 1223, 1225 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007]; see also *People v Greene*, 306 AD2d 639, 642-643 [3d Dept 2003], *lv denied* 100 NY2d 594 [2003]).

"[C]ompromise of a defendant's fundamental right to a fair trial free of undue prejudice as the *quid pro quo* for the mere expeditious disposition of criminal cases will not be tolerated" (*Lane*, 56 NY2d at 7-8). Here, I conclude that, because "defendant suffered undue prejudice from cumulative evidence and the risk of propensity inference during a consolidated trial that accomplished little with respect to public or judicial economy, a consolidated trial on the basis of CPL 200.20 (2) (c) was an abuse of discretion and error" (*Davis*, 225 AD3d at 76). On that basis alone, the judgments should be reversed and new trials granted.

In addition, in appeal No. 1, I conclude that the court erred in failing to give a circumstantial evidence charge. Although I agree with the majority that defendant failed to preserve his contention for our review (see CPL 470.05 [2]), I conclude that it warrants the exercise of our power to review the contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

There is no requirement that we grant interest of justice review for an unpreserved error in a jury charge (see generally *People v Robinson*, 88 NY2d 1001, 1001-1002 [1996]). However, in cases where the evidence is circumstantial and the proof of the defendant's guilt is not overwhelming, this Court has often exercised our interest of justice power to reverse or modify on the ground of a defendant's unpreserved contention that a court erred in failing to give a circumstantial evidence charge (see e.g. *People v Soto*, 210 AD3d 1502, 1503 [4th Dept 2022], *lv denied* 40 NY3d 931 [2023]; *People v Burnett*, 41 AD3d 1201, 1202 [4th Dept 2007]; cf. e.g. *People v Blackshear*, 125 AD3d 1384, 1385-1386 [4th Dept 2015], *lv denied* 25 NY3d 987 [2015]). Defendant has presented such a case here, given that the evidence in support of the counts in the Curry indictment is wholly circumstantial and is far from overwhelming. I conclude that this contention merits an exercise of our interest of justice power in light of the "unique risk 'that the trier of facts may [have] leap[t] logical gaps in the proof offered and draw[n] unwarranted conclusions based on probabilities of low degree' " (*People v Bague*, 43 NY3d 26, 29 [2024], quoting *People v Benzinger*, 36 NY2d 29, 32 [1974]; see also *People v*

Cleague, 22 NY2d 363, 367 [1968]) as a result of the missing charge.

Even if the indictments were properly consolidated, I would nevertheless reverse the conviction in appeal No. 1 and grant a new trial under the Curry indictment (see *People v Sanchez*, 61 NY2d 1022, 1023 [1984]; *People v Swem*, 182 AD3d 1050, 1051-1052 [4th Dept 2020]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 24-01529

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONATHAN SPINKS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), rendered December 22, 2022. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree, burglary in the first degree (two counts) and criminal possession of a weapon in the second degree (three counts).

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

Same memorandum as in *People v Spinks* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the same dissenting memorandum as in *People v Spinks* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00974

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

BRIDGE FUNDING CAP LLC, PLAINTIFF-RESPONDENT,

V

ORDER

SIMONEXPRESS PIZZA, LLC, DOING BUSINESS AS HUNGRY
HOWIES, D19 BUILDING, LLC, D19 LIQUOR, INC., THE
SIMON CORPORATION, INC., THE SIMONS ENTERPRISE, INC.,
SIMON & SONS ENTERPRISES, INC., SIMON STORES
CORPORATION, SIMON LAND DEVELOPMENT GROUP, LLC,
F & Z HOLDINGS, LLC, SE CORPORATION OF MICHIGAN,
SIMON HOLDING, LLC, AND FAWZI R. SIMON,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

AMOS WEINBERG, GREAT NECK, FOR DEFENDANTS-APPELLANTS.

BERKOVITCH & BOUSKILA PLLC, POMONA (DANIELA PALGI OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County
(Frederick G. Reed, A.J.), entered May 20, 2024. The judgment awarded
plaintiff \$229,780, plus costs, disbursements and interest.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051,
1051 [4th Dept 1990]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

294

CA 24-00993

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

BRIDGE FUNDING CAP LLC, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SIMONEXPRESS PIZZA, LLC, DOING BUSINESS AS HUNGRY HOWIES, D19 BUILDING, LLC, D19 LIQUOR, INC., THE SIMON CORPORATION, INC., THE SIMONS ENTERPRISE, INC., SIMON & SONS ENTERPRISES, INC., SIMON STORES CORPORATION, SIMON LAND DEVELOPMENT GROUP, LLC, F & Z HOLDINGS, LLC, SE CORPORATION OF MICHIGAN, SIMON HOLDING, LLC, AND FAWZI R. SIMON, DEFENDANTS-APPELLANTS.

(APPEAL NO. 2.)

AMOS WEINBERG, GREAT NECK, FOR DEFENDANTS-APPELLANTS.

BERKOVITCH & BOUSKILA PLLC, POMONA (DANIELA PALGI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered June 24, 2024. The amended judgment awarded plaintiff the sum of \$229,780, plus costs, disbursements and interest as against defendants.

It is hereby ORDERED that the amended judgment so appealed from is reversed on the law without costs and the motion is denied.

Memorandum: This appeal arises from the execution of and performance under a revenue purchase agreement between plaintiff and defendants SimonExpress Pizza, LLC, doing business as Hungry Howies, D19 Building, LLC, D19 Liquor, Inc., The Simon Corporation, Inc., The Simons Enterprise, Inc., Simon & Sons Enterprises, Inc., Simon Stores Corporation, Simon Land Development Group, LLC, F & Z Holdings, LLC, SE Corporation of Michigan, and Simon Holding, LLC (collectively, entity defendants). The agreement was personally guaranteed by defendant Fawzi R. Simon (individual defendant), who guaranteed entity defendants' performance of the agreement.

Under the agreement, plaintiff advanced a monetary amount to the entity defendants in exchange for 25% of the future revenues of their business, until the purchased amount, i.e., an agreed-upon amount that was greater than the advanced amount, was paid to plaintiff. There was no interest rate or payment schedule and no time period during which the purchased amount was to be collected by plaintiff. Indeed,

the agreement specifically stated that it was not a loan and that the entity defendants were "not borrowing money from" plaintiff. The agreement contained a daily remittance amount, which constituted "a good faith estimate of" plaintiff's share of the future revenue stream. The agreement also contained an acknowledgment from plaintiff that it was "entering this [a]greement knowing the risks that [the entity defendants'] business may slow down or fail, [that plaintiff] assumes these risks," and that there would be no recourse for plaintiff in the event the entity defendants went bankrupt, went out of business, or experienced a slowdown in business, among other things. The agreement also contained two reconciliation provisions, whereby the daily remittance would be modified both retroactively and prospectively upon request and with proof of earned revenue amounts.

Plaintiff commenced this action alleging, inter alia, that the entity defendants breached the agreement and that the individual defendant bore financial responsibility for that breach because he guaranteed performance by the entity defendants. Thereafter, plaintiff moved for summary judgment on the breach of contract and breach of guaranty causes of action. Defendants opposed the motion arguing, inter alia, that the agreement was actually a criminally usurious loan that was unenforceable and that, alternatively, plaintiff failed to meet its initial burden on the motion. Supreme Court granted plaintiff's motion, and awarded judgment to plaintiff. Defendants appeal from the amended judgment, which brings up for our review the order granting plaintiff's motion (see CPLR 5501 [a] [1]; see generally *Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1025-1026 [2022], rearg denied 38 NY3d 1170 [2022]).

On appeal, defendants contend that the agreement is void because it is, in actuality, a criminally usurious loan. Consequently, they contend that the court erred in granting plaintiff's motion. Thus, the central question before us is whether the agreement was, in fact, a revenue purchase agreement or whether it was a loan. It is well settled that, "[i]f the transaction [in question] is not a loan, 'there can be no usury, however unconscionable the contract may be' " (*Seidel v 18 E. 17 St. Owners*, 79 NY2d 735, 744 [1992]; see *Principis Capital, LLC v I Do, Inc.*, 201 AD3d 752, 754 [2d Dept 2022]). To make that determination, the agreement must be considered "in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it" (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020] [internal quotation marks omitted]).

In determining whether a transaction constitutes a loan, courts must determine whether the plaintiff " 'is absolutely entitled to repayment under all circumstances' "; "[u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan" (*id.* at 665-666; see *Samson MCA LLC v Joseph A. Russo M.D. P.C./IV Therapeutics PLLC* [appeal No. 2], 219 AD3d 1126, 1128 [4th Dept 2023]; *Principis Capital, LLC*, 201 AD3d at 754). "Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the

agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy" (*LG Funding, LLC*, 181 AD3d at 666; see *Samson MCA LLC*, 219 AD3d at 1128; *Principis Capital, LLC*, 201 AD3d at 754).

Here, contrary to defendants' contention, plaintiff established as a matter of law that the agreement was a revenue purchase agreement rather than a loan (see *Samson MCA LLC*, 219 AD3d at 1128; *Principis Capital, LLC*, 201 AD3d at 754). With respect to the first factor, the agreement submitted by plaintiff contained two reconciliation provisions that required the adjustment of the remittance amount upon the entity defendants' request based on changes to their revenues (see *Samson MCA LLC*, 219 AD3d at 1128). We note that the reconciliation provisions here were not illusory because, inter alia, they did not contain any language indicating that plaintiff would "not be subject to any consequences for failing to comply with its terms" or that plaintiff "ha[d] sole discretion to adjust the amount of the daily payments" (*Oakshire Props., LLC v Argus Capital Funding, LLC*, 229 AD3d 1199, 1201 [4th Dept 2024]). Under the second factor, we note that the agreement does not have a finite term or payment schedule (see *Samson MCA LLC*, 219 AD3d at 1128). Indeed, "the term of the agreement was not finite" inasmuch "as the amount of the monthly payments [made by the entity defendants] could change" as a consequence of the application of the agreement's reconciliation provisions (*Principis Capital, LLC*, 201 AD3d at 754). We further conclude that the third factor also weighs in favor of concluding that the agreement was not a loan inasmuch as under the agreement, plaintiff "did not have recourse in the event that the entity defendants declared bankruptcy," went out of business, or experienced a slowdown in business (*Samson MCA LLC*, 219 AD3d at 1128). Indeed, the agreement contained language indicating that plaintiff was entering the agreement "knowing the risks that [the entity defendants'] business may slow down or fail, and [that plaintiff] assumes these risks."

We nonetheless agree with defendants' alternative contention that the court erred in granting the motion because plaintiff did not meet its prima facie burden of establishing its entitlement to judgment as a matter of law with respect to the breach of contract and breach of guaranty causes of action. "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' " (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], lv denied 22 NY3d 864 [2014]; see *Pearl St. Parking Assoc. LLC v County of Erie*, 207 AD3d 1029, 1031 [4th Dept 2022]). As the party seeking summary judgment on that cause of action, plaintiff bore the initial burden of establishing the existence of all of those elements (see *Wm. Schutt & Assoc. Eng'g & Land Surveying P.C. v St. Bonaventure Univ.*, 151 AD3d 1634, 1635 [4th Dept 2017], amended on rearg 153 AD3d 1676 [4th Dept 2017]; *Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1455 [4th Dept 2014]). Here, we conclude that plaintiff's own submissions raise a triable issue of fact regarding the amount of

any resulting damages inasmuch as the amount stated in the affidavit of plaintiff's manager conflicts with the amount stated in the complaint also verified by plaintiff's manager (see generally *Sanchez v National R.R. Passenger Corp.*, 21 NY3d 890, 891 [2013]; *Michael P. v Dombroski*, 211 AD3d 1469, 1472 [4th Dept 2022]), and no explanation was proffered for that discrepancy. Plaintiff therefore failed to make the required prima facie showing of entitlement to judgment as a matter of law with respect to the breach of contract cause of action. Further, plaintiff's breach of guaranty cause of action is dependent on the success of the breach of contract cause of action. Inasmuch as plaintiff failed to meet its burden on the motion, the court should have denied the motion regardless of the sufficiency of defendants' opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In light of our conclusion, defendants' remaining contention is academic.

All concur except NOWAK and DELCONTE, JJ., who concur in the result in the following memorandum: We agree with the majority that given the factual discrepancies in this record, plaintiff failed to meet its initial burden on its motion for summary judgment. However, unlike the majority, we would not apply the tripartite test derived from *K9 Bytes, Inc. v Arch Capital Funding, LLC* (56 Misc 3d 807, 816-818 [Sup Ct, Westchester County 2017]), adopted by the Second Department in *LG Funding, LLC v United Senior Props. of Olathe, LLC* (181 AD3d 664, 665-666 [2d Dept 2020]) and by our Court in *Samson MCA LLC v Joseph A. Russo M.D. P.C./IV Therapeutics PLLC* ([appeal No. 2], 219 AD3d 1126, 1128 [4th Dept 2023]) to determine whether the agreement constitutes an actual revenue purchase agreement or a usurious loan. In our view, the *Samson MCA LLC* test is insufficient. Instead, we propose a test which we believe is better suited to reliably differentiate between a loan and revenue purchase agreement.

Under the *Samson MCA LLC* test, the "three factors [to be weighed] when determining whether repayment is absolute or contingent [are]: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy" (*Samson MCA LLC*, 219 AD3d at 1128 [internal quotation marks omitted]).

Reliance on the first two factors could result in an inaccurate finding that the parties have made a legitimate revenue purchase agreement as opposed to entering into a usurious loan. The first factor requires the presence of a reconciliation provision, but not necessarily an analysis of its validity. The second factor asks whether the agreement is for a finite term. But these two factors are just different sides of the same coin. Whether the agreement has a finite term is entirely dependent upon whether the agreement has a valid reconciliation provision. Absent a valid reconciliation provision—which the merchant could utilize to actually reduce its payments during times of lower than anticipated revenue—the agreement is necessarily for a fixed daily (or weekly) payment until the sum borrowed is repaid.

Reliance on the third factor could lead to the opposite inaccurate result; that the parties entered into a usurious loan when they actually made a legitimate revenue purchase agreement. The *K9 Bytes, Inc.* court reasoned that where the lender is able to recover funds via a personal guarantee in the event of a breach of the agreement or bankruptcy, the lender is not assuming the risk that their investment might fail, and thus, the agreement is more akin to a usurious loan (56 Misc 3d at 818). However, "[u]nder . . . New York law, a guarantee agreement is separate and distinct from the contract between lender and borrower" (*Kinville v Jarvis Real Estate Holdings, LLC*, 38 AD3d 1225, 1227 [4th Dept 2007] [internal quotation marks omitted]). Thus, a financing company and a merchant should be free to agree to a guarantee, which may reduce the interest required by the merchant, without the risk that the existence of the guarantee might convert the parties' otherwise legitimate agreement to exchange immediate funds for future accounts receivable into a usurious loan.

In our view, the more appropriate test under these circumstances—where the parties agree to a fixed daily or weekly payment as an "estimate" of revenue—is to evaluate: (1) whether the "estimate" of the defendant's revenue is reasonably based upon the defendant's prior accounts receivable or anticipated future earnings (rather than simply conjured from the void); and (2) not whether a reconciliation provision exists, but whether it is *illusory*—that is, whether there is an actual, practical ability for the defendant merchant to reconcile and adjust the amount owed based on actual revenue.

As to the first factor, if the parties' estimate of the merchant's future revenue is reasonably based upon the merchant's prior performance or projected upon future growth, the agreement would appear to reflect a true purchase of future accounts receivable. Conversely, where the numbers are vastly inflated, or are simply round numbers for ease of accounting, the agreement looks more like a loan.

Here, the first factor compels the conclusion that the agreement looks more akin to a traditional loan, which precludes summary judgment to plaintiff. To that end, the defendant merchants agreed to pay a total of \$360,000 at a rate of \$3,500 per day—which the parties claimed to be 25% of defendants' daily receivables. Thus, by the express terms of the agreement, defendants were purportedly earning \$14,000 per day, or \$5,110,000 per year. However, during the course of discovery, the parties stipulated that defendant merchants had \$1,440,220 in revenue *between January 30, 2020 and April 12, 2023*, a period of over three years—earnings of \$1,232.01 per day, less than 10% of the initial \$14,000 "estimate." Moreover, by the express terms of the agreement, defendants were required to pay 103 installments of \$3,500 starting January 15, 2020, and thus, the debt would be fully repaid by April 27, 2020. However, plaintiff alleges that defendants performed under the agreement until June 30, 2020, more than two months after the agreement should have been repaid.

As to the second factor, if the ability of the merchant to reconcile is merely illusory, then the agreement is simply a usurious

loan. In some circumstances, a reconciliation provision may be illusory on its face, such as where a lender "has *sole discretion* to adjust the amount of the daily payments" (*Oakshire Props., LLC v Argus Capital Funding, LLC*, 229 AD3d 1199, 1201 [4th Dept 2024] [emphasis added]). In other circumstances, a reconciliation provision may appear valid on its face, but be illusory in practice. For example, the lender could repeatedly request a merchant to submit documentation to support a change in revenue while continuing to debit the designated account. This factor would generally present a factual question, as it does here, and in our view, also precludes summary judgment to plaintiff.

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

322

KA 23-00588

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TRAVIS ZUKIC, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered October 6, 2021. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree and attempted murder 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 murder in the second degree (Penal Law § 125.25 [1]) and attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [i]; [b]), defendant contends that he did not validly waive his right to appeal inasmuch as the written waiver form that he signed—a form commonly used in Erie County—portrayed the waiver as an absolute bar to the taking of a direct appeal (*see People v Thomas*, 34 NY3d 545, 558-559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We agree with defendant that the written waiver form that he signed is flawed insofar as it affirmatively misstates that “the waiver of appeal means [defendant’s] case will come to an end when [he is] sentenced,” that he is “giving up the right to have any court review [his] case,” and that “the waiver includes all aspects of [defendant’s] case” (*see generally id.*) and is internally inconsistent insofar as it also contains an isolated statement signaling that appellate review remains available for “rare exceptions.” Notwithstanding the problematic misstatements and conflicting nature of its provisions, the written waiver form “cannot be viewed in isolation but is only one component to be considered in the totality of the circumstances” (*People v Bisono*, 36 NY3d 1013, 1018 n [2020]). Here, County Court’s oral colloquy followed the model colloquy, accurately advising defendant that “[b]y waiving [his] right to appeal, [he] do[es] not give up [his] right to take an appeal” and that “[a]mong the limited number of claims that will survive the

waiver of the right to appeal are the voluntariness of this plea, the validity and voluntariness of this waiver, the legality of the sentence, and the jurisdiction of this court." The oral colloquy thus "cured [the] defect[s]" in the written waiver form (*People v Vandusen*, 235 AD3d 1254, 1255 [4th Dept 2025], *lv denied* 43 NY3d 966 [2025]; see *People v Williams*, 228 AD3d 1316, 1317 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024], *reconsideration denied* 42 NY3d 1055 [2024]; see generally *Thomas*, 34 NY3d at 563). We conclude that the record establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (see *Vandusen*, 235 AD3d at 1254; *People v Malcolm*, 231 AD3d 1503, 1504 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *People v Rowell*, 224 AD3d 1335, 1335 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]).

Defendant's valid waiver of the right to appeal precludes our review of his contention that the court erred in refusing to suppress his statements to the police (see *People v Dozier*, 191 AD3d 1492, 1493 [4th Dept 2021], *lv denied* 36 NY3d 1119 [2021]; *People v Hardy*, 173 AD3d 1649, 1649 [4th Dept 2019], *lv denied* 34 NY3d 932 [2019]) and his challenge to the severity of his sentence (see *People v Lopez*, 6 NY3d 248, 256 [2006]; *Rowell*, 224 AD3d at 1335-1336; *People v Giles*, 219 AD3d 1706, 1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]).

Defendant further contends that his guilty plea was not voluntary inasmuch as the court placed a time limitation on the plea offer and did not advise defendant of the maximum potential sentences under Penal Law § 70.25 (2). Although defendant's contention that his plea was involuntary "survives his waiver of the right to appeal" (*People v Halsey*, 108 AD3d 1123, 1124 [4th Dept 2013]), we note that, "[b]y failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that the guilty plea was not knowingly, intelligently, and voluntarily entered" (*People v Motell*, 229 AD3d 1330, 1331 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; see *People v Torres*, 205 AD3d 1211, 1211 [3d Dept 2022]; *People v Powell*, 81 AD3d 1307, 1308 [4th Dept 2011], *lv denied* 17 NY3d 799 [2011]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

We have reviewed defendant's remaining contention and conclude that it lacks merit.

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

323

KA 24-00075

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAHQUIL PETERSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Debra L. Givens, A.J.), rendered December 20, 2023. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The charge arose from an incident in which a security guard saw defendant point a handgun at a woman, force her into the driver's seat of a vehicle, and then seat himself behind her on the rear passenger seat. The security guard called 911 to report the incident, and the police effectuated a traffic stop, during which they recovered a loaded 9 millimeter handgun from the space between the driver's seat and the center console. DNA taken from the handgun was consistent with defendant's DNA.

Defendant contends that Supreme Court erred in refusing to suppress the handgun inasmuch as the 911 call was anonymous and thus was not sufficiently reliable to provide the officers with reasonable suspicion to stop the vehicle in which defendant was a passenger. We reject that contention. Here, although the caller did not provide his name, the 911 call was not anonymous because the caller identified himself as a security guard working at a specific location, he provided a contemporaneous description and location of the vehicle from his vantage point, and the police were able to obtain his phone number, all of which provided sufficient self-identifying information (*see People v Griffin*, 188 AD3d 1701, 1702 [4th Dept 2020], *lv denied* 36 NY3d 1050 [2021], *cert denied* – US –, 141 S Ct 2538 [2021]; *People v Van Every*, 1 AD3d 977, 978 [4th Dept 2003], *lv denied* 1 NY3d 602

[2004]). We further conclude that the record supports the hearing court's determination that the stop of the vehicle was supported by reasonable suspicion that an occupant of the vehicle had committed or was committing a crime (see generally *People v Hinshaw*, 35 NY3d 427, 430 [2020]; *People v Tyler*, 166 AD3d 1556, 1556-1557 [4th Dept 2018], *lv denied* 32 NY3d 1179 [2019], *reconsideration denied* 33 NY3d 954 [2019]). Defendant's contention that the subsequent search of the vehicle was not supported by probable cause is unpreserved for our review because it was not raised in defendant's suppression motion and was not addressed by the court below (see generally CPL 470.05 [2]; *People v Jacque-Crews*, 213 AD3d 1335, 1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]).

Defendant's contention that his right to a fair trial was violated when the court failed to conduct a sufficient inquiry before discharging a juror is not properly before us inasmuch as defendant was not adversely affected by the court's discharge of the juror based on defendant's request for his removal (see CPL 470.15 [1]; *People v Chapman*, 229 AD2d 789, 790 [3d Dept 1996]; see generally *People v Rawlinson*, 175 AD3d 1109, 1110-1111 [4th Dept 2019], *lv denied* 34 NY3d 983 [2019]; *People v King*, 137 AD3d 1746, 1748 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]).

We reject defendant's contention that the court violated his right to a fair trial by allowing the People to introduce evidence of an uncharged crime, i.e., that he pointed a gun at the woman involved in the incident. Here, the security guard's testimony that defendant produced a gun and pointed it at the woman was relevant to the central issue of whether defendant actually possessed the handgun (see *People v Till*, 87 NY2d 835, 836-837 [1995]; *People v Larkins*, 128 AD3d 1436, 1438 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]; cf. *People v Foster*, 295 AD2d 110, 112-113 [1st Dept 2002], *lv denied* 98 NY2d 710 [2002]) and provided necessary background information to explain why the police stopped the vehicle and acted aggressively during the traffic stop (see *People v Morris*, 21 NY3d 588, 597 [2013]; *People v Tosca*, 98 NY2d 660, 661 [2002]). We further conclude that the probative value of the evidence outweighed its potential prejudicial effect (see *People v Weinstein*, 42 NY3d 439, 458 [2024]; *People v Leonard*, 29 NY3d 1, 7 [2017]; *People v Alvino*, 71 NY2d 233, 242 [1987]). Defendant's contention that the court erred in failing to give a limiting instruction regarding the *Molineux* evidence is unpreserved for our review because defendant failed to request a limiting instruction during the security guard's testimony or as part of the court's jury charge and did not object to the court's failure to give one (see *People v Hymes*, 174 AD3d 1295, 1299-1300 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]; *People v Williams*, 107 AD3d 1516, 1516 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013]). 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]; cf. *People v Presha*, 83 AD3d 1406, 1407 [4th Dept 2011]).

Contrary to defendant's contention, we conclude that, viewed in the light most favorable to the People (see *People v Contes*, 60 NY2d

620, 621 [1983]), the evidence is legally sufficient to establish defendant's knowing possession of the handgun (see *People v Hailey*, 128 AD3d 1415, 1416 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]; *People v Phillips*, 109 AD3d 1124, 1124 [4th Dept 2013], *lv denied* 22 NY3d 1090 [2014]; see generally *People v Redmond*, 182 AD3d 1020, 1022 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]). Further, viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contention, the admission in evidence of testimony regarding the supporting deposition given by the woman involved in the incident did not violate defendant's constitutional right to confrontation. Although the evidence in question constituted inadmissible testimonial hearsay (see *Crawford v Washington*, 541 US 36, 53-54 [2004]; *People v Garcia*, 25 NY3d 77, 85 [2015]), it was properly admitted under the rule of completeness to correct defendant's misrepresentation to the jury that the woman did not say that anyone pulled a gun on her (see *People v Torre*, 42 NY2d 1036, 1037 [1977]; see also *People v Rackover*, — AD3d —, —, 2025 NY Slip Op 03389, *1 [1st Dept 2025]; *People v Horton*, 181 AD3d 986, 993 [3d Dept 2020], *lv denied* 35 NY3d 1045 [2020]). Even assuming, arguendo, that the evidence was not properly admitted under the rule of completeness, we conclude that any error in its admission was harmless inasmuch as the proof of defendant's guilt is overwhelming and there is no reasonable possibility that the jury would have acquitted defendant if the statement in the supporting deposition had not been admitted in evidence (see *People v Douglas*, 4 NY3d 777, 779 [2005]; *People v Astacio*, 105 AD3d 1394, 1396 [4th Dept 2013], *lv denied* 22 NY3d 1154 [2014]).

Defendant further contends that he was denied effective assistance of counsel as a result of defense counsel's failure to make a motion to dismiss the indictment on statutory speedy trial grounds (see CPL 30.30 [1] [a]). A failure of defense counsel to assert a meritorious statutory speedy trial claim "is, by itself, a sufficiently egregious error to render a defendant's representation ineffective" (*People v Sweet*, 79 AD3d 1772, 1772 [4th Dept 2010] [internal quotation marks omitted]; see *People v Bailey*, 195 AD3d 1486, 1487 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]; see generally *People v Caban*, 5 NY3d 143, 152 [2005]). We conclude, however, that defendant's contention is based on matters outside the record, and thus "a CPL 440.10 proceeding is the appropriate forum for reviewing [defendant's] claim[]" (*People v Dunn*, 229 AD3d 1220, 1223 [4th Dept 2024]; see *People v Stoby*, 232 AD3d 1298, 1299 [4th Dept 2024], *lv denied* 43 NY3d 947 [2025]).

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

329

CA 24-00213

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

SHAKYRA M., AS MOTHER AND NATURAL GUARDIAN
OF INFANT, J.M., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CHAD STRITTMATTER, M.D., ET AL., DEFENDANTS,
AND GEORGE ALBERT, M.D., DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK C. BACHMAN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

DUFFY & DUFFY, PLLC, UNIONDALE (JILLIAN ROSEN OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered January 29, 2024 in a medical malpractice action. The order denied the motion of defendant George Albert, M.D., for summary judgment.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries allegedly sustained by her son (child) during his birth as a result of, inter alia, the negligent failure of defendant George Albert, M.D. to determine that the child suffered from hypoxic-ischemic encephalopathy (HIE) and to treat that condition with hypothermic therapy (cooling therapy) to prevent or lessen the brain damage caused by HIE. Albert appeals from an order that denied his motion for summary judgment dismissing the complaint against him. We affirm.

On a motion 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]; see *Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521 [4th Dept 2019]). There is no dispute here that defendant met his initial burden on the motion with respect to both issues through the submission of an affirmation from a neonatologist, who opined that defendant did not deviate from the standard of care by failing to administer cooling therapy to the child inasmuch as the child did not meet the strict protocol, in effect at

the time of the child's birth, necessary to warrant such treatment. Additionally, defendant's expert opined that the failure to administer cooling therapy to the child here was not a substantial factor in causing or contributing to the child's injuries.

Consequently, "the burden 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 injur[ies]" (*Isensee*, 174 AD3d at 1522; see *Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). Here, we conclude that Supreme Court properly denied the motion because plaintiff raised a question of material fact with respect to both deviation from the standard of care and causation by submitting, inter alia, an affidavit from an expert in neonatology and pediatrics who opined that the criteria for the administration of cooling therapy relied on by defendant's expert were inaccurate and incomplete and that, at the time in question, the child did qualify for the use of cooling therapy. Moreover, we conclude that plaintiff's expert adequately raised a question of fact with respect to causation by opining that the failure to administer cooling therapy was a substantial factor in causing the child's injuries inasmuch as the use of cooling therapy would have slowed the brain damage caused by HIE, resulting in a better outcome for the child. Contrary to defendant's contention, this is not a case where plaintiff's expert affidavit was " 'vague, conclusory, speculative, [or] unsupported by the medical evidence in the record' " (*Occhino*, 151 AD3d at 1871; see generally *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Rather, on the question whether cooling therapy was contraindicated for the child and whether the failure to administer that therapy proximately caused the child's injuries, plaintiff's expert affidavit "squarely oppose[d]" the affirmation of defendant's expert, which resulted 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 *Cully v Ricottone*, 228 AD3d 1240, 1240 [4th Dept 2024]; *Lewis v Sulaiman*, 217 AD3d 1443, 1445 [4th Dept 2023]).

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

331

CA 24-00941

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

CHRISTINE OWEN, INDIVIDUALLY, DERIVATIVELY
AS A SHAREHOLDER OF ROHM SERVICES CORPORATION
AND RHH MENDON PROPERTIES, INC., AND AS EXECUTOR
OF THE ESTATE OF BARBARA A. HURLBUT, DECEASED,
PLAINTIFF-APPELLANT,

V

ORDER

ROBERT W. HURLBUT AND HURLBUT HEALTH
CONSULTING, LLC, DEFENDANTS-RESPONDENTS.

LIPPES MATHIAS LLP, ROCHESTER (KELLY S. FOSS OF COUNSEL), AND HARRIS
BEACH PLLC, PITTSFORD, FOR PLAINTIFF-APPELLANT.

PULLANO & FARROW, EAST ROCHESTER (CHRISTIAN VALENTINO OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County
(Christopher S. Ciaccio, A.J.), entered October 5, 2023 in an action
for damages for, inter alia, breach of fiduciary duty. The order
denied the motions of plaintiff to supplement the motion record and to
disqualify counsel for defendants.

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: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

332

CA 24-00787

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

CHRISTINE OWEN, INDIVIDUALLY AND DERIVATIVELY AS A
SHAREHOLDER OF ROHM SERVICES CORPORATION AND RHH
MENDON PROPERTIES, INC., AND AS EXECUTOR OF THE
ESTATE OF BARBARA A. HURLBUT, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,
ET AL., PLAINTIFF,

V

MEMORANDUM AND ORDER

ROBERT W. HURLBUT AND HURLBUT HEALTH
CONSULTING, LLC, DEFENDANTS-APPELLANTS-RESPONDENTS.

PULLANO & FARROW, EAST ROCHESTER (CHRISTIAN VALENTINO OF COUNSEL), FOR
DEFENDANTS-APPELLANTS-RESPONDENTS.

LIPPES MATHIAS LLP, ROCHESTER (KELLY S. FOSS OF COUNSEL), AND HARRIS
BEACH PLLC, PITTSFORD, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court,
Monroe County (Christopher S. Ciaccio, A.J.), entered December 1, 2023
in an action for damages for, inter alia, breach of fiduciary duty.
The order granted in part and denied in part the respective motion and
cross-motion of the parties for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting those parts of defendants'
motion seeking summary judgment dismissing the first through twelfth
and the nineteenth causes of action as asserted by plaintiff,
individually, and as asserted by plaintiff, as executor of the estate
of Barbara A. Hurlbut, and seeking summary judgment dismissing the
twentieth cause of action; by denying that part of defendants' motion
seeking summary judgment dismissing the undercharging claims as
asserted by plaintiff, derivatively as a shareholder of ROHM Services
Corporation, and reinstating those claims to that extent; by denying
those parts of plaintiff's cross-motion seeking partial summary
judgment on the excessive compensation and underpayment claims; by
striking from the fourth subparagraph of the second ordering paragraph
the language "for the period from 2017 through 2019 under the
faithless servant doctrine in the amount of \$1,694,073" and
substituting therefor the language "for the period of disloyalty
beginning in late 2019 under the faithless servant doctrine in an
amount to be determined"; and as modified the order is affirmed
without costs.

Memorandum: Christine Owen (plaintiff), individually and derivatively as a shareholder of ROHM Services Corporation (ROHM) and RHH Mendon Properties, Inc., and as executor of the estate of Barbara A. Hurlbut (decedent), brought this action against defendants, Robert W. Hurlbut (defendant) and Hurlbut Health Consulting, LLC, asserting various causes of action in the amended complaint and seeking, inter alia, damages for defendants' alleged evisceration of the value of ROHM. Defendants moved, as relevant on appeal, to dismiss the first through twelfth, nineteenth, and twentieth causes of action based on various grounds set forth in CPLR 3211, and Supreme Court converted the motion to one for summary judgment pursuant to CPLR 3211 (c). Plaintiff then cross-moved for, inter alia, partial summary judgment on the issue of defendants' liability under various claims asserted in the amended complaint. The court granted in part and denied in part both the motion and the cross-motion. Defendants appeal, and plaintiff cross-appeals. We now modify.

With respect to their appeal, we agree with defendants that the court erred in denying their motion insofar as it sought summary judgment dismissing the first through twelfth and the nineteenth causes of action as asserted by plaintiff individually, and we therefore modify the order accordingly. " 'It is axiomatic that a shareholder has no individual cause of action to recover damages for a wrong against a corporation, even if that shareholder loses the value of [their] investment or incurs personal liability in an effort to maintain the solvency of the corporation' " (*Davis v Magavern*, 237 AD2d 902, 902 [4th Dept 1997]). "[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" (*Abrams v Donati*, 66 NY2d 951, 953 [1985], *rearg denied* 67 NY2d 758 [1986]; see *Jobson v Progno*, 100 AD3d 1407, 1407-1408 [4th Dept 2012]). Here, we conclude that "none of the [aforementioned] causes of action arise from an independent duty owed to [plaintiff] individually, unrelated to [her] status as a shareholder" (*Albany-Plattsburgh United Corp. v Bell*, 307 AD2d 416, 420 [3d Dept 2003], *lv dismissed in part & denied in part* 1 NY3d 620 [2004]; see *Jobson*, 100 AD3d at 1408). For the same reason, we agree with defendants that the court should have granted the motion with respect to those causes of action to the extent that the amended complaint asserted that the estate had a right to individual relief (see generally *Abrams*, 66 NY2d at 954), and we therefore further modify the order accordingly.

We nonetheless reject defendants' contention that plaintiff lacks standing to maintain a derivative action as a shareholder of ROHM. As relevant here, Business Corporation Law § 626 (b) "imposes upon the plaintiff in a derivative action a dual requirement as to the ownership of stock: 'it shall be made to appear that the plaintiff is . . . [a shareholder] at the time of bringing the action and . . . at the time of the transaction of which [the plaintiff] complains' " (*Independent Inv. Protective League v Time, Inc.*, 50 NY2d 259, 263 [1980], *rearg denied* 50 NY2d 1059 [1980]). "Ownership at the time of the alleged wrong, known as the contemporaneous ownership doctrine, . . . was adopted by State courts and Legislatures 'to prevent

litigious persons from buying stock for the purpose of bringing suit as to alleged past mismanagement' " (*id.*). "Because it seeks to foster public policy by inhibiting speculation in litigation, the contemporaneous ownership rule must, as a general matter, be rigorously enforced" (*id.*). The statute nevertheless provides a limited exception to that rule in circumstances where the shares "devolved upon [the plaintiff] by operation of law" (§ 626 [b]; see *Pessin v Chris-Craft Indus.*, 181 AD2d 66, 70 [1st Dept 1992]).

Here, it is undisputed that plaintiff was a shareholder of ROHM at the time she brought the action (see Business Corporation Law § 626 [b]). Plaintiff, however, was not a shareholder of ROHM at the time of the transactions of which she complains. The sole shareholder of ROHM during the relevant period was a marital trust created by the will of plaintiff's and defendant's father for the benefit of decedent, who was their mother, and plaintiff did not receive her shares of ROHM until the principal in the marital trust was distributed to plaintiff and defendant pursuant to the terms of the will following decedent's subsequent death (*cf. id.*). We nonetheless agree with plaintiff that the limited exception to the contemporaneous ownership rule applies here because shares "acquired through a will or intestacy . . . devolve by operation of law" (*Pessin*, 181 AD2d at 71; see § 626 [b]). Contrary to defendants' related contention, we conclude that plaintiff set forth with particularity in the amended complaint that a prelitigation demand for initiation of an action would have been futile (see § 626 [c]; *Lizard O's, Inc. v Baha Lounge Corp.*, 214 AD3d 597, 599 [1st Dept 2023]; *Miller v Kastner*, 100 AD2d 728, 728 [4th Dept 1984]; see generally *Bansbach v Zinn*, 1 NY3d 1, 8-9, 11-12 [2003], *rearg denied* 1 NY3d 593 [2004]).

We further agree with defendants, however, that plaintiff lacks standing to maintain a derivative action as executor of the estate. At the time the action was commenced, the estate was neither a holder of ROHM shares nor a holder of a beneficial interest therein (see Business Corporation Law § 626 [a], [b]; *Sakow v Waldman*, 155 AD3d 1078, 1080 [2d Dept 2017]). We therefore further modify the order accordingly.

With respect to defendants' contentions challenging the viability of the causes of action in the amended complaint, we conclude that the court properly denied defendants' motion with respect to the first through twelfth and the nineteenth causes of action, as asserted by plaintiff derivatively as a shareholder of ROHM, inasmuch as defendants failed to meet their initial burden of establishing their entitlement to judgment as a matter of law dismissing those causes of action (see CPLR 3212 [b]; see *e.g. Taylor v Wynkoop*, 132 AD3d 843, 845-846 [2d Dept 2015]; *Mobarak v Mowad*, 117 AD3d 998, 1000-1001 [2d Dept 2014]). We nonetheless agree with defendants' further contention, which they adequately raised in their motion papers and accompanying memorandum of law, that they are entitled to summary judgment dismissing the twentieth cause of action, for breach of an implied covenant of good faith and fair dealing. We therefore further modify the order accordingly. Defendants met their initial burden of establishing entitlement to judgment as a matter of law on that cause

of action, and plaintiff failed to raise a triable issue of fact that defendants breached an implied covenant of good faith and fair dealing arising from an agreement between plaintiff and defendant (see *Victor G. v North Syracuse Cent. Sch. Dist.*, 158 AD3d 1287, 1288-1289 [4th Dept 2018], *lv denied* 32 NY3d 904 [2018]).

We also agree with defendants on their appeal that, to the extent that the amended complaint asserts an excessive compensation claim against defendant, the court erred in granting plaintiff's cross-motion insofar as it sought partial summary judgment on that claim because there are unresolved questions of fact on this record regarding that issue (see generally *Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1100 [4th Dept 2018]). In addition, we agree with defendants that the court erred in granting the cross-motion insofar as it sought partial summary judgment on the claim that defendants underpaid for ROHM's assets inasmuch as triable issues of fact remain in that regard (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Moreover, although the court properly determined that plaintiff established entitlement to partial summary judgment on the issue of liability under the fourth cause of action, for disgorgement of compensation under the faithless servant doctrine (see *Barasch & McGarry, PC v Marcowitz*, 219 AD3d 1242, 1242-1243 [1st Dept 2023], *lv dismissed* 41 NY3d 996 [2024]), we conclude that the court erred in determining that compensation should be disgorged for the time period from 2017 through 2019. "While a faithless agent forfeits [the] right to compensation, such forfeiture is limited 'to compensation paid *during the time period of disloyalty*' " (*X-Med, Inc. v Western N.Y. Spine, Inc.*, 74 AD3d 1708, 1711 [4th Dept 2010]), and plaintiff alleged here that the scheme began in late 2019. On the aforementioned bases, we further modify the order accordingly.

Next, we agree with plaintiff on her cross-appeal that the court erred in granting that part of defendants' motion seeking summary judgment dismissing the claims, as asserted by plaintiff derivatively as a shareholder of ROHM, that defendant breached his fiduciary duty to ROHM by undercharging for its services because there are triable issues of fact in that regard (see *Zuckerman*, 49 NY2d at 562). We therefore additionally modify the order accordingly.

Finally, we have considered the parties' remaining contentions and conclude that none warrants reversal or further modification of the order.

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

336

CA 24-00399

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

LINDA L. GATES, AS ADMINISTRATOR OF THE
ESTATE OF MICHAEL H. GATES, DECEASED,
PLAINTIFF-APPELLANT,

V

ORDER

DONALD J. SIMPSON, CHANDLER D. SIMPSON,
TOWN OF HENRIETTA AND JOSEPH E. LAROCCA,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

CELLINO LAW, LLP, ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS TOWN OF HENRIETTA AND JOSEPH E. LAROCCA.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered January 19, 2024 in a personal injury action arising from a motor vehicle accident. The order granted the motion of defendants Town of Henrietta and Joseph E. LaRocca for summary judgment dismissing the complaint against said defendants.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

337

CA 24-00400

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

LINDA L. GATES, AS ADMINISTRATOR OF THE
ESTATE OF MICHAEL H. GATES, DECEASED,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DONALD J. SIMPSON, CHANDLER D. SIMPSON,
TOWN OF HENRIETTA AND JOSEPH E. LAROCCA,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CELLINO LAW, LLP, ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS TOWN OF HENRIETTA AND JOSEPH E. LAROCCA.

Appeal from an amended order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered January 23, 2024 in a personal injury action arising from a motor vehicle accident. The amended order granted the motion of defendants Town of Henrietta and Joseph E. LaRocca for summary judgment dismissing the complaint and cross-claims against said defendants.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law without costs, the motion of defendants Town of Henrietta and Joseph E. LaRocca is denied, and the complaint and cross-claims are reinstated against those defendants.

Memorandum: Plaintiff, Linda L. Gates, as administrator of the estate of Michael H. Gates, deceased (decedent), commenced this negligence action seeking damages arising from a motor vehicle accident in which decedent's car was struck near an intersection by a dump truck owned by defendant Town of Henrietta and operated by defendant Joseph E. LaRocca (collectively, Town defendants). The dump truck veered into decedent's lane of travel after colliding with a vehicle operated by defendant Chandler D. Simpson, which had just entered the intersection from LaRocca's right. The Town defendants moved for summary judgment dismissing the complaint and all cross-claims against them, contending that Simpson's failure to yield the right-of-way at the intersection was the sole proximate cause of the accident and that LaRocca's actions did not contribute to the accident. Supreme Court granted the motion, and plaintiff appeals. We reverse.

The Town defendants, "as the movant[s] for summary judgment, had the burden of establishing as a matter of law that [they were] not negligent or that, even if [they were] negligent, [their] negligence was not a proximate cause of the accident" (*Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept 2018]; see *Burnett v Allen* [appeal No. 3], 218 AD3d 1190, 1191 [4th Dept 2023]; *Galletta v Delsorbo*, 188 AD3d 1641, 1642 [4th Dept 2020]). This required the Town defendants to establish that LaRocca exercised reasonable care under the circumstances to avoid an accident, including by keeping a reasonably vigilant lookout, and that there was nothing he could have done to avoid the accident (see *Pagels*, 167 AD3d at 187). In light of that burden, "summary judgment is seldom appropriate in negligence actions Indeed, even when the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances. This can rarely be decided as a matter of law" (*id.* at 188 [internal quotation marks omitted]). Here, viewing the evidence in the light most favorable to plaintiff and giving plaintiff the benefit of every reasonable inference, as we must (see *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that the Town defendants failed to meet their initial burden on the motion because their own submissions raise triable issues of fact whether LaRocca was negligent in operating the vehicle at a speed greater than was reasonable and prudent under the conditions and whether he could have used reasonable care to avoid a collision and, if so, whether his conduct was a proximate cause of the collision (see *Uhteg v Kendra*, 200 AD3d 1695, 1697-1698 [4th Dept 2021]; *Pagels*, 167 AD3d at 188-189; *O'Brien v Couch*, 124 AD3d 975, 977 [3d Dept 2015]). The Town defendants' submissions established that LaRocca, who was driving a dump truck containing 10 tons of asphalt, did not adhere to an advisory traffic sign recommending that speed be reduced to 35 miles per hour prior to entering the intersection and further established that the tree line limited his view of cross traffic at the intersection. If a trier of fact were to determine that LaRocca's speed was unreasonable under the existing conditions, the trier of fact could also conclude that LaRocca's own unreasonable speed was what deprived him of sufficient time to avoid the collision (see *White v Connors*, 177 AD3d 1250, 1252-1253 [4th Dept 2019]; see generally *Mohammed v City of New York*, 206 AD3d 988, 989 [2d Dept 2022]; *Cooley v Urban*, 1 AD3d 900, 901 [4th Dept 2003]). Inasmuch as the Town defendants failed to meet their initial burden on the motion, the court should have denied the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The Town defendants' assertion on appeal that their motion was properly granted on the ground that Simpson was the "sole proximate cause of the accident" is inapt and need not be addressed on the merits "because . . . [it is] merely the converse of [the Town defendants'] burden on the motion of establishing that [they were] not negligent or that [their] negligence was not a proximate cause of the accident" (*Pagels*, 167 AD3d at 189; see generally *Jackson v City of Buffalo*, 144 AD3d 1555, 1556 [4th Dept 2016]). By focusing on "sole proximate cause" in this common-law negligence action, the Town defendants overlook the fact that their burden on their motion was to establish "as a matter of law that [they were] not negligent or that,

even if [they were] negligent, [their] negligence was not a proximate cause of the accident" (*Pagels*, 167 AD3d at 187 [emphasis added]; see *Burnett*, 218 AD3d at 1191; *Galletta*, 188 AD3d at 1642). In other words, when moving for summary judgment in the negligence context and addressing only the issue of proximate cause, the Town defendants must effectively assume, arguendo, that they were negligent (see *Pagels*, 167 AD3d at 188; see generally *Mylar v Niagara Falls Mem. Med. Ctr.*, 234 AD3d 1262, 1265 [4th Dept 2025]). Inasmuch as the Town defendants did not do that here, we need not address their proximate cause argument.

In light of the issues of fact raised by the Town defendants' submissions, we also agree with plaintiff that the Town defendants did not meet their burden of demonstrating entitlement to summary judgment based on the emergency doctrine (see *White*, 177 AD3d at 1251-1253). We further agree with plaintiff that the Town defendants are not entitled to the benefit of the immunity under Vehicle and Traffic Law § 1103 (b) because that provision protects only "vehicles engaged in highway construction, maintenance or repair," and LaRocca was not so engaged at the time of the accident (*Riley v County of Broome*, 95 NY2d 455, 464 [2000]; see also *Zanghi v Doerfler*, 158 AD3d 1275, 1275 [4th Dept 2018]).

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

378

KA 24-00485

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HEATH M. CUMMINGS, DEFENDANT-APPELLANT.

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 Supreme Court, Steuben County (Jason L. Cook, J.), rendered February 16, 2024. The judgment convicted defendant, upon his plea of guilty, of attempted rape 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 attempted rape in the first degree (Penal Law §§ 110.00, former 130.35 [1]), defendant contends that he did not validly waive his right to appeal, that his guilty plea was not entered knowingly, intelligently, or voluntarily, and that his sentence is unduly harsh and severe. Contrary to defendant's contention, the record establishes that the oral colloquy, together with the written waiver of the right to appeal, was adequate to ensure that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *People v Taylor*, 192 AD3d 1683, 1684 [4th Dept 2021], *lv denied* 37 NY3d 968 [2021]), and we reject defendant's contention that Supreme Court's statements at sentencing invalidated his appeal waiver (*see People v Snyder*, 153 AD3d 1662, 1663 [4th Dept 2017]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence.

Although the valid waiver of the right to appeal does not preclude defendant's challenge to the voluntariness of his plea, defendant failed to preserve that challenge for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Sanford*, 138 AD3d 1435, 1436 [4th Dept 2016]). This case nevertheless falls within the rare exception to the

preservation requirement because defendant's recitation of the facts, specifically those with respect to the element of forcible compulsion, negated an essential element of the crime pleaded to (see *People v Lopez*, 71 NY2d 662, 666 [1988]). The court thus had a duty to conduct an inquiry to ensure that defendant understood the nature of the crime (see *id.*).

Here, the court properly engaged defendant in the requisite further inquiry before accepting his guilty plea, and defendant subsequently agreed that he acted with physical force. We conclude that "defendant's responses to the court's subsequent questions removed [any] doubt about [his] guilt" (*People v Collins*, 191 AD3d 1469, 1471 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021] [internal quotation marks omitted]; cf. *People v Hernandez*, 185 AD3d 1428, 1429 [4th Dept 2020]). Contrary to defendant's contention, the court had no obligation to conduct an inquiry in response to defendant's statements at sentencing or during the presentence investigation (see *People v Garbarini*, 64 AD3d 1179, 1179 [4th Dept 2009], *lv denied* 13 NY3d 744 [2009]).

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

379

KA 22-00181

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JESUS HERNANDEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered December 1, 2021. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, that part of the omnibus motion seeking to suppress defendant's statements is granted, and a new trial is granted on count 1 of the indictment.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that he was unlawfully detained by the police following a traffic stop of the vehicle in which he was a passenger and that County Court erred in refusing to suppress his statements to the police as the fruit of that unlawful detention. We agree.

Two New York State Troopers assigned to the Gun-Involved Violence Elimination detail in the City of Rochester pulled over a vehicle in which defendant was a passenger because the driver failed to stop at a stop sign and defendant was not wearing a seatbelt. The Troopers subsequently determined that the vehicle would have to be impounded because neither the driver nor defendant had a valid driver's license. The Troopers then directed the driver and defendant to exit the vehicle so the Troopers could conduct an inventory search. Pursuant to standard procedure, the driver and defendant were placed in handcuffs. No other basis for placing the driver and defendant in handcuffs was offered by the People, and at the suppression hearing one of the Troopers testified that, in the City of Rochester, "for our safety reasons, every single time we have somebody exit the vehicle, we put them in handcuffs." Before the inventory search was conducted,

the vehicle's driver began acting nervous, and when one of the Troopers inquired about her behavior, the driver stated that there was a gun in a bag in the vehicle. The Troopers retrieved and searched the bag, which contained a loaded handgun. Defendant and the driver were then arrested and taken to the State Police station for processing, where defendant began talking to one of the Troopers and made spontaneous statements indicating that the gun belonged to him. Defendant was later read the *Miranda* warnings; he waived his *Miranda* rights and signed a written statement admitting that the gun belonged to him. Prior to trial, defendant sought suppression of his oral and written statements on the ground that, inter alia, the Troopers subjected him to an unreasonable seizure in violation of his Fourth Amendment rights when they placed him in handcuffs as he exited the vehicle. The court refused to suppress the statements.

We agree with defendant that by placing him in handcuffs after directing him to exit the vehicle, the Troopers transformed the traffic stop into a "forcible stop and detention" (*People v De Bour*, 40 NY2d 210, 223 [1976]), which "must be justified by some additional circumstances, such as a threat of evasive conduct . . . ; a need to transport the defendant for a showup procedure . . . ; a fear that the suspect may interfere with the execution of a search warrant . . . ; or a concern for officer safety" (*People v Hernandez*, 187 AD3d 1502, 1505 [4th Dept 2020]; see *People v Harrison*, 57 NY2d 470, 476 [1982]). The People did not present evidence at the suppression hearing of " 'articulable facts' from the encounter to establish reasonable suspicion that defendant posed any danger to the officers" (*People v Porter*, 136 AD3d 1344, 1345 [4th Dept 2016]), and the mere fact that defendant was located in the City of Rochester, an alleged high crime area, which was the sole justification offered by the People for his forcible stop and detention, "does not supply that requisite reasonable suspicion" (*People v Riddick*, 70 AD3d 1421, 1423 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]). Thus, we further agree with defendant that he was unlawfully detained in violation of his Fourth Amendment rights prior to making the statements he seeks to suppress.

Statements made by a defendant following an unlawful detention in violation of the Fourth Amendment must be suppressed unless the People establish that the statements were voluntary or otherwise admissible under *Miranda v Arizona* (384 US 436 [1966]) and that the statements were not "obtained by exploitation of the illegality" of defendant's detention (*Dunaway v New York*, 442 US 200, 217 [1979] [internal quotation marks omitted]; see *Brown v Illinois*, 422 US 590, 600-604 [1975]), i.e., that they were "sufficiently attenuated" to dissipate the taint of the unlawful conduct (*Dunaway*, 442 US at 216; see *Brown*, 422 US at 600-604). To be sufficiently attenuated, the statements must have been " 'acquired by means sufficiently distinguishable from the [detention] to be purged of the illegality,' " and a court must consider " 'the temporal proximity of the arrest and the [statements], the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct' " in making that determination (*People v Bradford*, 15 NY3d 329, 333 [2010]; see *People v Butler*, 80 AD2d 644, 645 [2d Dept 1981]).

Here, the People failed to argue during the suppression hearing that defendant's statements were sufficiently attenuated from the unlawful detention to be admissible at trial (see *People v Clark*, 149 AD2d 720, 721 [2d Dept 1989]). In response to defendant's contention on appeal, the People do not dispute that they failed to argue attenuation at the suppression hearing, and they assert instead that the issue was nonetheless preserved inasmuch as the court, in its decision and order, implicitly determined the issue in concluding that the statements were admissible. Contrary to the People's assertion, we conclude that the court's decision and order addressed only the voluntariness of defendant's statements under *Miranda* and did not "expressly decide[]" that the statements were sufficiently attenuated from the unlawful detention (CPL 470.05 [2]; see *People v Benbow*, 193 AD3d 869, 872-873 [2d Dept 2021]). Inasmuch as " 'an appellate court may not uphold a police action on a theory not argued before the suppression court' " (*People v Rollins*, 125 AD3d 1540, 1541 [4th Dept 2015]), we agree with defendant that the court erred in denying that part of his omnibus motion seeking to suppress his statements.

We further conclude that the error is not harmless inasmuch as there is a "reasonable possibility that the error might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237 [1975]; see *Porter*, 136 AD3d at 1345). Defendant's statements were the only evidence introduced at trial that directly tied him to the gun found in the vehicle (see *Porter*, 136 AD3d at 1345-1346). We therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to suppress his statements, and grant a new trial on count 1 of the indictment.

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

All concur except LINDLEY, J.P., and KEANE, J., who dissent and vote to hold the case, reserve decision, and remit the matter to Monroe County Court for further proceedings in accordance with the following memorandum: We respectfully dissent. The majority suppresses undisputedly spontaneous statements made by defendant at the police station following his arrest for possession of a loaded firearm that was found, following a lawful traffic stop, in a vehicle operated by his girlfriend. In his spontaneous statements, defendant said that "the bullets were hollow points" and "I know that gun inside and out, now you know its mine." The majority also suppresses a written statement that defendant made after waiving his *Miranda* rights.

As the majority concludes, two New York State Troopers unlawfully detained defendant in handcuffs following the traffic stop. At the time, the Troopers had no reason to believe that either defendant or the driver had committed a crime. But the unlawful detention lasted less than a minute before the driver informed the Troopers that there was a gun in the vehicle, thus providing the Troopers with probable cause to arrest both the driver and defendant for criminal possession of a weapon. Thus, at the time he made his statements, defendant was lawfully under arrest.

In seeking suppression, defendant, relying on *Wong Sun v United States* (371 US 471 [1963]) and *Dunaway v New York* (442 US 200 [1979]), contended that his statements should be suppressed as fruit of the poisonous tree, the tree being the unlawful detention. Defendant repeated that argument at the conclusion of the suppression hearing. In determining whether evidence constitutes fruit of the poisonous tree, courts must determine "whether, granting establishment of the primary illegality [here, the unlawful detention], the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint" (*Wong Sun*, 371 US at 488 [internal quotation marks omitted]; see *Dunaway*, 442 US at 217-218).

In refusing to suppress the statements, however, County Court did not specifically address whether defendant was unlawfully detained and, if so, whether his otherwise voluntary statements constituted fruit of the poisonous tree. Because the court did not base its suppression determination on the ground that defendant's statements were not fruit of the poisonous tree, as defendant contended, we cannot affirm on that ground (see *People v Concepcion*, 17 NY3d 192, 195 [2011]; *People v LaFontaine*, 92 NY2d 470, 473-474 [1998], rearg denied 93 NY2d 849 [1999]; see generally CPL 470.15 [1]). The court's failure to rule on defendant's contentions "cannot be deemed a denial thereof" (*People v Fulcott*, 236 AD3d 1350, 1350 [4th Dept 2025]; see generally *People v Baker*, 229 AD3d 1324, 1328 [4th Dept 2024]). We would thus hold the case, reserve decision, and remit the matter to County Court for a ruling on defendant's fruit of the poisonous tree contention as it relates to the oral and written statements he made at the police station following discovery of the loaded firearm, which provided the Troopers with independent grounds to arrest defendant.

Although the majority is correct that the People did not argue below that defendant's statements were attenuated from the unlawful detention, attenuation is an exception to the application of the exclusionary rule with respect to "fruits of the poisonous tree" (*People v Turriago*, 90 NY2d 77, 85 [1997], rearg denied 90 NY2d 936 [1997] [internal quotation marks omitted]; see *People v Crispell*, 223 AD3d 941, 945 [3d Dept 2024], lv denied 41 NY3d 964 [2024]; *People v Contreras*, 194 AD3d 835, 837 [2d Dept 2021], lv denied 37 NY3d 991 [2021]). There is no need to determine whether the attenuation exception applies unless and until it is determined that there is evidence to suppress in the first instance. The fact that the People did not argue attenuation below does not mean that we or the motion court must accept defendant's contention that his voluntary statements should be suppressed due to the unlawful detention.

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

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

380

KA 22-01562

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RICARDO CASIANO, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 25, 2022. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed on each count to a determinate term of four years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). The conviction arises from an incident in which police officers responded to shots fired in the area of defendant's house. The trial evidence established that, upon their arrival at approximately 10:30 p.m. on the night in question, the officers heard additional shots fired and observed defendant standing on the roof of his garage, and at least one officer observed a muzzle flash indicative of gunfire. The garage was detached from the house, and located within a fenced-in yard. Defendant was apprehended in his yard, with a leg injury, after either jumping or falling from the garage to the ground below. Upon searching the yard, the police located a loaded magazine and a handgun. Shell casings were found on the roof of the garage and on the back porch of the house. A number of bullet strikes were also found on a vehicle in front of the house and at two locations across the street. In addition, the evidence, including body camera footage and audio recordings that were admitted at trial, established that defendant made certain statements to the police, both while in his backyard and later while he was being treated at a hospital, indicating that he had fired shots in response to an earlier

altercation during which, inter alia, his son was stabbed by an assailant.

Defendant contends, with respect to the first count of which he was convicted, that there is legally insufficient evidence that he possessed the gun in question with the intent to use it unlawfully against another (see Penal Law § 265.03 [1]). We reject that contention. Based on the evidence adduced at trial, we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found, beyond a reasonable doubt, that defendant intended to use the gun unlawfully by firing it at the individual who stabbed his son (see *People v Horton*, 216 AD2d 913, 913 [4th Dept 1995], *lv denied* 87 NY2d 902 [1995]; see generally *People v Estrella*, 41 NY3d 514, 517 [2024]).

Defendant further contends, with respect to the second count, that there is legally insufficient evidence that the possession of the firearm took place "outside of [his] home" (Penal Law § 265.03 [3]). We reject that contention. Although "article 265 of the Penal Law contains no definition of 'home,' " an important consideration in determining whether possession occurred outside of one's "home" is "whether the possessor of the weapon was entitled to 'privacy, as one would have in [their] home' in the area where [they possessed] the weapon" (*People v Powell*, 54 NY2d 524, 526-527, 530 [1981]). Here, the evidence reflects that defendant left the privacy of his fenced-in yard and climbed to the roof of his garage, where he was readily observable by anyone passing by, including the police who observed him firing his weapon. Under these circumstances, we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found beyond a reasonable doubt that defendant possessed the gun outside of his home (see § 265.03 [3]; see generally *Estrella*, 41 NY3d at 517).

Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude "that the jury failed to give the evidence the weight it should be accorded" (*People v Maull*, 167 AD3d 1465, 1467 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019] [internal quotation marks omitted]; see generally *Bleakley*, 69 NY2d at 495).

We reject defendant's contention that Supreme Court erred in refusing to suppress statements that he made to police officers in the absence of *Miranda* warnings. It is well settled that *Miranda* warnings must be given when a defendant is subject to custodial interrogation (see *People v Paulman*, 5 NY3d 122, 129 [2005]; *People v Berg*, 92 NY2d 701, 704 [1999]; *People v Torres*, 172 AD3d 758, 760 [2d Dept 2019]). "In determining whether suppression is required, the court 'should consider: (1) the amount of time the defendant spent with the police, (2) whether [defendant's] freedom of action was restricted in any significant manner, (3) the location and atmosphere in which the

defendant was questioned, (4) the degree of cooperation exhibited by the defendant, (5) whether [the defendant] was apprised of [their] constitutional rights, and (6) whether the questioning was investigatory or accusatory in nature' " (*People v Lunderman*, 19 AD3d 1067, 1068-1069 [4th Dept 2005], *lv denied* 5 NY3d 830 [2005]). Although no *Miranda* warnings were given to defendant while in his backyard or at the hospital, we conclude upon our review of the relevant factors that, under the circumstances here, the questioning by the police officers in each instance "constituted a noncustodial investigatory inquiry for which *Miranda* warnings were not required" (*People v Baker*, 188 AD2d 1012, 1012 [4th Dept 1992], *lv denied* 81 NY2d 967 [1993]; *see People v Bennett*, 70 NY2d 891, 893-894 [1987]).

We agree with defendant that his sentence is unduly harsh and severe under the circumstances of this case. Thus, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence of imprisonment imposed on each count to a determinate term of four years (*see* CPL 470.15 [6] [b]), to be followed by the five years of postrelease supervision imposed by the court, with the sentences remaining concurrent.

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

All concur except OGDEN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent inasmuch as I conclude that Supreme Court erred in refusing to suppress statements made by defendant in his backyard and subsequently at a local hospital absent *Miranda* warnings.

Initially, I agree with the majority that, based on the evidence admitted at trial, defendant's conviction is supported by legally sufficient evidence, and the verdict is not against the weight of the evidence (*see generally People v Estrella*, 41 NY3d 514, 517-518 [2024]; *People v Danielson*, 9 NY3d 342, 348-349 [2007]). I disagree with the majority, however, that the questioning by the police in defendant's backyard constituted a noncustodial investigatory inquiry for which *Miranda* warnings were not required. In my view, defendant was in custody at that time and was subjected to an interrogation.

"The *Miranda* rule protects the privilege against self-incrimination" (*People v Paulman*, 5 NY3d 122, 129 [2005]). "*Miranda* warnings must be administered when an interrogation occurs 'after a person has been taken into custody or otherwise deprived of [their] freedom of action in any significant way' " (*People v Cabrera*, 41 NY3d 35, 52 [2023], quoting *Miranda v Arizona*, 384 US 436, 444 [1966]). "To ascertain custodial status, [courts] must consider 'whether a reasonable person innocent of any wrongdoing would have believed that [they were] not free to leave' . . . and whether there has been a 'forcible seizure which curtails a person's freedom of action to the degree associated with a formal arrest' " (*id.*). "[I]n determining whether a defendant was in custody for *Miranda* purposes, the court should consider: (1) the amount of time the defendant spent with the police; (2) whether the defendant's freedom of action was

restricted in any significant manner; (3) the location and atmosphere in which the defendant was questioned; (4) the degree of cooperation exhibited by the defendant; (5) whether the defendant was apprised of [their] constitutional rights; and (6) whether the questioning was investigatory or accusatory in nature" (*People v Allen*, 183 AD3d 1284, 1285 [4th Dept 2020], *affd* 36 NY3d 1033 [2021]; see *People v Hughes*, 199 AD3d 1332, 1334 [4th Dept 2021]).

As the body camera footage admitted in evidence at the suppression hearing reflects, defendant was approached in his backyard at approximately 10:30 p.m. by a number of police officers. One such officer (initial approaching officer), who testified at the suppression hearing, yelled, "Hey, don't move!" and "Police, don't fucking move!," to which defendant replied, multiple times, "I'm not moving, my leg is broken." The initial approaching officer accused defendant of possessing a weapon and asked him, several times, "What did you throw back here?" In addition, an officer can be heard on the body camera footage saying that it would be "best for you to be honest with me" because the police "were going to find it," i.e., the gun. Later, in front of defendant, the initial approaching officer told an officer who was with defendant, "We know we're eventually gonna have to cuff him, right?," to which that officer replied, "Yeah." Defendant then asked if they could wait to handcuff him until he was inside a van. Seconds after the exchange concerning whether defendant needed to be handcuffed occurred, defendant told the officers, "I was just protecting my family. He literally stabbed my son, what would of you had [sic] done?"

In my view, each and every factor in determining whether defendant was in custody for *Miranda* purposes weighs in defendant's favor. First, defendant was with the police in his backyard for almost an hour (see *People v Hernandez*, 174 AD3d 1352, 1353-1354 [4th Dept 2019]; cf. *People v Weakfall*, 108 AD3d 1115, 1115-1116 [4th Dept 2013], *lv denied* 21 NY3d 1078 [2013]). Second, defendant's freedom of action, notwithstanding his leg injury, was restricted in a significant manner from the inception of the encounter. The encounter started with police officers yelling at defendant not to move, to get on the ground, and to let the officers see his hands at all times (see generally *United States v Guarino*, 629 F Supp 320, 325 [D Conn 1986]). Moreover, defendant was informed multiple times that nothing would happen until the officers found the gun (see generally *People v Doll*, 98 AD3d 356, 362 [4th Dept 2012], *affd* 21 NY3d 665 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]). Next, the atmosphere in which defendant was questioned was highly intrusive because his backyard was full of officers searching for a gun (cf. *United States v Luna-Encinas*, 603 F3d 876, 881-882 [11th Cir 2010]; see generally *People v Rabideau*, 82 AD3d 1283, 1284 [3d Dept 2011], *lv denied* 17 NY3d 799 [2011]). It is apparent from the body camera footage that defendant did not cooperate with the officers because he never told them where the gun was, despite repeated accusatory questioning on the topic (cf. *Allen*, 183 AD3d at 1285). Despite the above, defendant was not advised of his *Miranda* warnings, and the officers' questions to defendant were not merely investigatory in nature (see *People v Anthony*, 85 AD3d 1634, 1635 [4th Dept 2011], *lv*

denied 17 NY3d 813 [2011]; *People v Brown*, 49 AD3d 1345, 1346 [4th Dept 2008]; see also *People v Booker*, 66 AD2d 474, 478-479 [4th Dept 1979], *affd* 49 NY2d 989 [1980]).

Such accusatory questions constituted an interrogation because they were " 'reasonably likely to elicit an incriminating response' " (*Paulman*, 5 NY3d at 129, quoting *People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]; see *Rhode Island v Innis*, 446 US 291, 300-301 [1980]). I therefore conclude that the statements defendant made in the backyard should have been suppressed.

Defendant also contends that the statements that he made at the hospital should have been suppressed because the "cat [was] out of the bag" (*United States v Bayer*, 331 US 532, 540 [1947], *reh denied* 332 US 785 [1947]). "[T]he 'letting the cat out of the bag' theory . . . 'treats successive confessions as equally inadmissible, where the first is infected by the absence of *Miranda* warnings and the others follow in short order, even though accompanied by warnings' " (*People v Johnson*, 121 AD2d 84, 87-88 [4th Dept 1986], quoting *People v Parker*, 82 AD2d 661, 668 [2d Dept 1981], *affd* 57 NY2d 815 [1982]; see *People v Tanner*, 30 NY2d 102, 106 [1972]). The notable difference here is that no *Miranda* warnings were ever given at the hospital. That, however, does not change the logic behind the theory. I conclude that defendant's statements at the hospital were tainted by his earlier statements in the backyard (*cf. People v Thurman*, 262 AD2d 987, 988 [4th Dept 1999], *lv denied* 94 NY2d 830 [1999]), particularly because defendant made very similar incriminating statements at the hospital upon continued accusatory questioning. In my view, defendant's successive incriminating statements are equally inadmissible inasmuch as the initial statements in the backyard were infected by the ongoing absence of *Miranda* warnings.

I further conclude that the error in refusing to suppress defendant's statements to the police cannot be deemed harmless. At trial, the People relied upon those statements, which were admitted in evidence, when opposing defendant's motion for a trial order of dismissal, and the People later pointed to those statements in their closing argument to the jury. Even assuming, *arguendo*, that the proof was overwhelming as to defendant's guilt, I conclude that there is a reasonable possibility the error contributed to defendant's conviction (*see People v Crimmins*, 36 NY2d 230, 237 [1975]). I would therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to suppress his statements to the police, and grant a new trial. In light of my determination, it is not necessary to review defendant's remaining contentions.

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

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KA 22-01194

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY SMITH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (J. SCOTT PORTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

TIMOTHY SMITH, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered June 29, 2022. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). In both his main and pro se supplemental briefs, defendant contends that County Court erred in refusing to suppress physical evidence as a result of an alleged unlawful seizure of his person. We reject that contention.

Evidence at a suppression hearing established that, at 7:43 p.m. on the date defendant was arrested, an identified citizen called 911 to report that shots had been fired near 204 South Alvord Street in Syracuse and that at least one round hit the caller's vehicle. After that first call to 911, a dispatcher announced over police radio that "a male in a black hoodie just shot at the caller's vehicle" and was headed "northbound on Seward Street" on foot. At 7:45 p.m., officers arrived at the scene of the shooting and spoke with the 911 caller. At 7:49:14 p.m., the dispatcher updated the description of the suspect, stating that he was a Black male wearing black clothing traveling eastbound on Seward Street from South Alvord Street. At 7:50:48 p.m., two officers (first officer and second officer, respectively) were in the 100 block of Jasper Street, which is only a few blocks away from the shooting and is the continuation of Seward

Street after its intersection with Highland Street. At that time, and having heard the relevant dispatch reports, those officers observed, according to the first officer's testimony, "a male, a Black male in all black, walking eastbound on Jasper Street."

The first officer determined that the male matched the "general description" of the suspect inasmuch as he was a "[B]lack male, in all black." At that point, the officers shone a spotlight on the male, exited their patrol vehicle and told the male "that [they] were responding to a shots-fired in the area and that he matched the description of the possible shooter." The first officer then asked the male, who was not out of breath and did not appear to be carrying any weapons, if the officers "could check him for any weapons." According to the first officer, his purpose was "[t]o detain" the suspect because "he matched the description of someone who had been seen in the area of a shots-fired, possible suspect in a shooting." The suspect agreed to a pat frisk but fled on foot before it could be conducted. The officers pursued and observed the suspect grabbing at his waistband, tossing a firearm into a yard, and scaling a fence in the 300 block of Beecher Street. After ceasing pursuit, the first officer radioed a description of the suspect as a bald, Black male, dressed in all black. Shortly thereafter, the first officer added to his description, stating that the suspect was wearing a white glove.

At approximately 7:56 p.m., another officer in the area found discarded clothes in a yard on Douglas Street, a few blocks away from Jasper Street. The clothing consisted of black sweatpants, a black sweatshirt, a black jacket and a white glove. Shortly thereafter, another officer observed defendant, a bald Black man, running near the intersection of Highland Street and Graves Street. The officer detained defendant, who was wearing shorts and a T-shirt, until the first officer arrived and identified defendant as the individual he had stopped moments earlier on Jasper Street. Defendant was then placed under arrest. The police later found a revolver in the area of Jasper Street where the first officer and second officer had seen the suspect toss what appeared to be a gun.

Considering only the testimony and other evidence admitted at the suppression hearing (*see People v Gonzalez*, 55 NY2d 720, 721-722 [1981], *rearg denied* 55 NY2d 1038 [1982], *cert denied* 456 US 1010 [1982]; *People v Heverly*, 230 AD3d 1534, 1535 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]), we conclude that the initial stop of defendant was lawful as were the request to frisk defendant for weapons and the pursuit of defendant (*see generally People v De Bour*, 40 NY2d 210, 223 [1976]). Contrary to defendant's contention, the first officer and the second officer had a founded suspicion of criminality permitting them to approach defendant on Jasper Street and request information (*see id.*). Defendant was in temporal and geographic proximity to the crime and was a Black male in all black clothing. Although it was early evening on an autumn day, there is no evidence that there were any other pedestrians matching that general description in the vicinity (*see People v Watkins*, 221 AD3d 1430, 1432 [4th Dept 2023], *affd* 42 NY3d 1074 [2024]; *People v McKinley*, 101 AD3d

1747, 1749 [4th Dept 2012], *lv denied* 21 NY3d 1017 [2013]; *see also* *People v Gayden*, 126 AD3d 1518, 1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]; *see generally* *People v Moore*, 6 NY3d 496, 498-499 [2006]; *People v Hollman*, 79 NY2d 181, 184 [1992]). We thus conclude that the police encounter was lawful at its inception (*see De Bour*, 40 NY2d at 220).

We further conclude that the officers' request for consent to frisk defendant was lawful. "In circumstances justifying a level two encounter, the officer may request an individual's consent to conduct a search, so long as the request is 'reasonably related in scope to the circumstances that justified the interference in the first place' " (*People v Darby*, 234 AD3d 708, 709-710 [2d Dept 2025], *lv denied* 43 NY3d 1007 [2025], quoting *People v Mercado*, 120 AD3d 441, 443 [2d Dept 2014], *affd* 25 NY3d 936 [2015]; *see People v Dibble*, 43 AD3d 1363, 1364 [4th Dept 2007], *lv denied* 9 NY3d 1032 [2008]; *see generally* *People v Dunbar*, 5 NY3d 834, 835 [2005]; *Hollman*, 79 NY2d at 191-192).

Inasmuch as the officers had the requisite founded suspicion of criminality, their request to frisk defendant for weapons was lawful, especially considering that the officers were investigating a shooting that occurred minutes earlier only a few blocks away (*cf. Dunbar*, 5 NY3d at 835). The degree of suspicion ripened from a founded suspicion of criminality to reasonable suspicion upon defendant's flight, thereby justifying the officers' pursuit (*see Watkins*, 221 AD3d at 1432; *People v Thacker*, 156 AD3d 1482, 1483 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]; *see also* *Gayden*, 126 AD3d at 1518; *see generally* *Moore*, 6 NY3d at 498-499; *Hollman*, 79 NY2d at 184). The later recovery of "the abandoned gun was lawful inasmuch as the pursuit of defendant was lawful" (*People v Daniels*, 147 AD3d 1392, 1393 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *see also* *People v Davis*, 142 AD3d 1387, 1388 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]), and the officers' observation of defendant tossing a firearm during the pursuit "gave rise to probable cause to arrest defendant" (*Gayden*, 126 AD3d at 1518-1519; *see Davis*, 142 AD3d at 1388; *cf. People v Hightower*, 136 AD3d 1396, 1397 [4th Dept 2016]).

We thus conclude that the court properly refused to suppress any evidence related to defendant's stop, pursuit and arrest.

Contrary to defendant's contentions in his main brief, the conviction is supported by legally sufficient evidence (*see generally* *People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to the two counts of which defendant was convicted is not against the weight of the evidence (*see generally* *Bleakley*, 69 NY2d at 495). Defendant contends, in his pro se supplemental brief, that the verdict is repugnant. Inasmuch as defendant did not object to the verdict on that ground before the jury was discharged, he failed to preserve that contention for our review (*see People v Alfaro*, 66 NY2d 985, 987

[1985]; *People v Callistro*, 146 AD3d 795, 796-797 [2d Dept 2017], *lv denied* 29 NY3d 1029 [2017]). 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]).

Defendant further contends in his main brief that his conviction under Penal Law § 265.03 (3) was based on an uncharged theory. As defendant concedes, that contention is not preserved for review (*see People v Ekiert*, 232 AD3d 1275, 1276 [4th Dept 2024]; *People v Harlow*, 195 AD3d 1505, 1508 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *see generally People v Allen*, 24 NY3d 441, 449-450 [2014]). Again, we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention in his main brief that it was prejudicial error to allow a police officer to opine at trial that civilians often overstate the number of gunshots. The testimony was properly admitted to aid the jury in understanding something outside of their normal experience (*see People v Rivers*, 18 NY3d 222, 228 [2011]; *People v Jones*, 224 AD3d 1348, 1351 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]). In any event, any error in the admission of that testimony was harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

In both his main and pro se supplemental briefs, defendant contends that he was denied a fair trial by prosecutorial misconduct. To the extent that we are able to review defendant's contentions regarding prosecutorial misconduct on the record before us, we conclude that, even assuming, *arguendo*, that such contentions are preserved for our review, any improprieties did not " 'cause[] such substantial prejudice to defendant that he was denied due process of law' " (*People v Tetro*, 181 AD3d 1286, 1289 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]; *see generally People v Mott*, 94 AD2d 415, 419 [4th Dept 1983]). To the extent that defendant contends in his pro se supplemental brief that the prosecutor displayed "false" evidence to the jury that was never admitted in evidence, that contention is based on evidence outside the record and must be raised by way of a CPL article 440 motion (*see People v Dixon*, 138 AD3d 1016, 1017 [2d Dept 2016], *lv denied* 27 NY3d 1131 [2016], *reconsideration denied* 28 NY3d 1027 [2016], *cert denied* 581 US 906 [2017], *reh denied* 581 US 1014 [2017]).

Viewing the evidence, the law, and the circumstances in totality and as of the time of representation, we also reject defendant's contention in his main brief that he was denied meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). We further reject defendant's contention, raised in his main and pro se supplemental briefs, that the sentence is unduly harsh and severe.

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

All concur except OGDEN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent inasmuch as I conclude that the pursuit of defendant was unlawful. At the time the two officers in question approached defendant, they mistakenly believed that they could properly detain defendant. The information they had before them, a general description of a suspect, gave them, as the majority agrees, a level two right to inquire (see *People v Moore*, 6 NY3d 496, 498-499 [2006]; *People v De Bour*, 40 NY2d 210, 223 [1976]). In other words, defendant, at the time the officers approached him, had the right to be let alone.

The majority concludes that the degree of suspicion ripened from founded suspicion of criminality to reasonable suspicion upon defendant's flight, thereby justifying the officers' pursuit. " 'Flight alone, however, or even in conjunction with equivocal circumstances that might justify a police request for information, is insufficient to justify pursuit because an individual has a right to be let alone and refuse to respond to police inquiry' " (*People v Cleveland*, - NY3d -, -, 2025 NY Slip Op 02144, *2 [2025], quoting *People v Holmes*, 81 NY2d 1056, 1058 [1993]). A level two founded suspicion of criminality plus flight cannot equate to level three reasonable suspicion or else a defendant's right to be let alone during a level two encounter will be rendered utterly meaningless. In my view, the majority ignores binding New York jurisprudence on this point in favor of a standard that erodes the rights that individuals maintain in a level two encounter. As the Court of Appeals recently reiterated, "an individual's flight from a level one or two police encounter, without more, does not provide the reasonable suspicion necessary to pursue them" (*Cleveland*, - NY3d at -, 2025 NY Slip Op 02144, *1; see *Moore*, 6 NY3d at 500; *Holmes*, 81 NY2d at 1058), and defendant, during the lawful level two encounter, and even upon the officers' requests and his momentary acquiescence, retained his "right to be let alone and refuse to respond to police inquiry" (*People v May*, 81 NY2d 725, 728 [1992]). I conclude that there is no support in the record for determining that the officers in question could lawfully pursue defendant, and I would therefore reverse the judgment, grant that part of defendant's second omnibus motion seeking to suppress physical evidence, dismiss the superseding indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

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

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CA 24-00339

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

KENNETH HEINRICH, INDIVIDUALLY AND AS THE
ADMINISTRATOR OF THE ESTATE OF DAVID ALAN
HEINRICH, DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KELLEY A. SERENS, N.P., LAUREN PIPAS, M.D.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

SIDNEY P. COMINSKY, LLC, JAMESVILLE (SIDNEY P. COMINSKY OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County
(Joseph E. Lamendola, J.), entered December 13, 2023. The judgment
dismissed the amended complaint against defendants Kelley A. Serens,
N.P., and Lauren Pipas, M.D.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs, the amended complaint
is reinstated against defendants Kelley A. Serens, N.P., and Lauren
Pipas, M.D., and a new trial is granted.

Memorandum: Plaintiff, individually and as administrator of the
estate of David Alan Heinrich (decedent), commenced this medical
malpractice and wrongful death action against defendants, alleging,
inter alia, that decedent's death was caused by their negligent care
and treatment of decedent. Following a trial, the jury returned a
verdict in favor of each defendant, finding no negligent conduct in
the care and treatment of decedent. Three judgments were thereafter
entered dismissing the amended complaint against specific defendants.
In appeal No. 1, plaintiff appeals from the judgment in favor of
defendants Kelley A. Serens, N.P., and Lauren Pipas, M.D. In appeal
No. 2, plaintiff appeals from the judgment in favor of defendants
Mariam Alexander, M.D., Amy Patel, M.D., Vivian Chan, M.D., and
Michael Kosters, M.D. In appeal No. 3, plaintiff appeals from the
judgment in favor of defendant Lynn Marie Cleary, M.D. We reverse in
each appeal.

Initially, we reject plaintiff's contention that the verdict is

against the weight of the evidence. " 'It is well settled that a jury verdict will be set aside as against the weight of the evidence only when the evidence at trial so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence' " (*Monzon v Porter*, 173 AD3d 1779, 1780 [4th Dept 2019]; see *Clark v Loftus*, 162 AD3d 1643, 1643-1644 [4th Dept 2018]). While the resolution of a motion to set aside a verdict as against the weight of the evidence "is addressed to the sound discretion of the trial court, . . . if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720 [4th Dept 2003]; see *McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016]; *Sauter v Calabretta*, 103 AD3d 1220, 1220 [4th Dept 2013]). "[I]t is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses" (*2006905 Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 222 AD3d 1436, 1438-1439 [4th Dept 2023], lv denied 42 NY3d 904 [2024] [internal quotation marks omitted]; see *McMillian*, 136 AD3d at 1343-1344; *Sauter*, 103 AD3d at 1220). Conflicting expert testimony presents a credibility issue, and resolving "that conflict is a matter peculiarly within the province of the jury" (*Regelski v Weber*, 209 AD2d 965, 965 [4th Dept 1994] [internal quotation marks omitted]).

Here, the jury, which was entitled to credit defendants' experts and reject the testimony of plaintiff's experts (see *Clark*, 162 AD3d at 1644), reached the conclusion "that [defendants] did not depart from the standard of care" and we cannot conclude that the verdict could not have been reached upon "any fair interpretation of the evidence" (*Peevey v Unity Health Sys.*, 196 AD3d 1139, 1141 [4th Dept 2021] [internal quotation marks omitted]; see *Regelski*, 209 AD2d at 965-966).

We agree, however, with plaintiff that Supreme Court abused its discretion in precluding plaintiff from raising claims that defendants Serens and Pipas (ED defendants) were negligent in failing to give a blood transfusion to decedent when he was in the care of the hospital emergency department. Plaintiff alleged in his bills of particulars to the ED defendants that they were negligent in failing to act upon complaints, signs, symptoms, and diagnostic testing. Plaintiff further alleged that they failed to order blood to be typed and crossed despite being aware of a substantial drop in decedent's hemoglobin and hematocrit levels. During summary judgment motion practice, the ED defendants' expert, David Cohen, M.D., opined that "[t]he standard of care . . . did not require [the ED defendants] to type and cross the decedent's blood, or even consider a blood transfusion." When the ED defendants moved in limine to preclude evidence or testimony that decedent should have been given a blood transfusion, however, the court granted the ED defendants' motion in limine on the basis that it was "a new allegation that ha[d] not been previously pled." On the contrary, plaintiff from the outset alleged that the ED defendants failed to act upon complaints, signs, symptoms, and diagnostic testing, and such allegations were neither new nor would have been a surprise to the ED defendants because they had

responded during summary judgment motion practice to the allegation that they should have acted upon the drop in hemoglobin and hematocrit levels. That error requires reversal in appeal No. 1 (*see generally Brooks v Blanchard*, 174 AD3d 1362, 1365 [4th Dept 2019]).

We further agree with plaintiff that the court abused its discretion in failing to give a missing witness charge for defendants Patel, Chan, and Alexander. A trier of fact in a civil proceeding may draw the strongest inference that the opposing evidence permits against a party who fails to testify (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]; *Matter of Lewis*, 158 AD3d 1247, 1249-1250 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]; *Matter of Adam K.*, 110 AD3d 168, 178 [2d Dept 2013]; *Crowder v Wells & Wells Equip., Inc.*, 11 AD3d 360, 361 [1st Dept 2004]). This type of instruction, which is commonly referred to as a missing witness charge, "derives from the commonsense notion that the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause" (*People v Gonzalez*, 68 NY2d 424, 427 [1986] [internal quotation marks and emphasis omitted]). In seeking use of this charge, "[t]he burden, in the first instance, is upon the party seeking the charge to promptly notify the court that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case, that such witness can be expected to testify favorably to the opposing party and that such party has failed to call [the witness] to testify" (*id.*). Once the foregoing is established, the burden shifts to the party opposing the charge "to account for the witness' [s] absence or otherwise demonstrate that the charge would not be appropriate" (*id.* at 428). The opposing party's burden can be met by demonstrating, *inter alia*, that "the testimony would be cumulative to other evidence" (*id.*; *see People v Smith*, 33 NY3d 454, 459-460 [2019]).

Here, when counsel for defendants Patel, Chan, Alexander, and Kosters notified plaintiff's counsel that she did not intend to call Patel, Chan, and Alexander, plaintiff's attorney issued a letter to the court requesting a missing witness charge. The court initially ruled that it would not give a missing witness charge, but, later, it permitted plaintiff's counsel to make a showing on the issue of whether the testimony would be cumulative. The court then denied plaintiff's request for a missing witness charge on the basis that plaintiff failed "to set forth specific issues of noncumulative and material testimony."

Initially, the court improperly placed the burden on plaintiff to establish that the evidence would not be cumulative (*see Smith*, 33 NY3d at 459-460; *Gonzalez*, 68 NY2d at 428). In the circumstances of this case, the testimony of the uncalled defendants would not have been cumulative to the other evidence at trial because they were directly involved in decedent's care in the hours before his death. Had the uncalled defendants testified, they each could have elaborated or interpreted the medical records and notes received in evidence, which would be noncumulative evidence (*see Wilson v Bodian*, 130 AD2d 221, 234 [2d Dept 1987]; *see also Leven v Tallis Dept. Store*, 178 AD2d

466, 466 [2d Dept 1991]). We further conclude that the testimony of defense expert Dr. David Charles Kaufman or that of defendant Cleary, the supervising attending physician, could not render the testimony of the uncalled defendants cumulative because those witnesses were not present at the hospital during the relevant times of decedent's care and did not observe decedent (*see Leven*, 178 AD2d at 466). The uncalled defendants observed decedent and could have offered their observations and the underlying reasons for their medical decisions (*see Gagnon v St. Clare's Hosp.*, 58 AD3d 960, 962 [3d Dept 2009]; *see generally Adam K.*, 110 AD3d at 181; *Hanlon v Campisi*, 49 AD3d 603, 604 [2d Dept 2008]). Although we acknowledge that plaintiff's counsel read portions of the uncalled defendants' deposition testimony at trial, we note that the use of a missing party's deposition testimony does not constitute a waiver of that party's right to request a missing witness charge (*see Alli v Full Serv. Auto Repair, LLC*, 127 AD3d 1003, 1004 [2d Dept 2015]; *Farrell v Labarbera*, 181 AD2d 715, 716 [2d Dept 1992]). We therefore conclude that the court erred in denying plaintiff's request for a missing witness charge.

We further conclude that such error is not harmless as to defendants in appeal Nos. 2 and 3 and reversal is required in those two appeals. We note that although plaintiff's counsel commented during summation on the failure to call the witnesses in question, and such appeals are proper (*see DeVaul v Carvigo Inc.*, 138 AD2d 669, 670 [2d Dept 1988], *lv denied* 72 NY2d 806 [1988], *appeal dismissed* 72 NY2d 914 [1988]; *see also Goverski v Miller*, 282 AD2d 789, 791 [3d Dept 2001]), the court instructed the jury that plaintiff's counsel "improperly commented upon [the] decision not to call Dr. Patel, Dr. Chan, or Dr. Alexander to testify." The court also told the jury that "defendants [were] under no obligation to call any witnesses." The court ended its statement on the appeal to the jury by erroneously instructing the jury "to disregard all of [plaintiff's counsel's] comments on this issue." We therefore conclude that the error in denying the missing witness charge was not cured by the summation (*see DeVito v Feliciano*, 22 NY3d 159, 167 [2013]). Finally, it cannot be said that the evidence before the jury "so clearly supported a verdict in favor of . . . defendants [in appeal Nos. 2 and 3] that [the] error did not prejudice a substantial right of . . . plaintiff" (*id.*).

We have considered plaintiff's remaining contentions, and we conclude that they lack merit.

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

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CA 24-00340

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

KENNETH HEINRICH, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF DAVID ALAN
HEINRICH, DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KELLEY A. SERENS, N.P., ET AL., DEFENDANTS,
MARIAM ALEXANDER, M.D., AMY PATEL, M.D.,
VIVIAN CHAN, M.D., AND MICHAEL KOSTERS, M.D.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

SIDNEY P. COMINSKY, LLC, JAMESVILLE (SIDNEY P. COMINSKY OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County
(Joseph E. Lamendola, J.), entered February 7, 2024. The judgment
dismissed the amended complaint against defendants Mariam Alexander,
M.D., Amy Patel, M.D., Vivian Chan, M.D., and Michael Kosters, M.D.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs, the amended complaint
is reinstated against defendants Mariam Alexander, M.D., Amy Patel,
M.D., Vivian Chan, M.D., and Michael Kosters, M.D., and a new trial is
granted.

Same memorandum as in *Heinrich v Serens* ([appeal No. 1] – AD3d –
[July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00348

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

KENNETH HEINRICH, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF DAVID ALAN
HEINRICH, DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KELLEY A. SERENS, N.P., ET AL., DEFENDANTS,
AND LYNN MARIE CLEARY, M.D., DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

SIDNEY P. COMINSKY, LLC, JAMESVILLE (SIDNEY P. COMINSKY OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

GALE GALE & HUNT, LLC, FAYETTEVILLE (KEVIN T. HUNT OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County
(Joseph E. Lamendola, J.), entered February 22, 2024. The judgment
dismissed the amended complaint against defendant Lynn Marie Cleary,
M.D.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs, the amended complaint
is reinstated against defendant Lynn Marie Cleary, M.D., and a new
trial is granted.

Same memorandum as in *Heinrich v Serens* ([appeal No. 1] – AD3d –
[July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00478

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

KRISTIE M., AS PARENT AND NATURAL GUARDIAN
OF BRAYDEN M., AN INFANT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MERCY HOSPITAL OF BUFFALO AND CATHOLIC HEALTH
SYSTEM, INC., DEFENDANTS-APPELLANTS.

BARGNESI BRITT PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered March 14, 2024 in a medical malpractice action. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her son as a result of the alleged medical malpractice of agents, staff, and personnel affiliated with defendants in treating the infant following his premature birth. Defendants moved for summary judgment dismissing the complaint. Supreme Court denied the motion, and defendants appeal. We affirm.

Initially, we note that defendants' contentions on appeal rely on an outdated standard governing the burden shifting analysis for summary judgment motions in medical malpractice actions by citing to *O'Shea v Buffalo Med. Group, P.C.* (64 AD3d 1140 [4th Dept 2009], *appeal dismissed* 13 NY3d 834 [2009]). Under the current standard, "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, defendants met their initial burden on the motion with respect to deviation from the accepted standard of care and proximate causation through the submission of their expert physician affidavit, which was "detailed, specific and factual in nature" and addressed each negligence claim raised in claimant's bill of particulars (*Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1469 [4th Dept 2020] [internal quotation marks omitted]). The burden thus 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] [internal quotation marks omitted]; see *Bubar*, 177 AD3d at 1359). We conclude that plaintiff raised triable issues of fact with respect to both deviation and proximate causation. Plaintiff'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" (*Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020] [internal quotation marks omitted]; cf. *Bubar*, 177 AD3d at 1362), and "squarely opposes the [affidavit] of the moving parties' expert, . . . result[ing] [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]).

Contrary to defendants' contention in reply, plaintiff did not improperly raise a new theory of malpractice for the first time in opposition to the motion for summary judgment (see *Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]; *Marchetti v East Rochester Cent. School Dist.*, 26 AD3d 881, 881 [4th Dept 2006]). "In determining whether a new theory of liability has been alleged by a plaintiff in opposition to a defendant's motion for summary judgment, [the court] must initially focus on the allegations in the complaint" (*Braxton v Erie County Med. Ctr. Corp.*, 208 AD3d 1038, 1041 [4th Dept 2022]) "and examine whether the allegedly new theory was 'sufficiently pleaded to avoid surprise and prejudice to defendants' " (*Clark v Cucinotta*, 229 AD3d 1106, 1107 [4th Dept 2024]; see *Valette v Correa*, 216 AD3d 500, 500 [1st Dept 2023]). "[I]n a medical malpractice action, a plaintiff's bill of particulars need only make a reasonable attempt to amplify the pleading, limit the proof and prevent surprise at trial" (*Braxton*, 208 AD3d at 1041 [internal quotation marks omitted]). Here, plaintiff's complaint, original bill of particulars, and amended bill of particulars have consistently provided notice that her cause of action for medical malpractice asserts that defendants and those for whom they are responsible failed to properly diagnose her son, and thus we conclude that she "did not rely on a 'new theor[y] of liability' . . . in opposing [defendants'] motion" (*Jeannette S. v Williot*, 179 AD3d 1479, 1481 [4th Dept 2020]; see *Braxton*, 208 AD3d at 1042). To the extent that defendants contend that plaintiff asserted a theory of liability in her bill of particulars that was not pleaded in the complaint and, therefore, was untimely, defendants waived that contention by not moving for partial summary judgment on any part of

plaintiff's cause of action for medical malpractice on that basis (see CPLR 3212 [e]). Although a theory of liability may be embedded in a cause of action, it may be dismissed on summary judgment only if the motion provides notice that it seeks to have that theory of malpractice dismissed as a distinct part of the particular cause of action (see CPLR 2214 [a]; 3212 [e]).

In light of our determination, we do not address defendants' remaining contention.

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

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CA 24-00457

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

JOSEPH A. SKRZYNSKI AND DEBORAH M. SKRZYNSKI,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

AKEBONO BRAKE CORPORATION, ET AL., DEFENDANTS,
AND FORD MOTOR COMPANY, DEFENDANT-APPELLANT.

MAURO LILLING NAPARTY LLP, WOODBURY (RICHARD J. MONTES OF COUNSEL),
AND BOWMAN AND BROOKE LLP, CORAL GABLES, FLORIDA, FOR
DEFENDANT-APPELLANT.

MAUNE RAICHLE HARTLEY FRENCH & MUDD, LLC, NEW YORK CITY (JOSH MCMAHON
OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Edward Pace, J.), entered February 28, 2024 in a personal injury action arising from exposure to asbestos. The judgment awarded plaintiff Joseph A. Skrzyński money damages against defendant Ford Motor Company upon a jury verdict.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries Joseph A. Skrzyński (plaintiff) sustained as a result of his exposure to asbestos contained in, inter alia, friction products manufactured, distributed, or supplied by Ford Motor Company (defendant). Defendant moved for summary judgment dismissing the complaint against it and plaintiff opposed the motion. Supreme Court granted in part and denied in part defendant's motion and, inter alia, dismissed plaintiffs' derivative cause of action. The matter proceeded to a jury trial, at which evidence was adduced establishing that plaintiff was exposed to such products, including brakes containing asbestos, while working at an automobile dealership. Plaintiff proceeded under a failure to warn theory. Following the trial, the jury returned a verdict finding, among other things, that plaintiff was exposed to asbestos as a component of defendant's friction products, that defendant failed to exercise reasonable care in providing an adequate warning to plaintiff of the hazards of exposure to asbestos fibers from defendant's friction products, and that such failure to adequately warn was a substantial contributing factor in causing his mesothelioma.

Thereafter, defendant moved, pursuant to CPLR 4404 (a), for, among other things, judgment as a matter of law, a new trial based on alleged evidentiary errors, and to set aside the verdict as against the weight of the evidence. The court denied the motion and a judgment was entered in favor of plaintiff against defendant. Defendant appeals, contending that the evidence presented at trial was legally insufficient to establish specific and general causation, and that the court erred in denying defendant's pretrial motion for summary judgment dismissing the second amended complaint against it.

Initially, we note that the court's order denying in part defendant's pretrial motion for summary judgment is not reviewable on this appeal because, insofar as defendant challenges that order, the order did not "remove any issues from the case," and it therefore did not necessarily affect the final judgment (*Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1026 [2022], *rearg denied* 38 NY3d 1170 [2022]; *see Reed v Town of Amherst*, 221 AD3d 1454, 1455 [4th Dept 2023]; *see generally* CPLR 5501 [a] [1]).

On appeal, defendant principally contends that it was entitled to a directed verdict dismissing the second amended complaint against it as a matter of law (*see* CPLR 4404 [a]) on the basis that there was legally insufficient evidence to establish the element of causation (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). In that context, "the relevant inquiry [is] whether there is simply *no* valid line of reasoning and permissible inferences which could *possibly* lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Campbell v City of Elmira*, 84 NY2d 505, 509 [1994] [internal quotation marks omitted]). "When it can be said that *it would not be utterly irrational for a jury to reach the result it . . . determined . . .*, the court may not conclude that the verdict is as a matter of law not supported by the evidence" (*id.* at 510 [internal quotation marks omitted]). In other words, compared to weight of the evidence review, the "utterly irrational" test applicable in the context of a legal sufficiency challenge is "a harsher and more basic assessment of the jury verdict" where "the result of such an inquiry is of considerably greater significance than is a determination that a factual conclusion is against the weight of the evidence, for in the former case the result is a final judgment, while in the latter the result must be merely a new trial" (*Cohen*, 45 NY2d at 498-499). Inasmuch as defendant's contentions on appeal are limited to the issue of causation, we assume, *arguendo*, that plaintiff was exposed to asbestos as a component of defendant's friction products and that defendant failed to exercise reasonable care in providing an adequate warning to plaintiff of the hazards of exposure to asbestos fibers from defendant's friction products (*see Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept 2018]; *see also Gates v Simpson*, – AD3d –, – [July 25, 2025] [4th Dept 2025]; *Scutella v Dill*, – AD3d –, – [July 25, 2025] [4th Dept 2025]).

Addressing defendant's contentions concerning the sufficiency of the trial evidence on the issue of causation, it is well established that, in cases involving exposure to asbestos or other toxins, " 'an

opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)' " (*Nemeth v Brenntag N. Am.*, 38 NY3d 336, 342-343 [2022], quoting *Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006], *rearg denied* 8 NY3d 828 [2007]). " '[I]t is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship, provided that whatever methods an expert uses to establish causation are generally accepted in the scientific community' " (*id.* at 343, quoting *Parker*, 7 NY3d at 448). Indeed, "there may be several ways" for an expert to demonstrate causation, but "any method used must be 'generally accepted as reliable in the scientific community' " (*id.*, quoting *Parker*, 7 NY3d at 449).

First, we conclude that the trial evidence is legally sufficient to establish general causation. At trial, plaintiff called a professor of epidemiology (professor), who testified about his research, including his 2011 publication and its conclusion. He testified with respect to his approach, including his review of studies, which supported his conclusion that "chrysotile asbestos causes mesothelioma." The professor reviewed case reports and epidemiology studies from all over the world, which included studies of chrysotile asbestos in automotive friction products. Plaintiff also called an environmental scientist (scientist), who tested defendant's brakes to assess their asbestos composition, whether asbestos fibers protrude from their surfaces, and how many asbestos fibers are released during sanding or cleanup. The scientist's tests showed, *inter alia*, that defendant's brakes contained between 25% and 50% chrysotile asbestos fibers and that handling defendant's brakes created asbestos dust. We conclude that the scientist's testimony coupled with the professor's testimony sufficiently established that the chrysotile asbestos from brakes is capable of causing peritoneal mesothelioma.

We further conclude that the evidence is legally sufficient to establish specific causation. To establish specific causation, plaintiff was required to show that he "was exposed to sufficient levels of the toxin to cause" his alleged injuries; we note that "it is not always necessary for a plaintiff to quantify exposure levels precisely or use the dose-response relationship" (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 187 AD3d 1623, 1623-1624 [4th Dept 2020]). The scientist's testing of defendant's products provided scientifically backed levels of the toxin to which plaintiff may have been exposed. The scientist determined that sanding released asbestos fibers at a rate of 0.8 to 2.2 fibers per cubic centimeter in the breathing zone of the worker, with lower rates farther away from the work. Cleaning up dust with compressed air resulted in a recorded exposure level of 0.9 fibers per cubic centimeter, and sweeping after brake work was done produced a recorded exposure level of 1.7 fibers per cubic centimeter. Plaintiff also testified with respect to his actual exposure to defendant's products. Although plaintiff worked as a parts driver and clerk, plaintiff testified that he usually took breaks in the garage with the mechanics and that, when he was not

delivering parts, he was usually in the garage. Plaintiff believed that he was present for "over a thousand" brake jobs. He was in the garage "two hours or more" each workday, and he described the garage as "filthy," "[d]irty," and "dusty."

Notably, "it is also possible that more qualitative means could be used to express a plaintiff's exposure[, and c]omparison to the exposure levels of subjects of other studies could be helpful" where there is a specific comparison between a plaintiff and the other subjects (*Parker*, 7 NY3d at 449). To that end, the jury also heard evidence regarding a study that estimated exposure to garage workers. The professor testified that a garage worker's exposure could be estimated at 0.2 "fiber years" or, in other words, total dose exposure. The professor noted that the 0.2 "fiber years" corresponded with research on increased risk of developing mesothelioma. A physician that plaintiff called at trial thereafter testified that the professor's 0.2 fiber years figure is comparable to plaintiff's exposure from defendant's products and that, to a reasonable degree of medical certainty, that type of cumulative exposure was a substantial factor in causing plaintiff's mesothelioma.

Based on the foregoing, we conclude that inasmuch as there "is a valid line of reasoning and permissible inferences that could lead rational persons to the conclusion reached by the jury based upon the evidence presented at trial" (*Eighth Jud. Dist. Asbestos Litig.*, 187 AD3d at 1623; *cf. Matter of New York City Asbestos Litig.*, 148 AD3d 233, 240 [1st Dept 2017], *affd* 32 NY3d 1116 [2018]), the jury's verdict satisfies "the minimal 'not utterly irrational' appellate review test" (*Campbell*, 84 NY2d at 510).

All concur except LINDLEY, J.P., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. As the majority correctly notes, it is well established that, in cases involving exposure to asbestos or other toxins, "an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)" (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006], *rearg denied* 8 NY3d 828 [2007]; *see Nemeth v Brenntag N. Am.*, 38 NY3d 336, 342-343 [2022]). Here, I do not believe that Joseph A. Skrzyński (plaintiff) established general causation, i.e., that exposure to chrysotile asbestos as a component of friction products can cause peritoneal mesothelioma, nor did plaintiff meet his burden of proof on specific causation, i.e., that he was exposed to sufficient levels of chrysotile asbestos to cause peritoneal mesothelioma. Thus, in my view, there is "no valid line of reasoning and permissible inferences [that] could possibly lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial," and the verdict should be set aside on the ground that it is not supported by legally sufficient evidence (*Matter of New York City Asbestos Litig.*, 89 NY2d 955, 956 [1997]; *see Nemeth*, 38 NY3d at 342; *Matter of New York City Asbestos Litig.*, 148 AD3d 233, 235 [1st Dept 2017] [*Juni*], *affd* 32 NY3d 1116 [2018]).

As in *Nemeth*, plaintiff's experts offered only "conclusory assertions of causation" that are insufficient to establish that his exposure to asbestos through products manufactured, distributed, or supplied by Ford Motor Company (defendant) was a proximate cause of his mesothelioma (38 NY3d at 345). Although one of plaintiff's experts, a professor of epidemiology (professor), testified that mesothelioma is caused by asbestos, including chrysotile asbestos and peritoneal mesothelioma specifically, that professor offered no epidemiological evidence showing that chrysotile asbestos found in defendant's automotive friction products was capable of causing peritoneal mesothelioma. The professor relied on a case control study, which he described as an attempt to "start with the disease" and "try to reconstruct what happened in the past, retrospectively," and which established only, in his words, that "all types of asbestos of all sizes . . . seemed to be related to mesothelioma." That is not enough to establish general causation (see *Sean R. v BMW of N. Am., LLC*, 26 NY3d 801, 810 [2016]; *Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 782-783 [2014], *rearg denied* 23 NY3d 996 [2014]).

The professor's further reliance on his own 2011 article is similarly insufficient because only two of the many studies cited therein dealt with chrysotile asbestos in automotive friction products; one was a single case report involving a career mechanic, and the other was a case report of six individuals who worked at an asbestos plant that manufactured automotive friction products. Such reliance on anecdotal data and inference does not comport with the standards of *Parker* (see 7 NY3d at 450; see also *Juni*, 148 AD3d at 238-239). Plaintiff also called a physician, whose testimony was not appreciably different from what that same physician offered in *Nemeth*, which the Court of Appeals found wanting (see 38 NY3d at 344-345). Nor did plaintiff's remaining experts establish the requisite causal link between peritoneal mesothelioma and asbestos from automotive friction products.

In sum and substance, plaintiff's experts assumed that, because asbestos in general can cause mesothelioma, the same must be true for chrysotile asbestos found in automotive friction products. That is the type of assumption rejected by the Court of Appeals in *Parker*, and I conclude that, as in *Nemeth* and *Juni*, the evidence here was legally insufficient to establish general causation.

In any event, even assuming, arguendo, that plaintiff presented sufficient evidence of general causation, I conclude that the verdict should nevertheless be set aside because plaintiff failed to establish specific causation. In an attempt to establish that he was exposed to sufficient levels of chrysotile asbestos to cause peritoneal mesothelioma, plaintiff relied on exposure estimates made by the professor, who adopted from literature a mean exposure to asbestos of 0.04 fibers per cubic centimeter (f/cc) years for career brake mechanics, and speculated that this figure could accurately estimate plaintiff's dose. He then multiplied the 0.04 f/cc by the five years plaintiff worked at a Ford dealership to arrive at a lifetime dosage of 0.20 f/cc years.

However, the testimony reflects that 0.04 f/cc is the mean exposure to asbestos for career mechanics who work on brakes eight hours a day every day, and plaintiff was not a brake mechanic, much less a career brake mechanic. Instead, plaintiff worked in the parts department at the dealership. He spent four years primarily delivering parts and one year at the counter in the parts department, which was down the hall from the garage where some mechanics were at times doing brake work, among other things. When asked if .04 f/cc could be used as a reliable estimate of plaintiff's exposure to chrysotile asbestos, even though plaintiff admittedly was only sporadically in the garage and never directly working on brakes himself, the professor answered, "I don't know about accurate, but it is an estimate, so let's try it." Because that estimated exposure level was not remotely consistent with plaintiff's actual work history, the professor's use of that estimate cannot qualify as a "scientific method" capable of establishing specific causation in this case (*Juni*, 148 AD3d at 236; see *Parker*, 7 NY3d at 449; see also *Dyer v Amchem Prods. Inc.*, 207 AD3d 408, 413-414 [1st Dept 2022]).

The same is true of the physician's approach, which simply imported exposure estimates from scientific literature as support for a flat assertion that plaintiff's asbestos exposure was both "significant" and "significantly above ambient asbestos levels," and which was rejected by the Court of Appeals in *Nemeth* (see 38 NY3d at 344-346; see also *Matter of New York City Asbestos Litig.*, 207 AD3d 415, 416 [1st Dept 2022], *lv denied* 39 NY3d 913 [2023], *rearg denied* 40 NY3d 1007 [2023]).

The need for plaintiff to establish a causal link between his mesothelioma and his exposure to chrysotile asbestos from defendant's product was particularly important in light of evidence of other potential causes of his illness. For example, plaintiff acknowledged that he could have been exposed to asbestos while living for 25 years with his father, who worked at the Bethlehem Steel plant in Lackawanna, New York, where asbestos was present. Plaintiff himself worked at Bethlehem Steel for three years, and he was also exposed to asbestos while renovating the basement of his childhood home. More recently, plaintiff received 42 consecutive days of radiation treatment for prostate cancer, which one of plaintiff's experts acknowledged could have caused his mesothelioma.

Based on the foregoing, I would reverse the judgment, grant defendant's postverdict motion insofar as it sought to set aside the verdict based on legally insufficient evidence, and dismiss the second amended complaint against it.

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

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CA 24-01242

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

JACQUELINE ERLERBACK, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TAMMY J. CONGELLI, M.D., AND CENTRAL NEW YORK
SURGICAL PHYSICIANS, P.C., DEFENDANTS-RESPONDENTS.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (MICHAEL J.
CIRINCIONE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered February 16, 2024 in a medical malpractice action. The judgment dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this medical malpractice action alleging, among other things, that Tammy J. Congelli, M.D. (defendant) negligently performed plaintiff's bilateral mastectomy and was negligent in her postoperative care of plaintiff. Plaintiff further alleged that defendant's employer, defendant Central New York Surgical Physicians, P.C., is vicariously liable for defendant's negligence under the doctrine of respondeat superior. The matter proceeded to trial, after which the jury returned a verdict finding that defendant was not negligent.

We reject plaintiff's contention that the verdict is against the weight of the evidence. The evidence presented to the jury did not "preponderate so heavily in favor of [plaintiff] that the jury could not have reached its verdict on any fair interpretation of the evidence" (*Jurkowski v Sheehan Mem. Hosp.*, 85 AD3d 1672, 1673 [4th Dept 2011] [internal quotation marks omitted]; see *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Peevey v Unity Health Sys.*, 196 AD3d 1139, 1141 [4th Dept 2021]). Instead, "there was conflicting expert testimony concerning the alleged negligence of . . . defendant[], and thus it was for the jury to weigh the conflicting medical evidence and credit the opinion of one expert over that of another" (*Mascia v Olivia*, 299 AD2d 883, 884 [4th Dept 2002] [internal quotation marks omitted]).

We also reject plaintiff's contention that she should have been allowed to display her physical injuries to the jury. Whether an injury may be physically displayed to a jury is subject to the discretion of the court (*see Schou v Whiteley*, 9 AD3d 706, 709 [3d Dept 2004]). Here, the medical records and the numerous photographs of plaintiff's injuries were sufficient to establish the extent of her disfigurement, and thus there was no prejudice to plaintiff arising from Supreme Court's refusal to allow the jury to see plaintiff's bare chest. Under the circumstances, we cannot conclude that the court's ruling constitutes an abuse of discretion (*see id.*; *see generally Harvey v Mazal Am. Partners*, 79 NY2d 218, 223-224 [1992]).

Plaintiff further contends that the court erred in denying her request to instruct the jury on the doctrine of *res ipsa loquitur* (*see* PJI 2:65). We reject that contention. The doctrine of *res ipsa loquitur* applies "to occurrences '[w]here the actual or specific cause of an accident is unknown' " (*James v Wormuth*, 21 NY3d 540, 546 [2013], quoting *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]) and permits "a jury . . . in certain circumstances [to] infer negligence merely from the happening of an event and the defendant's relation to it" (*Kambat*, 89 NY2d at 494). "To rely on that doctrine, a plaintiff must show that (1) the injury does not ordinarily occur in the absence of negligence, (2) the instrumentality that caused the injury is within the defendants' exclusive control, and (3) the injury is not the result of any voluntary action by the plaintiff" (*Antoniano v Long Is. Jewish Med. Ctr.*, 58 AD3d 652, 654 [2d Dept 2009]; *see James*, 21 NY3d at 546; *Kambat*, 89 NY2d at 494).

Here, the conflicting medical testimony presented at trial "did not give rise to an inference of negligence based upon the mere occurrence of the adverse event at issue" (*Knapp v Soffer*, 196 AD3d 551, 552 [2d Dept 2021]), and therefore "the facts adduced at trial were insufficient to warrant a jury charge on the doctrine of *res ipsa loquitur*" (*Sangiovanni v Koloski*, 31 AD3d 422, 422-423 [2d Dept 2006]; *see Seung Ja Cho v In-Chul Song*, 286 AD2d 248, 249 [1st Dept 2001], *lv denied* 97 NY2d 610 [2002]).

Finally, plaintiff contends that the court should have granted her postverdict motion insofar as it sought a new trial based on newly discovered evidence (*see* CPLR 4404 [1]; 5015 [a] [2], [3]). Specifically, plaintiff contends that new evidence that had come to light would probably have resulted in a different verdict if it had been introduced at trial (*see* CPLR 5015 [a] [2]) and that such evidence establishes that defendants engaged in "fraud, misrepresentation or other misconduct," warranting a new trial (CPLR 5015 [a] [3]). According to plaintiff, the new evidence shows that defendants' expert committed perjury when she testified that she had "[n]ever" been sued and denied that she knew defendant, stating only that she "knew of" defendant. In her postverdict motion, plaintiff submitted evidence that defendants' expert had been sued the year before trial and evidence that defendant and the expert were in residency at the same time and location. In addition, in her reply papers on that motion, plaintiff submitted evidence that defendant and

the expert served on the same board for a charity.

With certain exceptions not applicable to this case, we do not consider evidence submitted for the first time in reply papers (see *Oakshire Props., LLC v Argus Capital Funding, LLC*, 229 AD3d 1199, 1202 [4th Dept 2024]; *Conarton v Holy Smoke BBQ & Catering, LLC*, 186 AD3d 1111, 1111 [4th Dept 2020]). " 'The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion' " (*Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 [1st Dept 2006]).

In any event, even assuming, arguendo, that the court properly considered evidence submitted by plaintiff for the first time in her reply papers, we conclude that none of the evidence submitted by plaintiff on her motion warrants a new trial. Although the information submitted by plaintiff is relevant to the credibility and bias of defendants' expert, it is not "newly discovered evidence" for purposes of CPLR 5015 (a) (2) inasmuch as it could have been discovered prior to trial. With respect to CPLR 5015 (a) (3), a new trial may be warranted by "fraud, misrepresentation, or other misconduct of an adverse party" (emphasis added). Of course, defendants' expert is not a party to this case, and there is no evidence of any fraud, misrepresentation or misconduct by defendants. Moreover, we conclude that any misconduct by defendants' expert witness did not "so infect[] the verdict as to require that [it] be set aside in the interest of justice" (*Trapp v American Trading & Prod. Corp.*, 66 AD2d 515, 519 [1st Dept 1979]; cf. *D'Amato v WDF Dev., LLC*, 183 AD3d 695, 697 [2d Dept 2020]).

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

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CA 23-01449

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

CATHLEEN SEEBALD, AS EXECUTOR OF THE ESTATE
OF GEORGE FLATTERY, III, DECEASED,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SHANE SPOONLEY, DEFENDANT,
GUY R. SPOONLEY AND CAROLE J. SPOONLEY,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (ALYSON R. TUFILLARO OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered April 28, 2023 in a breach of contract action. The amended order, inter alia, granted the motion of defendants Guy R. Spoonley and Carole J. Spoonley to vacate a default judgment.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law without costs on the condition that the third and fourth ordering paragraphs of the amended order shall remain in effect until further order of Supreme Court, Erie County, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking to recover the unpaid balance on a series of loans allegedly made to defendants, Shane Spoonley (Shane) and his parents, Guy and Carole Spoonley (parent defendants), totaling \$219,276. After defendants failed to answer or otherwise appear in the action, a default judgment was entered against them in November 2021. In June 2022, the parent defendants moved, inter alia, to vacate the default judgment against them pursuant to CPLR 5015 (a) (1) and (4). Supreme Court issued an order in which it, inter alia, granted the motion insofar as it directed that a traverse hearing be held to determine whether service pursuant to CPLR 308 (2) was proper. Following the traverse hearing, the court issued an amended order in which it, inter alia, granted the motion insofar as it sought to vacate the default judgment pursuant to CPLR 5015 (a) (4). Plaintiff now appeals from the amended order.

We agree with plaintiff that the court erred in granting vacatur

to the parent defendants under CPLR 5015 (a) (4) based on its determination that it lacked personal jurisdiction over the parent defendants due to ineffective service of process (see CPLR 308 [2]; see generally *Hallston Manor Farm, LLC v Andrew*, 60 AD3d 1330, 1331 [4th Dept 2009]; Hon. Mark C. Dillon, *Prac Commentaries, McKinney's Cons Laws of NY, CPLR C5015:9*). We note that on appeal there is no dispute that Shane was the person served by plaintiff and that he was then residing at, and received process at, the dwelling place he shared with the parent defendants. There also is no dispute that plaintiff complied with the mailing requirements of CPLR 308 (2). Rather, we conclude that the court erred in granting the motion on the basis that Shane was not a person of suitable age and discretion due to a purported conflict of interest with the parent defendants (see generally CPLR 308 [2]; *City of New York v Chemical Bank*, 122 Misc 2d 104, 108, 110-111 [Sup Ct, NY County 1983]).

Under CPLR 308 (2), service may be made upon a person of "suitable age and discretion." In that respect, "[t]he person to whom delivery is made must objectively be of sufficient maturity, understanding and responsibility under the circumstances so as to be reasonably likely to convey the summons to the defendant" (*Citimortgage, Inc. v Leitman*, 232 AD3d 847, 848 [2d Dept 2024] [internal quotation marks omitted]; see *Chemical Bank*, 122 Misc 2d at 108). Indeed, "[t]he criterion should be whether the person can be expected to advise the defendant of the service" (David D. Siegel & Patrick M. Connors, *New York Practice* § 72 [6th ed, Dec. 2024 update]). "A person would not be considered a person of suitable age and discretion where their interests in the proceeding were sufficiently adverse to the party for whom they were accepting service" (*Home Props., L.P., Westwood Vil. Apts. v Kalter*, 24 Misc 3d 391, 393 [Nassau Dist Ct, 1st Dist 2009]; *Bakht v Akhtar*, 18 Misc 3d 78, 79-80 [App Term, 2d Dept 2d & 11th Jud Dists 2007]). Furthermore, "[g]ood faith is implicit in the spirit of the statutory scheme. If a plaintiff knows, or should know, that service according to [CPLR 308 (2)] will not afford notice, then, by definition, it is not reasonably calculated to afford notice, and is constitutionally infirm" (*Chemical Bank*, 122 Misc 2d at 107 [emphasis added]).

Here, there is no evidence in the record to support a determination that plaintiff was aware, or should have been aware, of any alleged conflict between Shane and the parent defendants. We cannot conclude that Shane had a conflict of interest with the parent defendants and, therefore, was not a person of suitable age and discretion, merely because he is a codefendant (see e.g. *Xiao Hong Wang v Che Kei Li*, 169 AD3d 593, 594 [1st Dept 2019]; *Houss v Dachowitz*, 255 AD2d 491, 492 [2d Dept 1998]). Moreover, on the record before us, we note that this is not a case where plaintiff can be charged with any knowledge that service upon Shane with respect to his parents might be deficient (cf. *Home Props., L.P., Westwood Vil. Apts.*, 24 Misc 3d at 393-394; *Bakht*, 18 Misc 3d at 79-80; *Chemical Bank*, 122 Misc 2d at 111). Thus, based on the evidence adduced at the traverse hearing, we conclude that plaintiff established that Shane was a person of suitable age and discretion for purposes of serving his parents (see generally *Green 333 Corp. v RNL Life Science, Inc.*,

191 AD3d 506, 506 [1st Dept 2021]; *Hallston Manor Farm, LLC*, 60 AD3d at 1331).

Inasmuch as the parent defendants' remaining ground for seeking to vacate the default judgment against them, i.e., excusable default pursuant to CPLR 5015 (a) (1), is no longer moot and was not addressed by the court, we remit the matter to Supreme Court to determine that issue, following a hearing if necessary, on the condition that the third and fourth ordering paragraphs of the amended order shall remain in effect until further order of that court.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-01997

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

IN THE MATTER OF DAVID P. FENTON,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

COLLEEN S. SMITH, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Seneca County (Barry L. Porsch, J.), entered November 17, 2023, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner visitation with the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Seneca County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order entered upon her purported default that, inter alia, granted petitioner father's petition effectively seeking to modify a prior order of custody and visitation by granting him scheduled visitation with the child.

As an initial matter, we agree with the mother that Family Court erred in its determination that the mother was in default (*see generally Matter of Jayden M. [Carlos M.]*, 237 AD3d 1560, 1561-1562 [4th Dept 2025]). While the mother did not appear at the hearing, she was represented by counsel who appeared and actively participated in the hearing, rather than electing to stand mute (*cf. Matter of Reardon v Krause*, 219 AD3d 1710, 1711-1712 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]).

With respect to the merits, the mother does not dispute that there was a sufficient change in circumstances since the prior order, and thus the issue before us is whether the court properly determined that the best interests of the child would be served by a change in visitation (*see Matter of Manioci v Schreiber*, 210 AD3d 1523, 1523 [4th Dept 2022], *lv denied* 39 NY3d 907 [2023]). Here, the court did not weigh the various best interests factors, and instead simply granted the father's petition on the mother's purported default. Though in certain circumstances we may make our own best interests determination " 'in the interests of judicial economy and the well-being of the child' " (*Matter of Howell v Lovell*, 103 AD3d 1229, 1231

[4th Dept 2013]), the record in this case is insufficient for us to make our own best interests determination (see *Matter of Brockel v Martin*, 153 AD3d 1654, 1655 [4th Dept 2017]; *Matter of Marti v Mills*, 94 AD3d 1364, 1366 [3d Dept 2012]), particularly where, as here, the court failed to appoint an Attorney for the Child at the contested hearing.

In light of our determination, we remit the matter to Family Court for a "hearing and determination [whether scheduled visitation is in] the best interests of the child before a different judge" (*Matter of McClinton v Kirkman*, 132 AD3d 1245, 1246 [4th Dept 2015]).

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

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CA 23-02122

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

IN THE MATTER OF PAULINE JOHNSON,
JOANNE BOCACH AND MARY WANZER,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF VILLAGE OF BROCKPORT,
ET AL., RESPONDENTS,
AND EARTHORN MATERIALS, LLC, RESPONDENT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONERS-APPELLANTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered December 1, 2023, in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondent Earthborn Materials, LLC, to dismiss the petition and dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, the petition is granted in part, the determination of respondent Zoning Board of Appeals of Village of Brockport granting the area variance is annulled, and the matter is remitted to respondent Zoning Board of Appeals of Village of Brockport for a new determination on the application of respondent Earthborn Materials, LLC.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of respondent Zoning Board of Appeals of Village of Brockport (ZBA) granting an area variance to respondent Earthborn Materials, LLC (Earthborn) for certain operations of its landscape and construction material processing business. Petitioners appeal from a judgment granting Earthborn's pre-answer motion to dismiss the petition.

Earthborn's leased worksite is located near the southeastern edge of the Village of Brockport (Village) on property zoned as a Limited Industrial Use District (LI District) under the Code of the Village of Brockport (Code) (see Code § 58-12). The Code states that the purpose of the LI District "is to establish a district for research- and development-oriented uses, office buildings and other compatible light industrial, manufacturing and assembly uses which are in architectural harmony with one another in a campus-style setting which is attractively landscaped and fitting to a [v]illage environment"

(§ 58-12 [A]). The Code provides for numerous permitted uses within the LI District (see § 58-12 [B], [C]) as well as several prohibited uses and activities (see § 58-12 [D]). Additionally, the Code imposes other requirements within the LI District, including that "[a]ll uses, including equipment for the handling of processes, shall be conducted in a completely enclosed building" (§ 58-12 [E] [2]) and that "[n]o materials, supplies or equipment shall be permitted to be permanently stored outside any building" (§ 58-12 [E] [3]). Earthborn's application sought an "[a]rea [v]ariance" from the requirements of Code § 58-12 (E) (2) and (E) (3), thereby permitting it to process materials outside of an enclosed building and to maintain a number of piles of material on the worksite. After considering the matter at a meeting and evaluating the statutory criteria applicable to an area variance, the ZBA granted Earthborn's application for an area variance and imposed certain conditions.

Earthborn made a pre-answer motion to dismiss the petition on the ground that the proceeding was untimely because petitioners did not initiate the proceeding within the requisite 30 days of the filing of the ZBA's decision with the village clerk (see Village Law § 7-712-c [1]). Petitioners opposed the motion, contending that the proceeding was not time-barred because the ZBA's failure to first refer the area variance application to the requisite county planning agency pursuant to General Municipal Law § 239-m rendered the ZBA's determination jurisdictionally defective, which meant both that the statute of limitations never began to run and that the determination to grant the area variance was null and void. Earthborn replied that petitioners' contention lacked merit because, pursuant to section 239-m (3) (c), the Village and the county planning agency had entered into an agreement providing that certain proposed actions were not subject to the referral requirement, and the agreement rendered referral of the underlying area variance application unnecessary. Supreme Court granted the motion and dismissed the petition.

Petitioners contend that the court erred in granting the motion because the ZBA violated General Municipal Law § 239-m by granting Earthborn's application for an area variance without referring the matter to the appropriate county planning agency, which constitutes a jurisdictional defect that prevents the statute of limitations from running and renders the area variance null and void. We agree.

Any person aggrieved by a decision of a village zoning board of appeals may challenge that decision in a proceeding pursuant to CPLR article 78, but the proceeding must be "instituted within [30] days after the filing of a decision of the board in the office of the village clerk" (Village Law § 7-712-c [1]). "[W]here, [however], there is a jurisdictional defect, 'the statute of limitations does not begin to run upon the filing of [the] jurisdictionally defective document' " (*Matter of Fichera v New York State Dept. of Env'tl. Conservation*, 159 AD3d 1493, 1496 [4th Dept 2018]; see *Matter of Sullivan v Dunn*, 298 AD2d 974, 976 [4th Dept 2002]). As applicable here, General Municipal Law § 239-m requires that a village zoning body, before taking final action on specified proposed actions, refer such proposed actions to a county planning agency for its

recommendation (see § 239-m [2]-[4]; see e.g. *Fichera*, 159 AD3d at 1495; *Matter of Ferrari v Town of Penfield Planning Bd.*, 181 AD2d 149, 152 [4th Dept 1992]). Use and area variances, if they apply to real property set forth in the statute, are proposed actions for which referral is required (see § 239-m [3] [a] [v]; [4]; *Fichera*, 159 AD3d at 1495). Nevertheless, a county planning agency may enter into an agreement with a village "to provide that certain proposed actions . . . are of local, rather than inter-community or county-wide concern, and are not subject to referral" under the statute (§ 239-m [3] [c]; see generally Senate-Assembly Mem in Support, Bill Jacket, L 1993, ch 544 at 5-6). When the referral requirement applies, however, "[f]ailure to comply with the provision is a jurisdictional defect that renders the [village zoning body's] action invalid" (*Matter of Coalition for Cobbs Hill v City of Rochester*, 194 AD3d 1428, 1436 [4th Dept 2021]; see *Fichera*, 159 AD3d at 1495-1496; see also *Ferrari*, 181 AD2d at 152).

Here, there is no dispute that the ZBA did not refer Earthborn's application for an area variance to the county planning agency before taking final action on the application. Earthborn and the ZBA nonetheless argued, and the court agreed, that the requested area variance was not subject to referral under General Municipal Law § 239-m based on the exemptions contained in the agreement between the Village and the county planning agency (see § 239-m [3] [c]). We agree with petitioners that the court erred in that regard.

The agreement provides, in relevant part, that the Village and the county planning agency had agreed that the matters listed in an attached schedule were of local rather than inter-community or county-wide concern, and those matters were thus exempted from the county planning agency review process. The agreement further provides that "[a]ll other applicable requirements of [s]ection[] 239-m . . . of the General Municipal Law . . . remain in effect." Although the schedule lists numerous specifically defined matters that are subject to exemption from review, including several that relate to area variances, we conclude that, contrary to the arguments of Earthborn and the ZBA below and the ruling of the court, the agreement does not exempt all area variances, and none of the agreed-upon exemptions apply to the area variance sought by Earthborn here (*cf. Matter of Rizzo v Verizon CCC LLC*, 31 Misc 3d 1206[A], 2011 NY Slip Op 50505[U], *23 [Sup Ct, Niagara County 2011]). Earthborn applied for an ostensible area variance from the requirements applicable to the LI District that "[a]ll uses, including equipment for the handling of processes, shall be conducted in a completely enclosed building" (Code § 58-12 [E] [2]) and that "[n]o materials, supplies or equipment shall be permitted to be permanently stored outside any building" (§ 58-12 [E] [3]). The area variance exemptions in the agreement, however, relate to setback requirements, "[l]ot area, lot coverage and/or lot dimensions," floor area for principal and accessory structures, the height and elevation of structures, "[b]uffer and/or landscaping requirements," parking lot size, the location and size of signs, and the height and location of fences. None of those area-related exemptions apply to the processing of materials outside of an

enclosed building or to the permanent storage of industrial material and equipment outside of a building. Thus, the agreement does not exempt Earthborn's application for an area variance from the referral requirement (*cf.* General Municipal Law § 239-m [3] [c]).

We agree with petitioners that the court also erred to the extent that it rested its judgment on the determination that Earthborn requested "a use variance" and that the application for a use variance is exempt from the referral requirement under the agreement. Notwithstanding the content of the application itself, Earthborn's unwavering insistence that it sought an area variance, and the ZBA's evaluation and approval of the application under the area variance standard, the court improperly characterized the ZBA as having granted Earthborn's request for "a use variance" and then determined that the application for a use variance fell within the agreement's exemption for variances from the "[t]ype of use, as long as the use does not have direct access to a County or State road." The case upon which the court relied in recharacterizing Earthborn's application stands for the uncontroversial proposition that a court " 'must first ascertain what administrative decision [a] petitioner is actually seeking to review' " to determine the applicable limitations period (*Matter of Crowell v Zoning Bd. of Appeals of the Town of Queensbury*, 151 AD3d 1247, 1249 [3d Dept 2017]), not for the dubious proposition that a court is entitled to recast the nature of the administrative decision that was actually made. Earthborn applied for an area variance and that relief is what the ZBA considered and granted. The ZBA would have had to apply different statutory criteria if it had considered whether to grant a use variance (*compare* Village Law § 7-712-b [2], *with* § 7-712-b [3]). The court therefore erred in concluding that Earthborn's application for an area variance was not subject to the referral requirement on the ground that the application fit precisely within the agreed-upon exemption for certain use variances.

Inasmuch as the agreement does not exempt Earthborn's application for an area variance from the referral requirement (*cf.* General Municipal Law § 239-m [3] [c]) and the ZBA did not refer the application to the county planning agency, the ZBA's approval of the application is jurisdictionally defective (*see Fichera*, 159 AD3d at 1495-1496). Consequently, the statute of limitations did not begin to run upon the filing of the jurisdictionally defective document with the village clerk, and the court thus erred in granting the motion to dismiss the petition as untimely (*see id.* at 1496). Moreover, the ZBA's failure to refer Earthborn's application for an area variance to the county planning agency under these circumstances renders its approval of the application " 'null and void' " (*id.* at 1495). Inasmuch as the ZBA's approval of the area variance is null and void, the further appropriate remedy is to remit the matter to the ZBA for a new determination on Earthborn's application (*see id.* at 1496). Based on the foregoing, we reverse the judgment, deny the motion, reinstate the petition, grant the petition in part, annul the ZBA's

determination granting the area variance, and remit the matter to the ZBA for a new determination on the application.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

413

CA 24-00762

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

GRADY E. LOFTON, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JEANETTE COLON, DEFENDANT-RESPONDENT.

CANTOR, WOLFF, NICASTRO & HALL, LLC, BUFFALO (DAVID J. WOLFF, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (JUSTIN P. HARMON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 29, 2024 in a personal injury action arising from a motor vehicle accident. The order granted defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: In this personal injury action arising from a rear-end motor vehicle accident in July 2018, plaintiff appeals from an order that granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a qualifying serious injury under Insurance Law § 5102 (d).

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that the plaintiff did not sustain a serious injury caused by the accident" (*Banas v Waikiki*, 216 AD3d 1413, 1414 [4th Dept 2023] [internal quotation marks omitted]). When reviewing such a motion, we must "view[] the evidence in the light most favorable to plaintiff[]" as the non-moving party (*Mariacher v LPCiminelli, Inc.*, 225 AD3d 1288, 1292 [4th Dept 2024]) and "giv[e] [plaintiff] the benefit of every reasonable inference" (*Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]).

Contrary to plaintiff's contention, Supreme Court properly

granted the motion with respect to the 90/180-day category of serious injury (see *Licari v Elliott*, 57 NY2d 230, 238 [1982]; *Burns v McCabe*, 17 AD3d 1111, 1111 [4th Dept 2005]). Defendant submitted "competent evidence establishing that plaintiff's activities were not curtailed to a great extent and that [he] therefore did not sustain a serious injury under the 90/180[-day] category of serious injury," and plaintiff failed to raise a triable issue of fact with respect to that category (*Wilson v Colosimo*, 101 AD3d 1765, 1767 [4th Dept 2012] [internal quotation marks omitted]).

However, we agree with plaintiff that the court erred in granting the motion with respect to the significant limitation of use and permanent consequential limitation of use categories. In support of her motion, defendant submitted, inter alia, medical records of plaintiff and the affirmed report of a physician who conducted an examination of plaintiff on defendant's behalf. Defendant's physician opined that the 2018 accident "caused a minor exacerbation of a pre-existing problem," but nevertheless concluded that plaintiff "is back to his pre-2018 motor vehicle baseline, and has no disability related to the July 2018 accident," and that plaintiff's "limitations predated the 2018 motor vehicle accident and are related to his preexisting degenerative condition." However, defendant's physician did not review any of plaintiff's pre-accident medical records or diagnostic imaging, and failed to address the fact that, when plaintiff was discharged in January 2019 from a physical therapy program, he was noted to have reduced range of motion in his lumbar spine, particularly where defendant's physician produced deficits during his own examination.

We conclude that the opinion of defendant's physician is speculative, conclusory, and unsubstantiated and therefore insufficient to meet defendant's initial burden on her motion with respect to the permanent consequential limitation of use and significant limitation of use categories (see *Zona v JELD-WEN, Inc.*, 34 AD3d 1189, 1189 [4th Dept 2006], *affd* 8 NY3d 911 [2007]; *Ashquabe v McConnell*, 46 AD3d 1419, 1419 [4th Dept 2007]; see generally *Martindale v Town of Brownville*, 55 AD3d 1387, 1387 [4th Dept 2008], *lv denied* 11 NY3d 715 [2009]). Defendant's motion must therefore be denied with respect to those categories, without regard to the sufficiency of plaintiff's opposing papers (see *Rivera v Rochester Gen. Health Sys.*, 173 AD3d 1758, 1760 [4th Dept 2019]).

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

414

CA 24-00264

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

KEVIN KLEIN AND LISA KLEIN, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

CHRISTINA R. SHAWE, DEFENDANT-RESPONDENT.

THE KNOER GROUP, PLLC, BUFFALO (COLIN M. KNOER OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

CHRISTINA R. SHAWE, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered January 19, 2024 in an action pursuant to RPAPL article 15. The order, inter alia, denied the motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law, the motion is granted in part, the second and third ordering paragraphs are vacated, defendant's first through fourth counterclaims are dismissed, judgment is granted in favor of plaintiffs as follows:

It is ADJUDGED and DECLARED that plaintiffs are the
owners in fee simple of the property at issue

and, as modified, the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action pursuant to RPAPL article 15 seeking a determination that they are the lawful owners of specified real property based on, inter alia, their adverse possession of that property. Plaintiffs moved for summary judgment on the complaint and dismissing defendant's counterclaims for quiet title, trespass, ejectment, and permanent injunction. Plaintiffs appeal from an order that, inter alia, denied their motion.

As an initial matter, we note that the pre-2008 version of the RPAPL applies here because plaintiffs' property title claims, as alleged in the complaint and the supporting documentation submitted by plaintiffs, would have vested 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]).

We agree with plaintiffs that Supreme Court erred in denying

those parts of their motion with respect to the second cause of action, for adverse possession under a written instrument, and the third cause of action, for adverse possession not under a written instrument, and we therefore modify the order accordingly. "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" (*Rote*, 195 AD3d at 1523 [internal quotation marks omitted]; see *Olivieri v Colosi*, 129 AD3d 1540, 1541 [4th Dept 2015]; *Reardon v Broadwell*, 121 AD3d 1546, 1546 [4th Dept 2014]). "Because the acquisition of title by adverse possession is not favored under the law, these elements must be proven by clear and convincing evidence" (*Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012] [internal quotation marks omitted]). In addition, where, as in the third cause of action here, the claim of right is not founded upon a written instrument, the party asserting title by adverse possession must establish "that the land was 'usually cultivated or improved' or 'protected by a substantial enclosure' " (*id.*). "The type of cultivation or improvement sufficient under the statute will vary with the character, condition, location and potential uses for the property . . . and need only be consistent with the nature of the property so as to indicate exclusive ownership" (*City of Tonawanda v Ellicott Cr. Homeowners Assn.*, 86 AD2d 118, 122-123 [4th Dept 1982], appeal dismissed 58 NY2d 824 [1983]; see *Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159-160 [1996]).

Here, the evidence submitted by plaintiffs in support of their motion—namely, the affidavit of Kevin Klein (plaintiff), with attached exhibits—establishes their claims for adverse possession as a matter of law. Plaintiff's affidavit asserts that his family has continuously and exclusively used the disputed area since at least 1958 and that they have cultivated the disputed area since that time. Plaintiff further asserted that nobody other than his family and their guests were permitted to occupy or use the disputed area and that nobody other than his family or their contractors performed any maintenance or constructed any improvements on any portion of the disputed property. Accepted as true, those assertions establish that plaintiffs' possession of the disputed area was hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for the statutory period (see *Reardon*, 121 AD3d at 1547; see generally *Becker*, 19 NY3d at 81). The assertions, if true, also establish that plaintiffs made improvements to the disputed area that were consistent with the nature of their property (see *Montanaro v Rudchychk*, 189 AD3d 1214, 1216 [2d Dept 2020]; cf. *Ellicott Cr. Homeowners Assn.*, 86 AD2d at 122-123).

The burden of proof thus shifted to defendant to raise a triable issue of fact, and, even assuming, arguendo, that the court properly considered defendant's unsigned affirmation, we conclude that defendant failed to meet that burden (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). All of defendant's assertions pertained to a time period well after title to the disputed property vested in the adverse possessor and are therefore not relevant (see

West v Hogan, 88 AD3d 1247, 1249 [4th Dept 2011], *affd* 19 NY3d 1073 [2012]). Evidence that plaintiffs offered to purchase the disputed property from defendant's predecessor did not raise an issue of fact with respect to whether plaintiffs' possession was hostile and under a claim of right inasmuch as an offer to purchase the disputed property will not negate the element of hostility or otherwise defeat a valid claim of adverse possession where, as here, that offer occurred after title to the disputed property vested in the adverse possessor (see *Olivieri*, 129 AD3d at 1541; *2 N. St. Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 1395 [3d Dept 2009], *lv denied* 14 NY3d 706 [2010]). Similarly, defendant's assertion that plaintiff had known of the boundary line dispute since he was a child provided no time frame for when plaintiff's family was made aware of the boundary dispute, and the assertion was thus conclusory and insufficient to raise a question of fact (see *2 N. St. Corp.*, 68 AD3d at 1395; see generally *Petry v Gillon*, 199 AD3d 1277, 1279 [3d Dept 2021]).

Inasmuch as plaintiffs established their entitlement to summary judgment with respect to their second cause of action, for adverse possession under a written instrument, and their third cause of action, for adverse possession not under a written instrument, we conclude that the court erred in denying that part of their motion with respect to defendant's counterclaims for quiet title, trespass (see generally *Kramer v Kleiber*, 225 AD3d 1128, 1129 [4th Dept 2024]), ejectment (see generally *Reiter v Landon Homes, Inc.*, 31 AD2d 538, 539 [2d Dept 1968], *lv denied* 24 NY2d 738 [1969]), and permanent injunction (see generally *Rock Star Enters., LLC v Village of Sylvan Beach*, 237 AD3d 1601, 1604 [4th Dept 2025]). We therefore further modify the order by granting that part of the motion with respect to defendant's counterclaims and dismissing those counterclaims and by vacating the second and third ordering paragraphs (see generally *id.*).

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

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KA 24-01168

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

KYLE D. ERNST, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), dated June 25, 2024. The order, inter alia, granted the motion of defendant insofar as it sought to dismiss an indictment.

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

Memorandum: In this prosecution arising from defendant's alleged assault of the mother of his infant son, Supreme Court, by an oral decision and a subsequent written order, granted defendant's motion seeking, inter alia, dismissal of the indictment on the ground that the People failed to provide all discovery required by CPL 245.20, which rendered any certificate of compliance improper, and thereby rendered any statement of trial readiness pursuant to CPL 30.30 illusory and resulted in a violation of defendant's statutory right to a speedy trial. The People appeal from the order, and we affirm.

As a preliminary matter, we conclude, contrary to defendant's assertion, that the People's appeal is timely inasmuch as their notice of appeal was filed within 30 days after service of the written order from which they appeal (see CPL 460.10 [1] [a]). Defendant's reliance upon *People v Coaye* (68 NY2d 857 [1986]) is misplaced, because "that case stands for the proposition that where a motion pursuant to CPL 330.30 is granted and sentence is then imposed on the same date, the order and sentence are subsumed in the judgment of conviction and both the People and the defendant have 30 days after the imposition of sentence within which to file their respective notices of appeal" (*People v Baker*, 131 AD2d 491, 491-492 [2d Dept 1987], lv denied 70 NY2d 709 [1987]). No judgment of conviction was entered in this case and, thus, *Coaye* is inapplicable and "the time within which to appeal from the order is governed by the applicable language of CPL 460.10 (1) (a)" (*id.* at 492).

On the merits, the People contend that the court erred in

determining that they violated their initial discovery obligations by failing to disclose the police report and body-worn camera footage relating to a welfare check of two of defendant's children conducted by police officers two days after the alleged assault, inasmuch as they acted in good faith and with due diligence in an attempt to recover the report and footage. We reject that contention.

Where, as here, "a defendant bring[s] a CPL 30.30 motion to dismiss on the ground that the People failed to exercise due diligence and therefore improperly filed a [certificate of compliance (COC)], the People bear the burden of establishing that they did, in fact, exercise due diligence and ma[k]e reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure" (*People v Bay*, 41 NY3d 200, 213 [2023]; see *People v Mitchell*, 228 AD3d 1250, 1255-1256 [4th Dept 2024]). "If the prosecution fails to make such a showing, the COC should be deemed improper, the readiness statement stricken as illusory, and—so long as the time chargeable to the People exceeds the applicable CPL 30.30 period—the case dismissed" (*Bay*, 41 NY3d at 213; see *People v Baker*, 229 AD3d 1324, 1327 [4th Dept 2024]).

"Despite not being defined by the statute, due diligence is a familiar and flexible standard that requires the People to make reasonable efforts to comply with statutory directives . . . That analysis is fundamentally case-specific . . . and will turn on the circumstances presented" (*People v Lawrence*, 231 AD3d 1497, 1499 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025] [internal quotation marks omitted]), including, " 'among other things, the efforts made by the prosecution and the prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery' " (*Mitchell*, 228 AD3d at 1255, quoting *Bay*, 41 NY3d at 212). Here, despite being aware of the welfare check, which directly related to an issue upon which they presented testimony at the grand jury proceeding, the People failed to undertake the requisite efforts to ascertain the existence of, and obtain, the police report and body-worn camera footage, sending only a single letter to the police department that had conducted the welfare check and failing to follow up. We conclude under the circumstances presented here that the People failed to meet their burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the initial COC (see *Mitchell*, 228 AD3d at 1256; cf. *Lawrence*, 231 AD3d at 1499-1500; *People v Cooperman*, 225 AD3d 1216, 1220 [4th Dept 2024]; see generally *Bay*, 41 NY3d at 215) and, thus, the court properly determined that the initial COC was improper and struck the statement of readiness as illusory (see *Bay*, 41 NY3d at 213, 216; *Mitchell*, 228 AD3d at 1257).

We further conclude that upon striking the statement of readiness the court properly granted defendant's motion to dismiss the indictment on statutory speedy trial grounds (see CPL 30.30). Where, as here, a defendant is charged with a felony, the People must

announce readiness for trial within six months of the commencement of the action (see CPL 30.30 [1] [a]; *People v Gaskin*, 214 AD3d 1353, 1353 [4th Dept 2023]). "The statutory period is calculated by computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for exclusion" (*People v Barnett*, 158 AD3d 1279, 1280 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018] [internal quotation marks omitted]). "Once a defendant has shown the existence of a delay greater than six months, the People bear the burden of proving that certain periods within that time should be excluded" (*People v Shammah*, 229 AD3d 1250, 1250 [4th Dept 2024]). Although CPL 245.50 (4) (b) requires that, "[t]o the extent that the party is aware of a potential defect or deficiency related to a certificate of compliance or supplemental certificate of compliance, the party entitled to disclosure shall notify or alert the opposing party as soon as practicable" (see *Bay*, 41 NY3d at 210), we conclude that, contrary to the People's contention, defendant promptly notified them about the insufficiency of their COC when he raised the issue in his omnibus motion. Moreover, while CPL 30.30 (4) (a) provides that "a reasonable period of delay resulting from," inter alia, "pre-trial motions" and "the period during which such matters are under consideration by the court" must be excluded when computing the People's time (see *People v Sheard*, 236 AD3d 826, 827 [2d Dept 2025]), we conclude that the People have failed to meet their burden of establishing that any issues remained "under consideration by the court" with respect to defendant's omnibus motion following the August 17, 2023 order of Supreme Court (Haendiges, J.). Specifically, in response to the court's inquiry at the conclusion of the *Huntley* hearing as to what issues from defendant's omnibus motion remained under its consideration, defense counsel advised, without objection from the prosecutor, that "[t]he only thing [remaining that] we would need the [c]ourt to take a look at [is] any [g]rand [j]ury minutes." The court then resolved the issue of the grand jury minutes in its August 17, 2023 order and, thereafter, did not at any time consider additional issues from the omnibus motion, nor did either party ask the court, at any time after August 17, 2023, to consider any additional issues from the omnibus motion. Thus, inasmuch as the total time chargeable to the People exceeds the six-month period allowed pursuant to CPL 30.30, defendant was denied his right to a speedy trial and Supreme Court (Martoché, J.) properly granted that part of defendant's CPL 30.30 motion seeking to dismiss the indictment (see generally CPL 30.30 [1] [a]).

In light of our determination, the People's remaining contention is academic.

All concur except CURRAN and SMITH, JJ., who dissent in part and vote to reverse in accordance with the following memorandum: We respectfully dissent in part and vote to reverse, deny the motion insofar as it sought dismissal of the indictment, and reinstate the indictment. Although we agree with the majority's conclusion that the

certificate of compliance in this case was invalid (see *People v Mitchell*, 228 AD3d 1250, 1257 [4th Dept 2024]), we cannot agree with the majority's further conclusion that the People could be charged with more than six months of speedy trial time while defendant's omnibus motion remained pending. In our view, it cannot be disputed that the omnibus motion remained pending before Supreme Court, i.e., "under consideration" (CPL 30.30 [4] [a]), at least in part, during the relevant time frame inasmuch as the portion of the motion seeking to compel production of certain materials pertaining to a welfare check conducted by the West Seneca Police Department on November 6, 2022 (welfare check materials) was neither decided by the court nor withdrawn by defendant before defendant moved to dismiss the indictment. Because we conclude that defendant's omnibus motion remained pending before the court until defendant moved to dismiss the indictment on speedy trial grounds, we further conclude that all of the time that elapsed during that period was excludable, and that the People could not be charged with more than six months of statutory speedy trial time as a result (see *People v Jordan*, 220 AD3d 1187, 1188 [4th Dept 2023]; *People v Edmead*, 197 AD3d 937, 939 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1160 [2022]; see generally CPL 30.30 [4] [a]).

Here, the criminal action was commenced on January 10, 2023, when the indictment was filed (see CPL 1.20 [17]; see generally *People v Osgood*, 52 NY2d 37, 43 [1980]; *People v Sweet*, 98 AD3d 1252, 1253 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). Inasmuch as defendant was charged with a felony, the People were permitted no more than six calendar months of delay or, in this case, 181 days (see CPL 30.30 [1] [a]; *People v Cortes*, 80 NY2d 201, 207 n 3 [1992], *rearg denied* 81 NY2d 1068 [1993]). It is undisputed that defendant met his "initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]; see CPL 30.30 [1] [a]; *People v Anderson*, 188 AD3d 1699, 1699 [4th Dept 2020], *lv denied* 36 NY3d 1055 [2021]), thereby shifting the burden to the People to demonstrate "sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]).

Unlike the majority, we conclude that the People could be charged with, at most, approximately 105 days elapsing between the commencement of the criminal action and defendant's service upon the People of his omnibus motion on April 25, 2023, at which point the speedy trial clock stopped entirely. In the omnibus motion, defendant sought, inter alia, an order compelling the People to turn over the welfare check materials. Although the court resolved other aspects of the omnibus motion, it is beyond doubt that it never ruled on defendant's request with respect to the welfare check materials. Indeed, the record shows that, at a *Huntley* hearing held on August 14, 2023, defense counsel indicated that there were some outstanding issues with respect to the omnibus motion—an obvious reference to defendant's request for the welfare check materials—but anticipated that the parties could work out those issues without court intervention. Although the court offered to help resolve the outstanding issues, defense counsel declined the offer, informed the court that "[h]opefully, we will not need any court intervention," and

stated that the parties "[could] just let [the court] know if [they had] a problem," thereby suggesting that if the parties reached an impasse, defendant could at that later time ask the court to determine that part of the omnibus motion seeking to compel the disclosure of the welfare check materials.

The continued pendency of that portion of defendant's omnibus motion pertaining to the welfare check materials is further evidenced by the record before the Supreme Court Justice who issued the order on appeal. At a hearing on May 8, 2024, the court went through the record of proceedings that had occurred before the matter was transferred. When the court referenced defendant's omnibus motion, it expressly stated that it did not appear that the issue of the welfare check materials had been decided by the Supreme Court Justice previously assigned to the matter. Defense counsel did not object to that statement and, in fact, later agreed with the court that discovery was still a subject to be discussed.

In the face of those undisputed facts, the best the majority can do is conclude that the court did not "consider additional issues from the omnibus motion" after it entered the order entered on August 17, 2023. We disagree with the majority that the August 17, 2023 order disposed of the entirety of defendant's omnibus motion inasmuch as that order has nothing to do with defendant's request for the disclosure of the welfare check materials; indeed, the order is limited by its express terms to defendant's request for disclosure of grand jury instructions and for dismissal of the indictment as based on insufficient grand jury evidence. The order makes no reference to any other portions of the omnibus motion—clearly establishing the limited nature of the determination being made. Thus, as of August 17, 2023, and in light of defense counsel's specific statement at the close of the *Huntley* hearing that court intervention was not yet needed at that time, the dispute over the welfare check materials raised in the omnibus motion remained undecided, unresolved, and pending before the court.

In his brief to this Court, defendant asserts that, on August 14, 2023, "[c]ounsel explicitly informed the [c]ourt that, other than the grand jury sufficiency review, there were no pending motions before the [c]ourt," a position that defense counsel took in light of the People's purported "representation [in opposition to the omnibus motion] that the [welfare check] materials did not exist." In our view, however—and as explicated above—defense counsel made no such statement before the court at that time, and we further note that the People's stated basis for objecting to the production of the welfare check materials was that they were irrelevant. The extent to which the majority relies on defendant's inaccurate portrayal of defense counsel's statements to the motion court only serves to reveal the weakness of defendant's argument that the omnibus motion was no longer "under consideration by the court" (CPL 30.30 [4] [a]) during the relevant time frame.

We also note that there is nothing in the record to indicate that defendant ever formally withdrew that part of the omnibus motion

seeking to compel the production of the welfare check materials. Indeed, it would not have made sense for defendant to withdraw that aspect of the motion because, even if defendant formally withdrew his motion, that action would present its own set of difficulties that would undermine the defense of this case. For one thing, if the parties were unable to reach a compromise on the discovery issue, defendant would not be able to seek further relief from the court had he actually withdrawn his motion (see CPL 255.20 [3]). In other words, it was in defendant's interest to keep the motion pending during the ongoing negotiations because it would allow for the future judicial intervention originally offered by the court during the August 14, 2023 appearance should no agreement be reached. We also disagree with the majority to the extent it concludes that the People had some obligation to prompt the court to act on, or resolve, defendant's pending omnibus motion.

We would also reject the court's conclusion that the omnibus motion ceased being "under consideration" for purposes of the exclusion under CPL 30.30 (a) (4) when the "active parts of the omnibus motion were determined" (emphasis added). In our view, the fact that some parts of the motion were determined logically implies that the other parts of the motion were not determined. Absent withdrawal of those parts of the motion, the motion necessarily remained pending—particularly given defense counsel's indication that he did not yet need court intervention on the subject. In a somewhat similar situation, the First Department reversed the grant of a motion to dismiss the indictment on statutory speedy trial grounds and denied the motion where it found that sufficient time was excludable based on CPL 30.30 (4) (a) as a result of pending motions. In that case, the motion court concluded that the time was not excludable on the ground that "pro forma" portions of a defendant's motion were left undecided and therefore were not still pending. The First Department, however, concluded that "[a] 'pro forma' motion is still a motion within the meaning of the statute" (*People v Douglas*, 209 AD2d 161, 162 [1st Dept 1994], lv denied 85 NY2d 908 [1995]). A similar analysis should pertain here. Even accepting the court's distinction between "active parts" of defendant's omnibus motion and other parts of it, the irrefutable fact remains that the motion was "still a motion within the meaning of the statute" (*id.*), and therefore the time during which it was pending is excludable (see CPL 30.30 [4] [a]).

The majority's conclusion that defendant's omnibus motion was no longer pending because the court did not consider the additional issues raised therein after August 17, 2023, is no different than the conclusion of the trial court in *Douglas* that all that remained were "pro forma" issues. The majority never concludes that the court decided that portion of the omnibus motion seeking to compel production of the welfare check materials or ruled on the People's objection to producing them. The majority also does not conclude that the defendant withdrew that portion of the omnibus motion seeking those materials. In our view, the fact that the court did not consider that additional issue raised in the omnibus motion demonstrates that said aspect of the motion was still pending, even after the August 17, 2023 order was entered.

Consequently, because all of the time that elapsed between the filing of the omnibus motion and defendant's statutory speedy trial motion is excludable due to the pending motion (see CPL 30.30 [4] [a]), we conclude that the court erred in granting the statutory speedy trial motion and in dismissing the indictment inasmuch as the People cannot be charged with more than 181 days of speedy trial time.

In light of that conclusion, we must also consider whether the court abused its discretion in, alternatively, dismissing the indictment as a discovery sanction under CPL 245.80. We conclude that, on the record before us, the court abused its discretion in that regard (see generally *People v Jenkins*, 98 NY2d 280, 284 [2002]; *People v Bookman*, 224 AD3d 1269, 1270 [4th Dept 2024]). Pursuant to CPL 245.80 (2), as a sanction for a discovery violation, a court may "order the dismissal of all or some of the charges *provided that, after considering all other remedies*, dismissal is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure" (emphasis added). Here, we conclude that the court failed to show that it had considered whether any other remedy would suffice as a sanction for the People's discovery violation. Indeed, even assuming that the welfare check materials were found relevant and admissible at trial, there was no consideration by the court whether the prejudice sustained by defendant by virtue of the People's discovery violation could be ameliorated by some measure less than dismissal of the entire indictment such as preclusion or an adverse inference jury instruction (see e.g. CJI2d[NY] Destroyed or Lost Evidence, <https://nycourts.gov/judges/cji/1-General/CJI2d.Adverse-Inference-Destroyed-Evidence.pdf> [last accessed June 30, 2025]; PJI 1:77.2). Thus, we would not affirm that part of the order dismissing the indictment as a discovery sanction.

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

424

KA 23-01418

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HANNAH T., DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Stacey Romeo, A.J.), rendered April 24, 2023. The judgment convicted defendant upon her plea of guilty of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of five years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). The conviction was the result of an agreement between the then 17-year-old defendant and her then 16-year-old codefendant boyfriend to kill defendant's mother. Codefendant fired the fatal shots and then fled with defendant in her mother's car.

We reject defendant's contention that the waiver of the right to appeal is invalid. The oral waiver, together with the written waiver, establishes that defendant knowingly, intelligently, and voluntarily waived the right to appeal (*see People v Malcolm*, 231 AD3d 1503, 1504 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* - US -, 140 S Ct 2634 [2020]). That valid waiver forecloses defendant's challenge to County Court's "discretionary decision to deny youthful offender status" (*People v Stackhouse*, 214 AD3d 1303, 1304 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]; *see People v Burch*, 234 AD3d 1246, 1247 [4th Dept 2025], *lv denied* 43 NY3d 1006 [2025]) and her request that we exercise our interest of justice jurisdiction to adjudicate her a youthful offender (*see People v Hinson*, 229 AD3d 1191, 1191 [4th Dept 2024], *lv denied* 42 NY3d 1080 [2025]; *People v Allen*, 174 AD3d 1456, 1458 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]).

Although our analysis of sentencing challenges typically stops

with the valid appeal waiver, that does not mean that it *must* stop there. In *People v Lopez*, the Court of Appeals stated that “[a] defendant’s valid waiver of the right to appeal includes waiver of the *right to invoke* the Appellate Division’s interest-of-justice jurisdiction to reduce the sentence” (6 NY3d 248, 255 [2006] [emphasis added]; see *Hinson*, 229 AD3d at 1191). The Court further stated that “a defendant is free to relinquish the right to invoke that authority and indeed does so by validly waiving the right to appeal” (*Lopez*, 6 NY3d at 255). However, an agreement between the People and a defendant cannot extinguish our power to independently review a sentence in the interest of justice (see generally *People v Seaberg*, 74 NY2d 1, 9-10 [1989]). That power cannot be curtailed by the Legislature (see *People v Pollenz*, 67 NY2d 264, 268 [1986]; see also *People v Farrell*, 85 NY2d 60, 66 [1995]), and it “involves a type of discretion not reviewable by the Court of Appeals” (*People v Thompson*, 60 NY2d 513, 521 [1983]; see *People v Alvarez*, 33 NY3d 286, 294 [2019]). Indeed, “the Appellate Division may be divested of its unique interest-of-justice jurisdiction only by constitutional amendment” (*Lopez*, 6 NY3d at 255). As such, it cannot be bargained away by agreement between the parties.

The Court of Appeals has cautioned that “in most situations, the appellate courts *should* honor [appeal] waivers” (*People v Callahan*, 80 NY2d 273, 280 [1992] [emphasis added]), given the public policy interest in enforcing waivers of the right to appeal (see *Seaberg*, 74 NY2d at 10; see generally *People v Jenkins*, 138 AD3d 102, 106 [1st Dept 2016], *lv denied* 27 NY3d 1070 [2016]). However, courts are often called upon to conduct a balancing test to determine whether such public policy concerns are outweighed by injustice or prejudice to a defendant (see generally *People v Mahboubian*, 74 NY2d 174, 183-184 [1989]; *People v De Lucia*, 20 NY2d 275, 278-280 [1967]; see also *Maryland v Craig*, 497 US 836, 849 [1990]). In conducting those tests, courts must sometimes override a public policy consideration to avoid some larger injustice, such as “inherent prejudice” to a defendant (*De Lucia*, 20 NY2d at 280).

Thus, we conclude that, “as in most close issues of public policy,” this Court “is called upon to strike a fair balance of competing interests” (*People v Rivera*, 14 NY2d 441, 447 [1964]) when we determine whether to exercise our interest of justice power. Where a sentence is fundamentally unjust and all other safeguards have failed, we are compelled to exercise our constitutionalized interest of justice power to correct the injustice, no matter the validity of the appeal waiver.

Our dissenting colleagues conclude that, because we have not previously engaged in a similar balancing test to modify a sentence, “this Court has failed to recognize that all along it could have reduced sentences as unduly harsh or severe even in the face of a valid appeal waiver.” On the contrary, the fact that we have not previously applied such a test is an indication of the infrequency with which this Court is faced with a case in which the fundamental injustice of the sentence outweighs the strong public policy favoring

enforcement of appeal waivers. Defendant has presented such a case.

Here, prior to sentencing, defendant submitted a mitigation report, co-authored by a doctor of social work. The report discusses key parts of defendant's personal history and analyzes the factors that may have led to the crime. After suffering neglect and sexual abuse while in the custody of her biological family, defendant was transferred into foster care at the age of six. However, the removal did not serve its intended purpose. Instead, from the age of six until the age of eleven, defendant suffered extreme abuse and torture at the hands of her adoptive parents in Arizona. Together with an adoptive sister, defendant was physically and psychologically abused, including being starved to the point of malnourishment, forced to live outside, often while naked, and made to perform extreme physical exercise as punishment for allegedly "stealing" from her adoptive parents. When defendant was removed from her adoptive home, she weighed approximately 60 pounds and was characterized in a media report as resembling a "concentration camp survivor."

The adoptive parents were arrested and charged with child abuse. After pleading guilty, the adoptive father was sentenced to 14 years' incarceration and the adoptive mother was sentenced to 20 years' incarceration. Prior to their sentencing, defendant wrote a victim statement describing her treatment while in their house, that the adoptive parents would place duct tape over her mouth for days at a time, that she was made to run outside for hours, and that they dressed her like a baby, including by wearing diapers whenever she was inside the home.

At the age of 16, after two additional failed foster placements and a stay at a residential facility, defendant was placed with her biological maternal grandmother in Arizona. However, soon after her grandmother received custody of defendant, she left defendant alone with her mother in New York State. In the months leading up to the crime, defendant's mother physically and psychologically abused defendant, including by slapping her during an argument, threatening suicide when defendant said she wanted to return to Arizona, and, a few days before the killing, refusing to take defendant to a hospital while defendant was miscarrying a pregnancy and experiencing the "worst pain of [her] life."

Based on the extreme abuse, particularly the five years with her adoptive parents, defendant was given multiple clinical diagnoses, including reactive attachment disorder (RAD), conduct disorder, disruptive mood dysregulation disorder, and post-traumatic stress disorder. As explained in the mitigation report, RAD is "a rare psychological disorder found only in people who suffered extreme abuse as children." Individuals diagnosed with RAD cannot form attachments with caregivers and are "often frequently susceptible to forming inappropriately close relationships with near strangers," which can make them "highly susceptible to being exploited by others."

The mitigation report further states that defendant's cognitive development was significantly impaired by the abuse that she suffered

between the ages of six and eleven. Because she could not remove herself from the situation in which she was being abused, "her brain began to numb itself[,] removing her ability to feel the acute horror of what was happening." "Adults who suffer [such] repeated traumas [as children] have been shown to have extreme difficulty in decision making, ethical judgements and moral reasoning" because "[t]he chemical and physical makeup of the brain has been altered." Defendant's cognitive abilities were also impacted by the clinical starvation she suffered. Thus, even more so than other minors, defendant was susceptible to outside influence and unlikely to have understood the consequences of her actions (see generally *J.D.B. v North Carolina*, 564 US 261, 272 [2011]; *Graham v Florida*, 560 US 48, 68 [2010]; *Roper v Simmons*, 543 US 551, 569-571 [2005]).

The record includes a statement from defendant's maternal grandmother. As the only relative speaking on behalf of the victim's family, the victim's mother pleaded for leniency, stating that defendant "already did her time and got enough punishment from life." The record also includes a statement from an officer involved in defendant's arrest, who stated that defendant may have been manipulated by her codefendant.

We have before us strong evidence that defendant has undergone extreme and heinous abuse, which would have entitled her to consideration for sentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA). Under that statute, a defendant's sentence may be significantly reduced upon a determination that "(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household . . . ; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, . . . a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh" (Penal Law § 60.12 [1]). Although defense counsel failed to request a hearing on defendant's eligibility for DVSJA sentencing, the record contains more than sufficient evidence in support of each factor. Defendant suffered profound abuse, beginning in her earliest years and continuing through the date of the crime, which occurred a few days after her mother refused to take her to a hospital when she suffered a miscarriage. The mitigation report details how the impact of that abuse contributed to the crime, including defendant's clinical diagnosis of RAD, which made her unable to bond with her caregiver mother and also made her more susceptible to influence from her codefendant boyfriend. Further, the abuse caused defendant to disassociate, reduced her capacity for moral reasoning, and diminished her understanding of the consequences of her actions.

This Court has the inherent power to correct a sentence that "is unjust in its relation to the crime of which the defendant stands convicted" (*People v Miles*, 173 App Div 179, 185 [3d Dept 1916]; see NY Const, art VI, § 4 [k]; *People v Brisman*, 43 NY3d 322, 325 [2025]).

Under the unique circumstances of this case, including the heinous childhood abuse of defendant and the trauma she suffered as a result, the plea for leniency from the victim's mother, and defendant's lack of personal involvement in the violent act, we conclude that a prison sentence of 25 years is unjust and oppressive in relation to this crime and this defendant, and it must be corrected. Thus, not only is defendant's sentence unduly harsh and severe, but this is the rare case in which the fundamental injustice and prejudice to defendant arising from an unduly harsh and severe sentence outweigh the "legitimate interest in finality" promoted by the enforcement of appeal waivers (*Seaberg*, 74 NY2d at 10). However, in light of the relevant factors for youthful offender adjudication (*see People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd sub nom. People v Dawn Maria C.*, 67 NY2d 625 [1986]) and applying the same balancing test, we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see generally People v Saraceni*, 153 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]).

We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to a determinate term of five years, to be followed by the five-year period of postrelease supervision previously imposed by the court.

All concur except CURRAN and SMITH, JJ., who dissent and vote to affirm in the following memorandum: In our view, the majority advances an expansive theory of the Appellate Division's authority that is incompatible with both Court of Appeals case law elucidating the scope of that authority and this Court's long-held understanding of its power. In doing so, the majority takes a different view of binding precedent and then bypasses both the preclusive effect of waiver and the principle of party presentation, thereby failing to adhere to traditionally recognized constraints on appellate review. Furthermore, the doctrinal shift undertaken by the majority is, from our perspective, unnecessary because defendant has an available legal remedy to address any undue severity in her sentence—the issue that the majority decides to decide even though defendant has not asked this Court to do so. We submit that this Court's role is to neutrally apply its power of appellate review—both its discretion and its constraints—in unsympathetic and sympathetic cases alike. Inasmuch as the majority, in our view, deviates from that tenet of appellate decisionmaking, and in doing so commits several analytical missteps, we feel obligated to dissent from the majority's *sua sponte* modification of defendant's sentence.

I

The crime and defendant's upbringing are both undoubtably tragic. After being neglected and abused during early childhood by her biological family, including her biological mother, defendant was removed by child protective services and then adopted by an Arizona couple, who thereafter inflicted years of horrific abuse and torture upon defendant. Following her rescue from her adoptive parents, defendant experienced failed placements as a teenager and was

eventually placed with her biological grandmother in Arizona. During an extended visit to New York during the summer before the crime, the biological mother resumed her physical and psychological abuse of defendant, who was then 17 years old, and when the grandmother brought defendant back to the biological mother's home for the holidays later that year accompanied by defendant's boyfriend, the biological mother refused to take defendant to a hospital while she suffered a miscarriage.

The day after the grandmother left defendant and the boyfriend alone with the biological mother, the grandmother received text messages from the biological mother complaining that defendant was refusing to take birth control, as defendant had agreed to do in return for the boyfriend being permitted to stay at the home, and the biological mother thereafter prevented defendant from using her cell phone and told defendant that the boyfriend would need to leave. After the biological mother gave defendant "a dirty look" in the kitchen, defendant returned upstairs where the boyfriend effectively asked her, "Do you want me to do it[?]," to which defendant responded, in essence, "Yeah, get it over with." While defendant remained upstairs, the boyfriend went downstairs and fatally shot the biological mother twice in the back of the head. Defendant and the boyfriend placed the bedrooms in a state of disarray, but left the basement, which was equipped with security cameras, in an orderly fashion. Defendant and the boyfriend then took the biological mother's vehicle and fled the state, after which they were pulled over for speeding in Missouri and then detained. As a result of a coordinated investigation, the police discovered the biological mother's body at her home in New York.

Defendant and the boyfriend were charged in a joint indictment with, inter alia, murder in the second degree (Penal Law §§ 20.00, 125.25 [1]). Following various pretrial proceedings, the matter ultimately advanced to a plea proceeding during which defense counsel represented that, after thorough discussion with counsel of the People's plea offer, defendant had agreed to accept the offer. Under the terms of the plea agreement, defendant would plead guilty to the lesser charge of manslaughter in the first degree (§ 125.20 [1]) and waive her right to appeal in exchange for a sentence including a determinate term of 25 years of incarceration followed by 5 years of postrelease supervision. Defendant thereafter waived her right to appeal and pleaded guilty consistent with the agreement, and County Court accepted the plea. We note that the boyfriend also pleaded guilty to manslaughter in the first degree in exchange for the same sentence received by defendant. During defendant's subsequent sentencing proceeding, the court denied her request to be adjudicated a youthful offender and imposed the negotiated sentence.

Defendant now appeals, contending only that her appeal waiver is invalid or otherwise does not encompass her claim that she should be adjudicated a youthful offender and that the court abused its discretion in denying her youthful offender status or that, alternatively, this Court should adjudicate her a youthful offender in the interest of justice.

II

The majority concludes that defendant knowingly, intelligently, and voluntarily waived her right to appeal, and the majority does not determine the appeal waiver to be unenforceable on the ground that the bargain was not "fair, free from oppressiveness, and sensitive to the interests of both the accused and the People" (*People v Seaberg*, 74 NY2d 1, 8 [1989]; see *People v Thomas*, 34 NY3d 545, 557 [2019], cert denied – US –, 140 S Ct 2634 [2020]; *People v Holman*, 89 NY2d 876, 878 [1996]; *People v Frank*, 258 AD2d 900, 900-901 [4th Dept 1999], lv denied 93 NY2d 924 [1999]). The majority further concludes that defendant's valid appeal waiver forecloses appellate review of the court's discretionary decision to deny youthful offender status and her request that this Court exercise its interest of justice jurisdiction to adjudicate her a youthful offender (see *People v Pacherille*, 25 NY3d 1021, 1024 [2015]; *People v Allen*, 174 AD3d 1456, 1458 [4th Dept 2019], lv denied 34 NY3d 978 [2019]).

In the past, that would be the end of the appeal because defendant has not succeeded in her challenge to the validity and enforceability of the appeal waiver and the waiver precludes appellate review of the only challenges to the sentence raised in her brief. However, in an analysis that largely reprises the arguments previously made in a concurrence at the Court of Appeals and a dissent at the Third Department (see *People v Lopez*, 6 NY3d 248, 257-264 [2006, G.B. Smith, J., concurring]; *People v Romano*, 45 AD3d 910, 916-920 [3d Dept 2007, Cardona, P.J., dissenting], lv denied 10 NY3d 770 [2008]), the majority asserts that a valid appeal waiver imposes no barrier to this Court disturbing a negotiated sentence reached as part of the plea agreement by sua sponte exercising its interest of justice jurisdiction to reduce a sentence to a term it deems just. We disagree.

In our view, the majority's position proceeds from a premise that is at odds with precedent. According to the majority, the Court of Appeals has endorsed the view that the Appellate Division may always exercise its power to reduce a sentence in the interest of justice on its own initiative, notwithstanding the presence of a valid appeal waiver. In support of that notion, the majority isolates statements in Court of Appeals cases explaining that "the Appellate Division may be divested of its unique interest-of-justice jurisdiction only by constitutional amendment" (*Lopez*, 6 NY3d at 255) and that appeal waivers "do not interfere with the interest of justice jurisdiction of the Appellate Division" (*Seaberg*, 74 NY2d at 9). The majority understands those statements to represent a determination by the Court of Appeals answering the question whether the Appellate Division, despite the presence of a valid appeal waiver made as part of a plea agreement between a defendant and the People, nonetheless retains the ability to review the severity of the sentence on its own initiative and reduce the sentence in its discretion. When appropriately read in full context, however, those cases show that the Court of Appeals used the abovementioned language to answer the question whether appeal waivers, which operate to foreclose appellate review of the severity of the sentence, constitute an unlawful transgression upon the

Appellate Division's interest of justice jurisdiction (*see Lopez*, 6 NY3d at 255-256; *Seaberg*, 74 NY2d at 9-10). The Court of Appeals answered *that* question in the negative.

Indeed, *Lopez* and *Seaberg* reflect a rejection by the Court of Appeals of the notion—pressed by the defendants therein—that appeal waivers place an improper limitation upon the Appellate Division's interest of justice jurisdiction to reduce a sentence (*see Lopez*, 6 NY3d at 255-256; *Seaberg*, 74 NY2d at 9-10). The Court of Appeals held that appeal waivers do not constitute an unlawful divestiture of the Appellate Division's jurisdiction in that regard; instead, “[a] defendant’s decision to waive appeal . . . is simply a decision not to invoke the [appellate] court’s review power” (*Seaberg*, 74 NY2d at 9-10). The Court of Appeals reasoned that “[b]y pleading guilty a defendant *forecloses* the appellate court from reviewing the merits of the plea bargain in the *interest of justice* and there is nothing inherently wrong in a defendant similarly electing to *foreclose* review of a negotiated sentence” by validly waiving the right to appeal (*id.* [emphasis added]; *see People v Callahan*, 80 NY2d 273, 285 [1992]). Thus, unlike the unconstitutional legislative restriction that was the subject of *People v Pollenz* (67 NY2d 264 [1986]), “a bargained-for waiver of the right to appeal . . . does not operate to deprive the appellate court of its jurisdiction of the appeal. Instead, it merely *forecloses* appellate review of all claims that might be raised on appeal, except, of course, those categories of claims that survive such waivers under [Court of Appeals] case law” (*Callahan*, 80 NY2d at 285 [emphasis added]), such as the *legality* of the sentence and issues that “involve a right of constitutional dimension going to ‘the very heart of the process’ ” (*Lopez*, 6 NY3d at 255). The right to appellate review of the *severity* of a lawful sentence is not one of those nonwaivable rights, however (*see Seaberg*, 74 NY2d at 9).

The concurrence in *Lopez*, like the majority here, proposed that a historical review of the Appellate Division's inherent, statutory, and constitutional authority to reduce a sentence “ma[d]e[] clear that the Appellate Division may *always* exercise this power regardless of whether a sentence is imposed after the rendering of a jury verdict or after a plea and sentence bargain, even one including a valid waiver of the right to appeal” (*Lopez*, 6 NY3d at 264 [G.B. Smith, J., concurring]) and further proposed that public policy dictated that “where a defendant enters a plea and sentence bargain that happens to include an unjust (i.e., unduly harsh, severe or excessive) sentence, the Appellate Division, through the exercise of its unique interest-of-justice sentence review/reduction power, should be able to rectify the problem and render a just result” (*id.* at 263 [G.B. Smith, J., concurring]). The majority in *Lopez* held otherwise, reasoning that, “[b]y pleading guilty and waiving the right to appeal, a defendant has *forgone* review of the terms of the plea, including harshness or excessiveness of the sentence” (*id.* at 256 [emphasis added]).

Given the difficult task of reasonably giving *Lopez* and its antecedents the majority's preferred reading, the majority argues that

a distinction should be drawn between a defendant's right to invoke the Appellate Division's interest of justice jurisdiction to reduce an unduly harsh or severe sentence and the Appellate Division's power to sua sponte review the severity of the sentence in an extraordinary case despite the presence of a valid appeal waiver. However, that precise argument was raised in *Lopez* (see brief for defendant-appellant *Lopez* at 9-28; brief and appendix for appellant *Nicholson*, available at 2005 WL 3863390, *13-38) and, in contrast to the concurring opinion, nowhere in the majority opinion does the Court of Appeals set forth that distinction as logically or analytically sound (see *Lopez*, 6 NY3d at 253-257). The Court of Appeals has instead repeatedly described the right waived without making any such distinction (see e.g. *Thomas*, 34 NY3d at 559 n 2 [describing "the intermediate appellate court's review in the interest of justice of the severity of the sentence" as one of "the waivable rights that are the typical subject of appellate waivers"]; *Lopez*, 6 NY3d at 255 ["By waiving the right to appeal in connection with a negotiated plea and sentence, a defendant agrees to end the proceedings entirely at the time of sentencing and to accept as reasonable the sentence imposed"; "By pleading guilty and waiving the right to appeal, a defendant has forgone review of the terms of the plea, including harshness or excessiveness of the sentence"]; *Seaberg*, 74 NY2d at 10 ["By pleading guilty a defendant forecloses the appellate court from reviewing the merits of the plea bargain in the interest of justice and there is nothing inherently wrong in a defendant similarly electing to foreclose review of a negotiated sentence"]). Other Departments have similarly understood *Lopez* and its antecedents as standing for the proposition that a valid appeal waiver precludes any discretionary disturbance of the sentence by the Appellate Division (see e.g. *People v Rosario*, 204 AD3d 703, 704 [2d Dept 2022] ["The defendant's valid waiver of his right to appeal further prevents this Court from modifying the defendant's sentence in the interest of justice"]).

The Third Department's discussion of the issue in *Romano* (45 AD3d 910) is illustrative of the present state of the law and offers a refutation of the theory advanced by the majority in the present case. In *Romano*, the dissent expressed its concern with language contained in the majority decision that, according to the dissent, "could lead to a conclusion that a defendant's valid waiver of the right to appeal does not just restrict that defendant's own right to request that [the Appellate Division] invoke its interest of justice jurisdiction to reduce a sentence . . . but, further, leads inexorably to a restriction of [the Appellate Division's] own constitutionally mandated authority to exercise that jurisdiction in cases where we deem it appropriate despite the presence of a valid appeal waiver" (*id.* at 918-919 [Cardona, P.J., dissenting] [emphasis omitted]). The majority rebuffed the dissent, noting in particular that the dissent's concern was more properly directed at the Court of Appeals because its precedent had definitively resolved the issue by holding that a valid appeal waiver *did not* interfere with the interest of justice jurisdiction of the Appellate Division but *did* foreclose review of the severity of a negotiated sentence (*id.* at 913 n 2).

Like the majority in the present case, the dissent in *Romano* also

asserted that, even if a defendant validly waived the right to appeal and thus could not invoke their right to request that the Appellate Division reduce the sentence in the interest of justice, nothing prevented the Appellate Division from exercising that authority on its own when confronted with an unjust sentence (see *id.* at 918-919 [Cardona, P.J., dissenting]). Again, the *Romano* majority rejected that proposition. The majority pointed out that, under Court of Appeals precedent concerning a plea agreement with an appeal waiver, "[a] defendant may not subsequently eviscerate that bargain by asking an appellate court to reduce the sentence in the interest of justice—realistically an issue that as a practical matter is brought to an appellate court's attention only when raised by defendants' " (*id.* at 913, quoting *Lopez*, 6 NY3d at 255-256 [emphasis omitted]). Then, rejecting the notion advocated by the dissent that the Appellate Division could reduce the sentence on its own anyway, the majority reasoned that the bargain would be "similarly eviscerated, contrary to the well-established public policy of this state, when an appellate court purports to honor a defendant's waiver by rejecting a challenge to the excessiveness of a sentence as barred by an appeal waiver, but then reduces the sentence—just as requested—and deems the reduction to be 'sua sponte' " (*id.* at 913-914). The majority also noted that "[s]uch an action on [the Appellate Division's] part would, of course, also reflect a fundamental misunderstanding of the term 'sua sponte,' which is defined as '[w]ithout prompting or suggestion; on its own motion' (Black's Law Dictionary 1464 [8th ed 2004])" because "[r]eduction of [a] defendant's sentence in the interest of justice, as requested, would not be 'without prompting or suggestion'; rather, it would be an action taken upon [the] defendant's appeal, not 'on [our] own motion,' regardless of whether we claimed to be upholding the appeal waiver or not" (*id.* at 914 n 3). The majority then made its assessment even more explicit: "[T]he Court of Appeals has repeatedly held that the Appellate Division *does not have the power* to reduce a defendant's sentence under such circumstances" (*id.* [emphasis added]).

The majority in *Romano* even recognized that the Third Department had previously taken the position—i.e., the position now reprised by the majority in the appeal presently before this Court—that the Appellate Division "has the power to modify a prison sentence in the interest of justice . . . , even in cases where the defendant has waived the right to appeal from the judgment of conviction" (*People v Price*, 286 AD2d 802, 802 [3d Dept 2001], *lv denied* 97 NY2d 686 [2001], citing *People v Coleman*, 281 AD2d 653 [3d Dept 2001]). In the wake of *Lopez* and its antecedents, however, the Third Department disavowed those decisions to the extent that they failed to recognize that a valid appeal waiver forecloses review of a negotiated sentence, expressly declaring that the relevant rationale articulated in the *Price/Coleman* line of cases "should no longer be followed" (*Romano*, 45 AD3d at 913 n 2).

In addition to being contrary to the judiciary's precedent and understanding, the position taken by the majority in the instant appeal that the Appellate Division is presently entitled to exercise its discretion to reduce a sentence in the interest of justice, even

when confronted with a valid appeal waiver, is incompatible with the view of the legislature. Indeed, there is currently proposed legislation pending in both chambers to amend CPL 470.15 to provide intermediate appellate courts with the power to modify a sentence as unduly harsh or severe "notwithstanding an otherwise enforceable waiver of appeal" (2025 NY Senate Bill S330, 2025 NY Assembly Bill A322). In recognition that defendants who plead guilty are often required to waive their rights to an appeal in order to obtain the bargain and thereby "waiv[e] their rights to challenge crucial errors in their sentencing," the legislature has proposed to *change* that current state of affairs in order to "secure the right of a defendant to seek out a remedy to unjust sentences" by "*mak[ing] it possible* for courts to review" whether the sentence is unduly harsh or severe, even in cases involving valid appeal waivers (2025 NY Senate Bill S330 [emphasis added]).

More generally, the majority in the present appeal further asserts that the statement of the Court of Appeals in *Callahan* that, "in most situations, the appellate courts *should* honor [appeal] waivers" (80 NY2d at 280 [emphasis added]) stands for the proposition that the enforcement of *valid* appeal waivers is merely optional for the Appellate Division. In our view, that is inaccurate. When considered in context, it is clear that the Court of Appeals was making the point in *Callahan* that appeal waivers are ordinarily enforceable, and therefore appellate courts should enforce such waivers as a matter of judicial policy *unless* confronted with the traditional grounds for nonenforcement or inapplicability of the waiver—e.g., the waiver was not "knowingly, intelligently and voluntarily made" or the specific legal issue falls within one of "several categories of appellate claims that may not be waived because of a larger societal interest in their correct resolution" (80 NY2d at 280). *Callahan* thus does not stand for the proposition that the Appellate Division has the unbridled option to disregard the preclusive effect of valid appeal waivers.

In *People v Bryant* (28 NY3d 1094 [2016], *rev'd* 137 AD3d 401 [1st Dept 2016]), decided a decade after *Lopez*, the Court of Appeals confirmed by its disposition of the appeal that it does not consider the Appellate Division to possess the authority claimed by the majority here. In *Bryant*, the First Department, over a dissent maintaining that the defendant's valid waiver of the right to appeal foreclosed any reduction of sentence, determined that the appeal waiver was invalid and then exercised its discretion in the interest of justice to reduce the sentence imposed by the sentencing court as part of the judgment (*see* 137 AD3d at 401-402). On appeal by the People, the Court of Appeals unanimously concluded that the appeal waiver was valid and that the First Department had erred in holding otherwise (*see* 28 NY3d at 1096). If, as posited by the majority, the Appellate Division always has the ability to exercise its power to reduce a sentence in the interest of justice on its own initiative, notwithstanding the presence of a valid appeal waiver, then the proper disposition of the appeal in *Bryant* would have been for the Court of Appeals to remit the matter to the First Department to determine

whether it still wanted to reduce the sentence despite the valid appeal waiver. To do otherwise would, under the majority's theory, both deprive the Appellate Division of its unique constitutionalized power to review and reduce a sentence in the interest of justice and deny the defendant the opportunity to retain a just sentence. The Court of Appeals, however, did not dispose of the appeal by remitting to the First Department for that purpose. Instead, the Court of Appeals reversed the order of the First Department and reinstated the judgment of the sentencing court (*see id.* at 1095). The disposition of the appeal in *Bryant* by the Court of Appeals is therefore consistent with the view embodied in *Lopez* and its antecedents and progeny that—contrary to the majority's assertion—a valid waiver of the right to appeal waives "the intermediate appellate court's review in the interest of justice of the severity of the sentence" (*Thomas*, 34 NY3d at 559 n 2; *see Lopez*, 6 NY3d at 255-256; *Seaberg*, 74 NY2d at 9-10).

To the extent that the majority implies that its determination in this case is not reviewable by the Court of Appeals inasmuch as this Court is reviewing and reducing defendant's sentence as a matter of discretion in the interest of justice, we disagree with that suggestion because, in actuality, "an appeal does lie to consider the narrow issue concerning the legality of [this Court's] corrective action" (*People v Dawn Maria C.*, 67 NY2d 625, 627 [1986]; *see CPL* 450.90 [2] [b]; 470.10 [3]). In dissent, we do not address the substance of the majority's merits determination whether defendant's sentence should be reduced as unduly harsh or severe; rather, we dispute on the law the majority's assertion that the Appellate Division may disregard the preclusive effect of a valid appeal waiver to sua sponte reach the issue of the severity of the sentence.

III

The newfound authority of the Appellate Division to address the severity of a sentence on its own despite a valid appeal waiver, which the majority represents as having always been present, is inconsistent with prior cases involving defendants with arguably similar circumstances whose sentences went unreviewed by this Court on appeal due to the presence of a valid appeal waiver. Likewise, the majority's adoption and application of the concurrence-based reasoning from *Lopez* does not conform to this Court's prior treatment of a request by a defendant to adopt that rationale (*see People v Kemp*, 70 AD3d 1301, 1301 [4th Dept 2010], *lv denied* 14 NY3d 889 [2010]; brief for defendant-appellant, available at 2010 WL 9473173, *10-11). The implication of the majority's position is that, for decades at least, this Court has failed to recognize that all along it could have reduced sentences as unduly harsh or severe even in the face of a valid appeal waiver, if only it had understood that it could engage in a public policy balancing analysis to determine whether the circumstances warranted bypassing the valid appeal waiver.

As discussed above, however, this Court, post-*Lopez/Seaberg*, has never understood its discretionary power to review the severity of a sentence in the face of a valid appeal waiver as broadly as the

majority proposes, and at least one Department that *had* viewed its authority that expansively has since persuasively disavowed that approach (see *Romano*, 45 AD3d at 913 n 2). In our view, by changing the approach now, the majority's position will allow this Court to eviscerate plea agreements with valid appeal waivers at its discretion, thereby "render[ing] . . . valid waiver[s] of appeal meaningless" with respect to negotiated sentences (*People v Jenkins*, 138 AD3d 102, 106 [1st Dept 2016], *lv denied* 27 NY3d 1070 [2016]) and violating the principle that "[t]he important goals of fairness and finality in criminal matters are accomplished only insofar as the parties are confident that the carefully orchestrated bargain of an agreed-upon sentence will not be disturbed as a discretionary matter" (*Lopez*, 6 NY3d at 256 [internal quotation marks omitted]; see *Romano*, 45 AD3d at 913-914; see also *Jenkins*, 138 AD3d at 106).

IV

Even beyond its unprecedented departure from case law and this Court's prior understanding and practice with respect to enforcement of valid appeal waivers in the context of reviewing the severity of a sentence, the majority seemingly breaks new ground by reducing defendant's sentence even though defendant has not asked this Court to afford her that relief. In our view, the majority's apparently unprecedented decision to sua sponte modify defendant's sentence as a matter of discretion in the interest of justice is improper inasmuch as it violates the longstanding, traditionally recognized constraint on the scope of appellate review that an appellate court resolve appeals within the framework of the arguments presented by the parties.

With respect to the sentence, defendant contends in her appellate brief only that the court abused its discretion in denying her youthful offender status or that, alternatively, this Court should adjudicate her a youthful offender in the interest of justice. Defendant does not contend that her negotiated sentence should be reduced on the ground that it is unduly harsh and severe. Again, in the past, this Court would not consider the severity of a sentence if that issue was not raised in a defendant's appellate brief (see *People v Davis*, 188 AD3d 1731, 1732 [4th Dept 2020], *lv denied* 37 NY3d 991 [2021]). That is because it has been well understood that appellate courts " 'are not in the business of blindsiding litigants, who expect [such courts] to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made' " (*People v Sargeant*, 230 AD3d 1341, 1353 [2d Dept 2024], quoting *Misicki v Caradonna*, 12 NY3d 511, 519 [2009]). Yet, casting aside that previously recognized constraint, the majority now grants relief that defendant never requested and the People never had the opportunity to oppose (*cf. Davis*, 188 AD3d at 1732). Indeed, doing so "pose[s] an obvious problem of fair play" (*Misicki*, 12 NY3d at 519), particularly toward the People, who have been deprived of any ability to defend before this Court the terms of the sentence that they negotiated below. By reaching the unraised sentencing issue, the majority improperly fails to recognize that, " '[w]hile appellate judges surely do not sit as automatons, they are not freelance lawyers either' "

(*Sargeant*, 230 AD3d at 1353, quoting *Misicki*, 12 NY3d at 519).

V

In creating its exception to the enforcement of valid appeal waivers for sentences deemed unjust by the Appellate Division, the majority proposes a test—which uses language borrowed from the dissent in *Romano* (45 AD3d at 919 [Cardona, P.J., dissenting])—to determine whether the exception applies. According to the majority, “[w]here a sentence is fundamentally unjust and all other safeguards have failed, [the Appellate Division is] compelled to exercise [its] constitutionalized interest of justice power to correct the injustice, no matter the validity of the appeal waiver.”

The majority seems to want to limit invocation of the exception to those appeals involving “unique circumstances” where the sentence would be “ ‘unjust in its relation to the crime of which the defendant stands convicted’ ” (majority mem, quoting *People v Miles*, 173 App Div 179, 185 [3d Dept 1916]; see *Lopez*, 6 NY3d at 259-260 [G.B. Smith, J., concurring] [relying upon the same quote from *Miles*]). We have little confidence that the proposed test will constrain the exception. Inevitably, the test will simply collapse into this Court’s standard assessment of whether a sentence is unduly harsh and severe. After all, what is a determination by the Appellate Division that a sentence is unjust under circumstances that only it can correct but another way of saying that the circumstances warrant intervention by the intermediate appellate court to reduce an unduly harsh or severe sentence as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]; *People v Brisman*, 43 NY3d 322, 328-329 [2025])?

We are also deeply concerned that the majority’s theory about the scope of this Court’s constitutionalized interest of justice jurisdiction will not remain confined to the review of the severity of sentences. Indeed, the articulated rationale underpinning the majority’s approach to that power (see *Miles*, 173 App Div at 185) appears unbounded and, if applied in other contexts of criminal law, would allow this Court to reach an assortment of issues that were previously considered foreclosed by a valid appeal waiver. The majority, in fact, proves our concern justified in this very case by applying its admittedly new test to defendant’s request that this Court exercise its interest of justice jurisdiction to adjudicate her a youthful offender.

Even if we were to accept the majority’s proposed test on its own terms, defendant’s case would fail to meet it. As the majority acknowledges, defendant appears to have a strong case for entitlement to an alternative sentence as a victim of domestic violence pursuant to Penal Law § 60.12 as amended by the Domestic Violence Survivors Justice Act. Yet, defense counsel did not request a hearing to determine whether defendant should receive such a sentence. Defendant therefore seemingly has a colorable ground upon which to base a motion pursuant to CPL article 440 for ineffective assistance regarding defense counsel’s failure to seek an alternative sentence or their negotiation of the terms of the sentence (see *People v Linda R.M.*, 236

AD3d 1488, 1488-1489 [4th Dept 2025], *lv denied* – NY3d – [2025]; *cf. People v Riley*, 221 AD3d 1162, 1162-1164 [3d Dept 2023], *lv denied* 40 NY3d 1094 [2024]). Inasmuch as defendant has at least one available legal remedy to address any undue severity in her sentence, it cannot be said under the majority's proposed test that "all other safeguards have failed" such that this Court is justified in taking the extraordinary step of disregarding the preclusive effect of defendant's valid appeal waiver. Given those circumstances, the majority's aberrant decision to bypass the preclusive effect of a valid appeal waiver, *sua sponte* raise the issue of severity, and then reduce defendant's sentence is not only unprecedented, it is unnecessary.

* * *

In a system that largely resolves criminal charges by plea, it may be preferable for the sake of justice that appeal waivers, now so commonly required as part of plea agreements, not foreclose the Appellate Division from exercising its power to reduce a sentence in the interest of justice on its own initiative (*see Lopez*, 6 NY3d at 257-264 [G.B. Smith, J., concurring]), or even that appeal waivers are legislatively or judicially declared invalid *per se* as a matter of public policy (*see Thomas*, 34 NY3d at 587-599 [Wilson, J., dissenting in part and concurring in part]). Those determinations, however, are the prerogative of the legislature or the Court of Appeals, not this Court. The Court of Appeals is entitled to revisit its interpretation of the Appellate Division's authority to modify a sentence despite the presence of a valid appeal waiver by giving *Lopez* and its antecedents the majority's preferred reading and adopting the views expressed by the concurrence in *Lopez* and the majority here. In the meantime, "even if [the Appellate Division] do[es] not agree with the rules of law set forth in the decisions of the Court of Appeals, [the Appellate Division is] bound to follow those rules" (*Romano*, 45 AD3d at 913 n 2). For all of the foregoing reasons, we respectfully dissent.

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

428

KA 23-01247

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALTON D. BROWN, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANTHONY J. DIMARTINO, JR., DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Karen M. Brandt Brown, J.), rendered May 16, 2023. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (three counts), assault in the first degree (three counts), attempted murder in the second degree, burglary in the first degree, attempted robbery in the first degree, attempted robbery in the second degree, criminal possession of a weapon in the second degree and conspiracy in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of felony murder in the second degree (Penal Law § 125.25 [3]), three counts of assault in the first degree (§ 120.10 [1], [4]), and one count each of intentional murder in the second degree (§ 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), burglary in the first degree (§ 140.30 [2]), attempted robbery in the first degree (§§ 110.00, 160.15 [1]), attempted robbery in the second degree (§§ 110.00, 160.10 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and conspiracy in the fourth degree (§ 105.10 [1]). Defendant's conviction stems from his participation in a home invasion robbery of a known drug dealer along with two codefendants, defendant's girlfriend (female codefendant) and friend (male codefendant). During the incident, the robbery victim (victim) was shot and wounded and another occupant of the home (decedent) was shot and killed. The evidence at trial did not identify who shot the victim or decedent.

Defendant failed to preserve for our review his contention that

the People's supplemental certificates of compliance failed to detail the basis for the delayed disclosure as required by CPL 245.50 (1-a) (see CPL 470.05 [2]; *People v Odusanya*, 235 AD3d 1299, 1302 [4th Dept 2025], *lv denied* 43 NY3d 965 [2025]; *People v Macaluso*, 230 AD3d 1158, 1159 [2d Dept 2024], *lv denied* 42 NY3d 1036 [2024]).

Contrary to defendant's contention, we conclude that County Court did not err in refusing to suppress the statements defendant made to investigators and the tangible evidence arising from those statements. The court properly determined that defendant did not unequivocally invoke his right to remain silent when the investigators tried to steer the conversation away from plea negotiations relating to drugs found at the time of defendant's arrest, and defendant told the investigators that he was "ready" to go "downtown" and did not "want to talk no more" (see *People v DuBois*, 203 AD3d 1621, 1623 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022]; *People v Lowin*, 36 AD3d 1153, 1155 [3d Dept 2007], *lv denied* 9 NY3d 847 [2007], *reconsideration denied* 9 NY3d 878 [2007]). While "a suspect's right to remain silent, once invoked, must be scrupulously honored" (*People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985] [internal quotation marks omitted]), the invocation of that right must be "unequivocal and unqualified" (*People v Wiggins*, 229 AD3d 1095, 1096 [4th Dept 2024] [internal quotation marks omitted]). Whether a defendant's statement constitutes an unequivocal assertion of the right to remain silent " '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' " (*People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013], quoting *People v Glover*, 87 NY2d 838, 839 [1995]). The court's determination that defendant did not unequivocally invoke his right to remain silent "is 'granted deference and will not be disturbed unless unsupported by the record' " (*id.*; see *DuBois*, 203 AD3d at 1623), particularly where, as here, defendant thereafter "continued to participate in the conversation with the police" (*People v Trifunovski*, 199 AD3d 1344, 1345 [4th Dept 2021], *lv denied* 38 NY3d 931 [2022]; see *People v Johnston*, 192 AD3d 1516, 1519 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]).

We reject defendant's contention that the court abused its discretion when it denied defendant's request for a missing witness charge for decedent's brother. A missing witness charge instructs a jury that it may "draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events" (*People v Savinon*, 100 NY2d 192, 196 [2003]), and is appropriate where: "[1] the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; [2] the witness would naturally be expected to provide noncumulative testimony favorable to the party who has not called him, and [3] the witness is available to such party" (*People v Gonzalez*, 68 NY2d 424, 427 [1986]; see *People v Smith*, 33 NY3d 454, 458 [2019]; *Savinon*, 100 NY2d at 197). Here, the People established that the witness was unavailable because he was homeless and, despite

reasonable efforts, they were not able to locate or contact him (see *People v Barksdale*, 216 AD3d 534, 534 [1st Dept 2023], *lv denied* 40 NY3d 949 [2023]; *People v Lee*, 303 AD2d 977, 977-978 [4th Dept 2003], *lv denied* 100 NY2d 540 [2003]; *Matter of Mikal M.*, 191 AD2d 381, 382 [1st Dept 1993]).

We reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's withdrawal of that part of defendant's omnibus motion seeking suppression of defendant's statements, failure to challenge the People's supplemental certificates of compliance, and failure to move for severance. With respect to the withdrawal of that part of the omnibus motion seeking suppression of his statements, although the initial motion was withdrawn, a separate motion seeking the same relief was subsequently made by defense counsel and ruled upon by the court and, thus, " 'inasmuch as defendant suffered no prejudice[,] there can be no finding of ineffectiveness' " (*People v Rogers*, 277 AD2d 876, 877 [4th Dept 2000], *lv denied* 96 NY2d 834 [2001]). With respect to the failure to object to the People's supplemental certificates of compliance, the contention is raised for the first time in defendant's reply brief and, thus, is not properly before us (see *People v McMurtry*, 224 AD3d 1310, 1310-1311 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; see generally *Solvay Bank v Feher Rubbish Removal, Inc.*, 187 AD3d 1596, 1597 [4th Dept 2020]). With respect to the failure to move for severance, defense counsel specifically stated that the decision not to make the motion was strategic, and we conclude that defendant has not established that counsel's strategy " 'was inconsistent with the actions of a reasonably competent attorney' " (*People v Howie*, 149 AD3d 1497, 1500 [4th Dept 2017], *lv denied* 29 NY3d 1128 [2017]; see *People v Evans*, 142 AD3d 1291, 1292 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]). Additionally, inasmuch as the cases "were properly joined, [a]ny motion to sever . . . the indictment would have had little or no chance of success, and thus counsel's failure to make such a . . . motion . . . does not indicate ineffectiveness of counsel" (*People v Weather*, 182 AD3d 1043, 1044 [4th Dept 2020], *lv denied* 36 NY3d 932 [2020] [internal quotation marks omitted]).

Contrary to defendant's contention, the court properly admitted in evidence the text messages sent by the female codefendant to defendant's cell phone pursuant to the coconspirator exception to the hearsay rule. " 'A declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule' " (*People v Caban*, 5 NY3d 143, 148 [2005], quoting *People v Bac Tran*, 80 NY2d 170, 179 [1992], *rearg denied* 81 NY2d 784 [1993]). Such a declaration may be admitted only where the People have established a prima facie case of conspiracy " 'without recourse to the declarations [of that coconspirator]' " (*id.*, quoting *People v Salko*, 47 NY2d 230, 238 [1979], *rearg denied and remittitur amended* 47 NY2d 1010 [1979]; see *People v Tucker*, 200 AD3d 1584, 1586 [4th Dept 2021], *lv denied* 38 NY3d 954 [2022]). "The prima facie case of conspiracy does not need to be established before the coconspirator's statements are admitted

in evidence, so long as 'the People independently establish a conspiracy by the close of their case' " (*Tucker*, 200 AD3d at 1586, quoting *Caban*, 5 NY3d at 151).

Here, we conclude that, without recourse to the declarations in the text messages, the People established a prima facie case that defendant and his two codefendants conspired to commit a burglary and robbery on the night of the incident (*see id.*). A witness testified that, on the night of the incident, she drove defendant and the codefendants to a bar, at which point the female codefendant went inside alone while the two others waited for her. After a period of time, the female codefendant and the victim left the bar together to go to the victim's home. Defendant and the male codefendant followed the female codefendant and the victim to the victim's home, and then waited outside on the victim's porch while the female codefendant was inside. While they were waiting, defendant and the female codefendant used their cellular phones to call and send text messages to each other, as confirmed by phone records. At one point, defendant and the male codefendant forced their way into the victim's home, an overt act taken in furtherance of the conspiracy (*see id.* at 1587; *see generally People v McGee*, 49 NY2d 48, 57-58 [1979]). After defendant and the male codefendant entered the victim's home, they acted on the direction of the female codefendant to break down the door to the victim's room, where drugs were being stored, and all three subsequently left together in a vehicle waiting for them outside. Defendant later admitted during his statement to the police that the burglary and robbery had been set up by the female codefendant as "retaliation" for an ex-boyfriend getting her addicted to heroin.

Defendant further contends that the evidence is legally insufficient to support the conviction because the People failed to establish that he acted with the requisite intent for accomplice liability. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). To determine legal sufficiency, we must review the evidence "in the light most favorable to the prosecution," affording "the People . . . all reasonable evidentiary inferences" (*People v Delamota*, 18 NY3d 107, 113 [2011]) to determine whether "there was a 'valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime has been proven beyond a reasonable doubt' " (*People v Pietrocarlo*, 37 NY3d 1142, 1143 [2021]). Whether an accessory shares the intent of a principal actor may be established by circumstantial evidence (*see People v Ozarowski*, 38 NY2d 481, 489 [1976]; *People v Zuhlke*, 67 AD3d 1341, 1341 [4th Dept 2009], *lv denied* 14 NY3d 774 [2010]). The evidence at trial that decedent was killed and the victim suffered serious physical injury during the course of the burglary and robbery that defendant and his codefendants conspired to commit is legally sufficient to sustain the conviction of the crimes of two counts of murder in the second degree (Penal Law § 125.25 [3]), two counts of assault in the first degree (§ 120.10 [4]), and one count each of burglary in the first degree (§ 140.30 [2]), attempted robbery in the first degree (§§ 110.00, 160.15 [1]), attempted robbery in the second degree (§§ 110.00, 160.10 [1]), and

conspiracy in the fourth degree (§ 105.10 [1]). Evidence that defendant was aware both that he was breaking into the home of a known drug dealer and that one of his codefendants possessed a handgun is legally sufficient to sustain the conviction of criminal possession of a weapon in the second degree (§ 265.03 [3]) inasmuch as " 'defendant's conduct showed that he was aware that his codefendant possessed a [gun]' and that he intentionally aided the [male] codefendant in that possession" (*People v Johnson*, 94 AD3d 1408, 1409 [4th Dept 2012], *lv denied* 19 NY3d 998 [2012]). Evidence that the victim knew the female codefendant and was aware of defendant, that defendant and his codefendants intended to steal drugs, that defendant was aware that one of his codefendants possessed a handgun, that defendant continued with the robbery after the victim and decedent were shot, and that defendant and his codefendants left together in a waiting vehicle is legally sufficient to establish defendant's shared intent to kill or inflict serious injury and thus sustain the conviction of murder in the second degree (§ 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and assault in the first degree (§ 120.10 [1]) (*see People v McGee*, 87 AD3d 1400, 1401 [4th Dept 2011], *affd* 20 NY3d 513 [2013]; *People v Lewis-Bush*, 204 AD3d 1424, 1425 [4th Dept 2022], *lv denied* 38 NY3d 1072 [2022]; *People v Harris*, 195 AD3d 1535, 1536 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *cf. People v McDonald*, 172 AD3d 1900, 1902-1903 [4th Dept 2019]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We further reject defendant's contention that he was denied a fair trial by, *inter alia*, comments by the prosecutor in the opening statement and the admission in evidence of autopsy photographs. The allegedly inflammatory portions of the prosecutor's opening statement were not improper inasmuch as the statements did not demean defendant's character but instead accurately described evidence that the prosecutor intended to present (*see People v Celdo*, 291 AD2d 357, 358 [1st Dept 2002], *lv denied* 98 NY2d 673 [2002]; *People v Etoria*, 266 AD2d 559, 559 [2d Dept 1999], *lv denied* 94 NY2d 919 [2000]; *cf. People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]). Additionally, autopsy photographs "should be excluded only if [their] *sole purpose* is to arouse the emotions of the jury and to prejudice the defendant" (*People v Spencer*, 181 AD3d 1257, 1261 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020] [internal quotation marks omitted]) and, here, they were admitted "to help explain and corroborate" the testimony of the Medical Examiner concerning the deceased victim's injuries and cause of death (*id.*; *see People v Stevens*, 76 NY2d 833, 836 [1990]; *People v Brooks*, 214 AD3d 1425, 1427 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023]).

We conclude that defendant's sentence is not unduly harsh or severe.

Finally, we note that the certificate of disposition and uniform sentence and commitment form contain several errors that must be corrected (see *People v Cutaia*, 167 AD3d 1534, 1536 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]). Specifically, both the certificate of disposition and uniform sentence and commitment form incorrectly state that the conviction under count 5 of the indictment is for attempted murder in the second degree, rather than murder in the second degree (Penal Law § 125.25 [1]), and incorrectly state the sentences imposed on counts 3 and 4 are indeterminate terms of imprisonment of 25 years to life, rather than determinate terms of imprisonment of 25 years and with 5 years of postrelease supervision. Thus, the certificate of disposition and the uniform sentence and commitment form must be amended to reflect the correct crime and sentences under those counts of the indictment.

All concur except WHALEN, P.J., and SMITH, J., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part, inasmuch as we agree with defendant that his conviction is not supported by legally sufficient evidence with respect to the counts of intentional murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and assault in the first degree (§ 120.10 [1]). As the majority notes, defendant's conviction for those counts, as well as, *inter alia*, burglary in the first degree (§ 140.30 [2]) and attempted robbery in the first degree (§§ 110.00, 160.15 [1]), stems from his participation in a home invasion robbery along with two codefendants, defendant's girlfriend (female codefendant) and friend (male codefendant). During the course of the home invasion, one victim was shot and killed and another victim was shot and wounded.

"A verdict is legally sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). Here, although the jurors were instructed that they could consider defendant's guilt either as the principal or as an accessory, there is no dispute that the People offered no evidence as to which perpetrator possessed the firearm or who actually shot either victim. Thus, there is no evidence from which to infer defendant's intent to cause either the death of or serious physical injury to another person (Penal Law §§ 120.10 [1]; 125.25 [1]) from "the natural and probable consequences of [defendant's own] acts" (*People v Noonan*, 202 AD3d 1469, 1470 [4th Dept 2022], *lv denied* 38 NY3d 1009 [2022] [internal quotation marks omitted]; see *People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]).

The majority nonetheless concludes that there is legally sufficient evidence to establish defendant's guilt as an accessory to whomever shot the victims. Accessorial liability requires the People to prove beyond a reasonable doubt that defendant acted with the mental culpability necessary to commit the crime charged and that he solicited, requested, commanded, importuned, or intentionally aided

such person to engage in such conduct (see Penal Law § 20.00; *People v Maldonado*, 189 AD3d 2083, 2084 [4th Dept 2020], *lv denied* 36 NY3d 1098 [2021]). Although we agree with the majority that there is legally sufficient evidence that defendant shared a community of purpose with his codefendants with respect to the burglary and attempted robbery (see §§ 140.30 [2]; 110.00, 160.15 [1]), we respectfully disagree that there is legally sufficient evidence to establish, without speculation, that defendant shared any intent to cause the death of or seriously injure another person. Contrary to the conclusion of the majority, there was no evidence that defendant knew on the day of the home invasion that one of his codefendants possessed a handgun. Although the People presented evidence that a photo of the firearm used in the home invasion was recovered from defendant's cell phone, the trial evidence also established that the photo was sent to defendant from an unknown person six to seven weeks before the home invasion occurred and no accompanying text message was recovered. No evidence was presented that defendant knew on the day of the home invasion that either codefendant was armed prior to the shooting (see *People v Hawkins*, 192 AD3d 1637, 1639 [4th Dept 2021]; *cf. People v Ramos*, 218 AD3d 1113, 1115 [4th Dept 2023]). None of the witnesses to the home invasion, including the witness who drove defendant and the male codefendant to the home, saw a firearm prior to the shooting. There is also no evidence of what actions defendant did or did not take inside the home after the shots were fired, which a witness testified occurred almost immediately upon defendant and the male codefendant entering the home, "from which the jury could rationally exclude the possibility that . . . defendant was without knowledge of the [shooter's] intent" to kill or seriously injure any person by the use of a firearm as alleged in the indictment (*People v MacDonald*, 172 AD3d 1900, 1902 [4th Dept 2019]; *cf. People v Cabey*, 85 NY2d 417, 421 [1995]).

We would therefore modify the judgment by reversing those parts convicting defendant of intentional murder in the second degree, attempted murder in the second degree, and assault in the first degree under counts 5, 6 and 7 of the indictment and dismissing those counts. We agree with the majority that the remainder of defendant's contentions do not warrant further modification or reversal of the judgment.

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

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CA 24-01245

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

JOHN M. GALLT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ROBERT A. NELK AND RAMAKRISHNA YARLAGADDA,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

PENINO & MOYNIHAN LLP, WHITE PLAINS (MELISSA L. VINCTON OF COUNSEL),
FOR DEFENDANT-RESPONDENT ROBERT A. NELK.

CARMAN, CALLAHAN & INGHAM, LLP, FARMINGDALE (JONATHAN D. SILVERSTEIN
OF COUNSEL), FOR DEFENDANT-RESPONDENT RAMAKRISHNA YARLAGADDA.

Appeal from an order of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered July 3, 2024 in a personal injury action arising from a motor vehicle accident. The order denied in part the motion of plaintiff for summary judgment.

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

Same memorandum as in *Gallt v Nelk* ([appeal No. 2] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-01636

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

JOHN M. GALLT, PLAINTIFF,

V

MEMORANDUM AND ORDER

ROBERT A. NELK, DEFENDANT-RESPONDENT,
AND RAMAKRISHNA YARLAGADDA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CARMAN, CALLAHAN & INGHAM, LLP, FARMINGDALE (JONATHAN D. SILVERSTEIN
OF COUNSEL), FOR DEFENDANT-APPELLANT.

PENINO & MOYNIHAN LLP, WHITE PLAINS (MELISSA L. VINCTON OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered July 3, 2024 in a personal injury action arising from a motor vehicle accident. The order denied the motion of defendant Ramakrishna Yarlagadda for summary judgment dismissing the complaint and all cross-claims against him.

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 against defendant Ramakrishna Yarlagadda, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as a pedestrian in a multi-vehicle collision that occurred on the New York State Thruway. Plaintiff was manually pushing a disabled vehicle at the time of the accident. Defendant Ramakrishna Yarlagadda was driving a minivan in the right-hand lane, and defendant Robert A. Nelk was approximately three car lengths behind Yarlagadda driving a pickup truck towing a camping trailer. When Yarlagadda was approximately 150 to 200 feet away from plaintiff, plaintiff suddenly pushed his disabled vehicle from the shoulder so that its driver's side door extended into, and partially blocked, the right-hand lane in which Yarlagadda and Nelk were traveling. Yarlagadda, who conceded that he did not look to his left to determine whether he could safely change lanes, testified that he activated the hazard lights on his vehicle and applied the brakes to avoid striking plaintiff's vehicle. Nelk, who similarly conceded that he did not have a recollection of looking to his left to determine whether he could safely change lanes, testified that he did not observe Yarlagadda's vehicle's hazard lights activate and that Yarlagadda came to a complete stop. Nelk was unable to slow down or stop in time to

avoid an accident and rear-ended Yarlagadda's vehicle, pushing it forward and causing it to strike and injure plaintiff.

In appeal No. 1, plaintiff appeals from an order insofar as it denied that part of his motion seeking summary judgment on the issue of Nelk's negligence. In appeal No. 2, Yarlagadda appeals from an order that denied his motion for summary judgment dismissing the complaint and cross-claims against him. We affirm in appeal No. 1 and modify in appeal No. 2.

With respect to appeal No. 1, "[i]t is well settled that a rear-end collision with a vehicle 'establishes a prima facie case of negligence on the part of the driver of the rear vehicle . . . [, and, i]n order to rebut the presumption [of negligence], the driver of the rear vehicle must submit a non[]negligent explanation for the collision' " (*Foote v March*, 211 AD3d 1513, 1514 [4th Dept 2022]; see *Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Oswald v Ramesh*, 236 AD3d 1436, 1437 [4th Dept 2025]). While there is no dispute that Nelk rear-ended Yarlagadda's vehicle, plaintiff's own submissions raise a triable issue of fact whether there is a nonnegligent explanation for the collision (see *Foote*, 211 AD3d at 1514; *Shah v Nowakowski*, 203 AD3d 1737, 1740-1741 [4th Dept 2022]). Specifically, " '[o]ne of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle . . . , and such an explanation is sufficient to overcome the inference of negligence and preclude an award of summary judgment' " (*Foote*, 211 AD3d at 1514; see *Shah*, 203 AD3d at 1740-1741; *Tate v Brown*, 125 AD3d 1397, 1398 [4th Dept 2015]). The parties' deposition testimony presents a triable issue of fact whether Yarlagadda's vehicle's sudden deceleration or stop was unforeseeable under the prevailing traffic conditions inasmuch as it occurred "in a travel lane of a busy highway where vehicles could reasonably expect that traffic would continue unimpeded" (*Tutrani*, 10 NY3d at 907; see *Niedzwiecki v Yeates*, 175 AD3d 903, 904 [4th Dept 2019]; *Gardner v Chester*, 151 AD3d 1894, 1896 [4th Dept 2017]; see generally *Gamblin v Nam*, 200 AD3d 1610, 1611-1612 [4th Dept 2021]).

Additionally, plaintiff's own submissions raise a triable issue of fact whether the emergency doctrine is applicable to Nelk. The emergency doctrine " 'recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context . . . , provided the actor has not created the emergency' " (*Zynda v Waid*, 221 AD3d 1578, 1578 [4th Dept 2023], quoting *Caristo v Sanzone*, 96 NY2d 172, 174 [2001]). While "the emergency doctrine does not apply to typical accidents involving rear-end collisions because trailing drivers are required to leave a reasonable distance between their vehicles and vehicles ahead" (*Lowhar-Lewis v Metropolitan Transp. Auth.*, 97 AD3d 728, 729 [2d Dept 2012]; see Vehicle and Traffic Law § 1129 [a]; see generally *Fergile v Payne*, 202 AD3d 928, 930-931 [2d Dept 2022]), "courts have

consistently held that the emergency doctrine may protect a driver from liability where the driver, through no fault of [their] own, is required to take immediate action in order to avoid being suddenly cut off" (*Maisonet v Roman*, 139 AD3d 121, 124 [1st Dept 2016], *appeal dismissed* 27 NY3d 1062 [2016]; *see Barath v Marron*, 255 AD2d 280, 281 [2d Dept 1998]; *McGowan v Marcus*, 216 AD2d 371, 372 [2d Dept 1995]). Here, there are triable issues of fact whether Nelk was required to take immediate action in order to avoid an obstruction resulting from plaintiff's act of suddenly pushing his vehicle into his lane of travel just ahead of Yarlagadda, whether Nelk contributed to creating an emergency by, *inter alia*, following too closely or failing to notice the disabled vehicle in his lane, and whether Nelk's conduct was reasonable in the face of an emergency (*see Zbock v Gietz*, 145 AD3d 1521, 1523 [4th Dept 2016]; *Sossin v Lewis*, 9 AD3d 849, 851 [4th Dept 2004], *amended on rearg on other grounds* 11 AD3d 1045 [4th Dept 2004]; *see generally Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991], *rearg denied* 77 NY2d 990 [1991]).

With respect to appeal No. 2, we agree with Yarlagadda that, inasmuch as plaintiff did not oppose Yarlagadda's motion for summary judgment in the motion court or in his appellate brief, plaintiff has abandoned his claims against Yarlagadda and, thus, the complaint against Yarlagadda must be dismissed (*see Beechler v Kill Bros. Co.*, 170 AD3d 1606, 1608 [4th Dept 2019]; *Allington v Templeton Found.*, 167 AD3d 1437, 1439 [4th Dept 2018]).

Contrary to Yarlagadda's contention, the summary conclusions regarding the cause of the collision contained in the police accident report are not in admissible form and Supreme Court properly declined to consider them. Although a police report is generally admissible as a business record (*see CPLR 4518; Silverman v Sciartelli*, 26 AD3d 761, 762-763 [4th Dept 2006]), "statements contained in the report concerning the cause of an accident constitute inadmissible hearsay unless" a relevant exception to the hearsay rule applies (*Huff v Rodriguez*, 45 AD3d 1430, 1432 [4th Dept 2007]) and, here, there is no applicable exception.

Contrary to Yarlagadda's further contention, triable issues of fact preclude summary judgment dismissing Nelk's cross-claims. Although it is well settled that "[i]n multiple-car, chain-reaction accidents . . . the operator of a vehicle [that] has come to a complete stop and is propelled into the vehicle in front of it as a result of being struck from behind is not negligent inasmuch as the operator's actions cannot be said to be the proximate cause of the injuries resulting from the collision" (*Gustke v Nickerson*, 159 AD3d 1573, 1574 [4th Dept 2018], *lv denied in part & dismissed in part* 32 NY3d 1048 [2018] [internal quotation marks omitted]), here we conclude that Yarlagadda failed to meet his prima facie burden of establishing as a matter of law that he was not negligent or that, even if he was negligent, his negligence was not a proximate cause of the accident (*see Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept 2018]; *cf. Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]). Specifically, the parties' submissions raise triable issues

of fact whether, inter alia, Yarlagadda contributed to the emergency by reasonably failing to notice the disabled vehicle in his lane and whether there was anything he could have done to avoid the collision (*see Zbock*, 145 AD3d at 1523; *see generally Rivera*, 77 NY2d at 327).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

435

CA 24-00820

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

2001, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SHAFFER BUILDING SERVICES, INC., DEFENDANT-APPELLANT,
AND MLT LEASING, LLC, DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

2001, INC., PLAINTIFF-RESPONDENT,

V

SHAFFER BUILDING SERVICES, INC., DEFENDANT-APPELLANT,
AND TDJ PROPERTIES, LLC, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)
(APPEAL NO. 1.)

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

ZISHOLTZ & ZISHOLTZ, LLP, GARDEN CITY (STUART SHALOM ZISHOLTZ OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

MANNION COPANI, SYRACUSE (LAURIE C. OLIVER OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered May 8, 2024. The order, inter alia, granted in part the cross-motions of plaintiff for summary judgment.

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

Memorandum: These consolidated appeals arise out of two actions involving separate roofing projects wherein plaintiff supplied commercial roofing materials to defendant Shaffer Building Services, Inc. (Shaffer), a roofing contractor. Plaintiff commenced the first action, asserting a cause of action against Shaffer and defendant MLT Leasing, LLC (MLT) seeking recovery under a mechanic's lien, a cause of action against Shaffer for an account stated, and a cause of action against Shaffer for breach of contract. On the same day, plaintiff commenced a second action, similarly asserting a cause of action against Shaffer and defendant TDJ Properties, LLC (TDJ) seeking recovery under a mechanic's lien, a cause of action against Shaffer

for an account stated, and a cause of action against Shaffer for breach of contract.

In appeal No. 1, Shaffer, as limited by its brief, appeals from an order insofar as it granted those parts of plaintiff's cross-motions seeking summary judgment on its breach of contract causes of action, denied those parts of Shaffer's cross-motions seeking summary judgment dismissing plaintiff's breach of contract causes of action, and granted those parts of the motions of MLT and TDJ seeking summary judgment dismissing Shaffer's second cross-claims in its answers, which asserted breach of contract claims against MLT and TDJ. Specifically, the second cross-claim in Shaffer's answer in the second action sought damages for work, labor, materials, and roofing services provided to TDJ. In appeal No. 2, Shaffer appeals from a judgment that, inter alia, awarded plaintiff damages against Shaffer on its breach of contract cause of action in the first action. In appeal No. 3, Shaffer appeals from a judgment that, inter alia, awarded plaintiff damages against Shaffer on its breach of contract cause of action in the second action.

As a preliminary matter, we conclude that the appeal from the order in appeal No. 1 must be dismissed inasmuch as that intermediate order is subsumed in the final judgments in appeal Nos. 2 and 3. The appeals from the judgments bring up for review the propriety of the order in appeal No. 1 (see *Matter of Aho*, 39 NY2d 241, 248 [1976]; see also CPLR 5501 [a] [1]).

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent and [t]he best evidence of what parties to a written agreement intend is what they say in their writing" (*Donohue v Cuomo*, 38 NY3d 1, 12 [2022] [internal quotation marks omitted]). "[A] written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.* at 13 [internal quotation marks omitted]; see *Medlock Crossing Shopping Ctr. Duluth, Ga. L.P. v TT Medlock Crossing, LLC*, 210 AD3d 1450, 1451 [4th Dept 2022], *lv dismissed in part & denied in part* 39 NY3d 1102 [2023]). Whether an agreement is ambiguous is a question of law for the courts to decide (see *Donohue*, 38 NY3d at 13). "Where the language chosen by the parties has a definite and precise meaning, there is no ambiguity" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009] [internal quotation marks omitted]; see *Tallo v Tallo*, 120 AD3d 945, 946 [4th Dept 2014]). Ambiguity is determined by looking within the four corners of the document, not to outside sources (see *Donohue*, 38 NY3d at 12-13). "[E]xtrinsic evidence may not be considered unless the document itself is ambiguous" (*Ames v County of Monroe*, 162 AD3d 1724, 1726 [4th Dept 2018]).

"To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction which can fairly be placed thereon" (*Nancy Rose Stormer, P.C. v County of Oneida*, 66 AD3d 1449, 1450 [4th Dept 2009] [internal quotation marks omitted]). We conclude that the invoices

from plaintiff to Shaffer were unambiguous and clearly established that the royalty roof design fees were included in the invoices' totals and therefore were not optional. Plaintiff met its initial burden on the parts of its cross-motions seeking summary judgment on its breach of contract causes of action, by submitting the invoices. Shaffer failed to raise a triable issue of fact, as its opposition papers attempted to introduce extrinsic evidence even though the written agreements were complete and unambiguous on their face (see generally *Cohn v Titan Drilling Corp.*, 79 AD3d 925, 926 [2d Dept 2010]). Thus, Supreme Court properly granted those parts of plaintiff's cross-motions (see *Nancy Rose Stormer, P.C.*, 66 AD3d at 1450; *Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1027 [4th Dept 1995]; see generally *Wilsey v 7203 Rawson Rd., LLC*, 204 AD3d 1497, 1499 [4th Dept 2022]). For similar reasons, we conclude that the court properly denied Shaffer's cross-motions to dismiss plaintiff's breach of contract causes of action (cf. *Harris v Reagan*, 161 AD3d 1346, 1349 [3d Dept 2018]).

We further conclude that the contract between Shaffer and MLT was unambiguous inasmuch as it clearly listed the engineering fee as an optional add-on item, which was not included in the total costs of the roof system. MLT met its burden on that part of its motion seeking summary judgment dismissing Shaffer's breach of contract cross-claim by submitting its contract with Shaffer (see generally *Centerline/Fleet Hous. Partnership, L.P.—Series B v Hopkins Ct. Apts., L.L.C.*, 195 AD3d 1375, 1376-1378 [4th Dept 2021], lv dismissed 37 NY3d 1227 [2022]), and Shaffer failed to raise a triable issue of fact (see generally *Cohn*, 79 AD3d at 926). Therefore, we affirm the judgment in appeal No. 2.

We agree with Shaffer, however, that the court erred with respect to the second action when it granted that portion of TDJ's motion seeking summary judgment dismissing Shaffer's second cross-claim. Initially, we note that the court erred when it determined that there was no contract between Shaffer and TDJ inasmuch as Shaffer's attempts to change the terms of the contract and enforce the engineering fee did not dissolve the agreement that the parties had executed (see *Gui's Lbr. & Home Ctr., Inc. v Mader Constr. Co., Inc.*, 13 AD3d 1096, 1097 [4th Dept 2004], lv dismissed 5 NY3d 842 [2005]).

Even assuming, arguendo, that TDJ met its initial burden on that part of the motion, we conclude that Shaffer raised triable issues of fact whether TDJ owed Shaffer for work, labor, materials, or roofing services, by submitting the affidavit of Shaffer's owner and its invoices to TDJ (see generally *Proline Concrete of WNY, Inc. v G.M. Crisalli & Assoc., Inc.*, 177 AD3d 1368, 1370 [4th Dept 2019]). Because we cannot determine from the record whether Shaffer is owed for the invoiced work allegedly performed before the contract was terminated, we modify the judgment in appeal No. 3 by denying TDJ's motion in part and reinstating Shaffer's second cross-claim against TDJ and remit this matter to Supreme Court for further proceedings

(see generally *F.K. Gailey Co. v Wahl*, 262 AD2d 985, 985-986 [4th Dept 1999]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

436

CA 24-01102

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

2001, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SHAFFER BUILDING SERVICES, INC.,
DEFENDANT-APPELLANT,
AND MLT LEASING, LLC, DEFENDANT.
(APPEAL NO. 2.)

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

ZISHOLTZ & ZISHOLTZ, LLP, GARDEN CITY (STUART SHALOM ZISHOLTZ OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oswego County
(Gregory R. Gilbert, J.), entered July 1, 2024. The judgment awarded
plaintiff money damages against defendant Shaffer Building Services,
Inc.

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

Same memorandum as in *2001, Inc. v Shaffer Bldg. Servs., Inc.*
([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

437

CA 24-01103

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

2001, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SHAFFER BUILDING SERVICES, INC.,
DEFENDANT-APPELLANT,
AND TDJ PROPERTIES, LLC, DEFENDANT.
(APPEAL NO. 3.)

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

ZISHOLTZ & ZISHOLTZ, LLP, GARDEN CITY (STUART SHALOM ZISHOLTZ OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oswego County
(Gregory R. Gilbert, J.), entered July 1, 2024. The judgment awarded
plaintiff money damages against defendant Shaffer Building Services,
Inc.

It is hereby ORDERED that the judgment so appealed from is
unanimously modified on the law by denying the motion of defendant TDJ
Properties, LLC, in part and reinstating the second cross-claim of
defendant Shaffer Building Services, Inc. against defendant TDJ
Properties, LLC, and as modified the judgment is affirmed without
costs and the matter is remitted to Supreme Court, Oswego County, for
further proceedings in accordance with the same memorandum as in *2001,
Inc. v Shaffer Bldg. Servs., Inc.* ([appeal No. 1] – AD3d – [July 25,
2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

441

KA 23-00837

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

WALTER C. GRAHAM, DEFENDANT-APPELLANT.

STEVEN D. SESSLER, GENESEO, FOR DEFENDANT-APPELLANT.

ASHLEY WILLIAMS, DISTRICT ATTORNEY, GENESEO, NEW YORK PROSECUTORS TRAINING INSTITUTE, ALBANY (BRIDGET RAHILLY STELLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered March 2, 2023. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, criminally using drug paraphernalia in the second degree (two counts) and aggravated unlicensed operation of a motor vehicle in the second degree.

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

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

444

KA 24-01625

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAMAR J. BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Julie M. Hahn, J.), rendered June 29, 2023. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree, criminal possession of a controlled substance in the seventh degree, attempted criminal possession of a weapon in the second degree and attempted criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), attempted criminal possession of a weapon in the third degree (§§ 110.00, 265.02 [3]) (collectively, weapons offenses), and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]), defendant contends that the evidence with respect to the weapons offenses is legally insufficient and that the verdict on those counts is against the weight of the evidence. More specifically, defendant asserts that the People failed to establish that he believed that the inoperable gun he possessed was operable. We reject defendant's contentions.

Although the jury, by its verdict with respect to the weapons offenses, evidently agreed with defendant that the firearm at issue was not operable, "it is well settled that a defendant may be convicted of attempted criminal possession of a weapon when [defendant] believes that the firearm is operable" even where, as here, the weapon turns out to be inoperable (*People v Boyd*, 153 AD3d 1608, 1609 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018]; see *People v Saunders*, 85 NY2d 339, 341-342 [1995]; *Matter of David H.*, 255 AD2d 264, 264 [1st Dept 1998]). When apprehended after he fled on foot

from the scene of a drug transaction, defendant said to the police, "You know how it is on these streets. Everyone needs [a gun]," suggesting that he possessed the gun for self-protection. The jury could reasonably have concluded that defendant would not have possessed the gun for self-protection if he knew it was not operable. The fact that the gun was loaded with nine rounds of ammunition also supports a finding that defendant believed that the gun was operable.

Viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence—i.e., defendant's statement to the police and his possession of a loaded gun in public—provided a valid line of reasoning and permissible inferences to support the jury's finding that defendant believed that the gun was operable (*see Matter of Lavar D.*, 90 NY2d 963, 965 [1997]; *see generally People v Clark*, — NY3d —, 2025 NY Slip Op 02102, *1 [2025]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, viewing the evidence in light of the elements of the weapons offenses as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict with respect to those offenses would not have been unreasonable (*see Danielson*, 9 NY3d at 348), "it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Cleveland*, 217 AD3d 1346, 1349 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023], *lv denied* 41 NY3d 942 [2024]).

Defendant further contends that the People failed to comply with their discovery obligations under CPL 245.20 because they did not turn over *Giglio* material in a timely manner and that County Court should have therefore imposed a sanction pursuant to CPL 245.80. Even assuming, *arguendo*, that the People failed to comply with their initial discovery obligations by not turning over the police disciplinary records at issue in a timely manner, we conclude that defendant was not prejudiced by the belated disclosure. The records are innocuous in nature, and defendant had them in time for trial to use for impeachment purposes. Under the circumstances, we cannot conclude that the court erred in failing to impose a discovery sanction (*see generally* CPL 245.80 [1] [a]).

Defendant contends that the court provided confusing and conflicting instructions to the jury on the weapons offenses. Inasmuch as defendant did not object to those instructions, he failed to preserve his contentions for our review (*see generally People v Wright*, 213 AD3d 1196, 1196 [4th Dept 2023]; *People v Vail*, 174 AD3d 1365, 1366 [4th Dept 2019]) and, inasmuch as the court's charge on the weapons offenses followed the Criminal Jury Instructions (*see* CJI2d[NY] Penal Law §§ 110.00, 265.02 [3]; 265.03 [3]), we decline to exercise our power to address defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, his sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that none warrants reversal of modification of the

judgment.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

448

KA 24-00153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES CURTIN, II, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Debra L. Givens, A.J.), rendered January 10, 2024. The judgment convicted defendant, upon his plea of guilty, of possessing a sexual performance by a child.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of possessing a sexual performance by a child (Penal Law § 263.16), defendant contends that certain conditions of his probation were unlawfully imposed and must be stricken.

We note at the outset that defendant does not challenge the validity of his waiver of the right to appeal. Even assuming, arguendo, that defendant's contention that Supreme Court improperly delegated its authority or failed to exercise discretion in imposing conditions of probation survives a valid waiver of the right to appeal, we conclude that his contention is unpreserved for our review inasmuch as he failed to raise that contention at the plea or sentencing proceedings (see *People v Cesar*, 131 AD3d 223, 227 [2d Dept 2015]). Defendant's alternative contention that the challenged " 'probation condition[s] [are] unlawful because [they are] not reasonably related to rehabilitation or [are] outside the authority of the court to impose' " (*People v King*, 151 AD3d 1651, 1652 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]) implicates the legality of defendant's sentence and thus survives even a valid waiver of the right to appeal (see *People v Blanco-Ortiz*, 196 AD3d 1153, 1154 [4th Dept 2021]; *People v Castaneda*, 173 AD3d 1791, 1792 [4th Dept 2019], *lv denied* 34 NY3d 929 [2019], *lv denied* 34 NY3d 1126 [2020]).

We reject defendant's contention that the court erred in imposing conditions that bar defendant from possessing a computer or accessing

the internet subject to certain exceptions and from possessing a cell phone with the ability to take or store photographs or videos. In light of the facts of the offense underlying defendant's conviction and defendant's ability to obtain certain exceptions for employment or educational purposes, we conclude that such conditions are "appropriate and will assist in both defendant's rehabilitation and his ability to lead a law-abiding life" (*Blanco-Ortiz*, 196 AD3d at 1154-1155).

We agree with defendant, however, that the court erred in imposing condition 24—which, as relevant here, barred defendant from having any contact with his daughter—without setting forth the basis on the record for imposing such a condition. Instead, the court concluded that there was "no way to know initially whether . . . defendant poses an actual threat to his own family member child." Inasmuch as condition 24 implicates defendant's "constitutionally protected liberty interest in his relationship with his child" (*United States v Myers*, 426 F3d 117, 125 [2d Cir 2005] [Sotomayor, J.]), we hold the case, reserve decision, and remit the matter to Supreme Court to conduct a hearing to determine whether condition 24 is appropriate under the facts and circumstances presented here (*see generally People v Gould*, 242 AD2d 583, 585 [2d Dept 1997]).

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

451

CAF 24-00545

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

IN THE MATTER OF KATRINA TUTTLE,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KRISTINE WORTHINGTON, DONALD WORTHINGTON,
AND ANDREW WORTHINGTON, RESPONDENTS-APPELLANTS.

MICHAEL J. CAPUTO, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR
RESPONDENTS-APPELLANTS KRISTINE WORTHINGTON AND DONALD WORTHINGTON.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT ANDREW
WORTHINGTON.

MICHAEL J. CAPUTO, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO
SE.

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

Appeals from an order of the Family Court, Allegany County
(Terrence M. Parker, J.), entered March 7, 2024, in a proceeding
pursuant to Family Court Act article 6. The order, among other
things, adjudged that primary placement of the subject child shall
remain with petitioner.

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

Memorandum: Petitioner mother commenced this proceeding pursuant
to Family Court Act article 6 seeking modification of a prior order
that awarded joint custody of the subject child to her, respondent
Andrew Worthington (father), and respondents Kristine Worthington and
Donald Worthington (grandparents), with "primary placement" of the
child with the grandparents and "secondary placement" with the mother
and with the father. In her amended petition for a change in custody,
the mother sought a continuation of the joint custody arrangement but
modification of the child's placement with primary placement of the
child awarded to the mother.

On a prior appeal, we determined that Family Court erred in

concluding that the grandparents had not established extraordinary circumstances giving them standing to contest the mother's amended petition (*Matter of Tuttle v Worthington* [appeal No. 2], 219 AD3d 1142, 1144 [4th Dept 2023]). We therefore reversed the order awarding primary placement of the child to the mother and remitted the matter for a new hearing on her amended petition to determine solely whether the relief "sought by the mother [is] in the best interests of the child" (*id.* at 1145).

Thereafter, the court issued a temporary order awarding custody of the child to the mother pending the best interests hearing. Following the hearing, the court, among other things, determined that it was in the child's best interests to continue primary placement with the mother. The father, the grandparents, and the Attorney for the Child (AFC) (collectively, appellants) now appeal from the resulting order, and we affirm.

Initially, inasmuch as the court entered a final order of custody, the AFC's challenge to the temporary order is moot (*see Matter of Brooks v Greene*, 153 AD3d 1621, 1622 [4th Dept 2017]; *Posporelis v Posporelis*, 41 AD3d 986, 988 [3d Dept 2007]).

We reject appellants' contention that it is in the child's best interests to award primary placement of the child to the grandparents. "The court's determination in a custody matter is entitled to great deference and will not be disturbed where, as here, it is based on a careful weighing of appropriate factors" (*Matter of Foster v Ouderkirk*, 187 AD3d 1573, 1573 [4th Dept 2020] [internal quotation marks omitted]). We conclude that there is a sound and substantial basis in the record for the court's determination that it is in the child's best interests to continue primary placement of the child with the mother (*see id.* at 1574; *Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1582 [4th Dept 2012], *lv denied* 20 NY3d 855 [2013]).

Next, the grandparents' contention concerning the court's alleged bias is unpreserved for our review because they failed to make a motion for the court to recuse itself (*see Matter of Shonyo v Shonyo*, 151 AD3d 1595, 1596 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]). In any event, we conclude that their contention is without merit. The record reveals that "the court listened to the testimony, treated the parties fairly, and, contrary to the [grandparents'] contention, did not have a predetermined outcome of the case in mind during the hearing" (*Matter of Detwiler v Detwiler*, 145 AD3d 778, 781 [2d Dept 2016]; *see Shonyo*, 151 AD3d at 1596-1597).

Finally, we are compelled to remind the Family Court Judge that the AFC's role is to be the advocate for the child, not a neutral observer (*see* 22 NYCRR 7.2 [d]; *Matter of Rotundo v Deptola*, 232 AD3d 1323, 1324 [4th Dept 2024]). To the extent that the Judge determined that the AFC's conduct exhibited an improper bias in favor of the

grandparents over the mother, we disagree and conclude that such conduct was a proper function of his role as the child's advocate.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00734

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

WENDY M. STONE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BRANDON D. HOPKINS, DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, ROCHESTER (KEVIN J. FEDERATION OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered May 2, 2024 in a personal injury action involving a motor vehicle accident. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when the vehicle that she was operating was struck by a vehicle owned and operated by defendant. The collision occurred on a two-lane expressway when it was dark and snowing, with traffic moving slower than usual due to the weather and merging lanes of traffic. According to plaintiff, she was traveling in the right-hand lane when she observed defendant's car in her rearview mirror driving "like a bat out of [hell]" behind her, and defendant's vehicle thereafter struck her vehicle. Plaintiff's testimony established, however, that she had problems with her memory, and she described her account of the accident as "a clip that keeps coming back" to her. According to defendant, he was traveling five miles beneath the speed limit in the left lane when plaintiff's vehicle unexpectedly moved from the right lane into his lane while moving at a slower rate of speed than defendant's vehicle. Defendant applied his brakes but was unable to avoid striking plaintiff's vehicle.

Following joinder of issue and discovery, defendant moved for summary judgment dismissing the complaint, contending that he was not negligent and that he acted reasonably in response to an emergency situation. Supreme Court denied that motion, and we affirm. We conclude that, contrary to defendant's contention, the court properly denied the motion. Even assuming, arguendo, that defendant's account

of the accident controls, given plaintiff's limited ability to recall the accident, we conclude that there are still triable issues of fact that warrant denial of defendant's summary judgment motion.

Although defendant, as " 'a driver of a vehicle with the right-of-way[, was] entitled to anticipate that the driver in the lane next to him . . . [would] obey the traffic laws requiring them to yield to [defendant as the] driver with the right-of-way' " (*Salama v Piccirillo*, 223 AD3d 692, 693 [2d Dept 2024]; see *Moore v Curtiss*, 129 AD3d 1504, 1505 [4th Dept 2015]; *Redd v Juarbe*, 124 AD3d 1274, 1275 [4th Dept 2015]), we nevertheless conclude, after viewing the evidence in the light most favorable to plaintiff (see *Moore*, 129 AD3d at 1505), that defendant's own submissions "raise an issue of fact whether the speed at which [he] was traveling, although reduced because of the weather conditions, was reasonable and prudent under the circumstances" (*id.*; see Vehicle and Traffic Law § 1180 [a]; *Bass v Burrell*, 181 AD3d 1177, 1177 [4th Dept 2020]).

For the same reasons, we conclude that defendant failed to make a prima facie showing of entitlement to judgment as a matter of law based on the emergency doctrine (see *Bass*, 181 AD3d at 1177). " 'If a [trier of fact] determines that [defendant's] speed was unreasonable under the existing weather and road conditions, the [trier of fact] could also conclude that [defendant's] own unreasonable speed was what deprived him of sufficient time to avoid the collision, thereby preventing him from escaping liability under the emergency doctrine' " (*White v Connors*, 177 AD3d 1250, 1252-1253 [4th Dept 2019]). Because defendant failed to meet his initial burden, the burden never shifted to plaintiff to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

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CA 24-01945

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

MRR PROPERTY SOLUTIONS, LLC, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

HAIBO JIANG, DEFENDANT-APPELLANT.

THE GARAS LAW FIRM, LLP, WILLIAMSVILLE (JOHN C. GARAS OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN B. FRIEDMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered August 22, 2024 in a property ejection action. The order, insofar as appealed from, granted the motion of plaintiff for summary judgment, dismissed the counterclaims, determined that plaintiff is entitled to possession of the property, and directed defendant to vacate the property.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, the counterclaims are reinstated, and the third through fifth ordering paragraphs are vacated.

Memorandum: In this real property ejection action, defendant appeals from an order to the extent that it granted plaintiff's motion for summary judgment on the complaint and dismissing defendant's counterclaims, determined that plaintiff is entitled to possession of the property, and directed defendant to vacate the property. We reverse the order insofar as appealed from.

"To establish a prima facie entitlement to ejection, a plaintiff must show that (1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate" (*Stamp Rite Tool & Die Corp. v Branded Leather, Inc.*, 236 AD3d 1076, 1078 [2d Dept 2025] [internal quotation marks omitted]; see *RPAI Pelham Manor, LLC v Two Twenty Four Enters., LLC*, 144 AD3d 1125, 1126 [2d Dept 2016]). Once a plaintiff has met its prima facie burden establishing entitlement to ejection, the burden shifts to the defendant to raise a triable issue of fact (see *RPAI Pelham Manor, LLC*, 144 AD3d at 1126; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, we conclude that plaintiff met its initial burden on the

motion. Plaintiff described two transactions in its motion, i.e., defendant's transfer of the property to a nonparty and the nonparty's transfer of the property thereafter to plaintiff. Plaintiff established, through the submission of an affidavit of one of its members and the relevant warranty deeds, that it is the owner of the property with an immediate right to possession (cf. *Peerless Constr. Co., Inc. v Mancini*, 96 AD2d 666, 667 [3d Dept 1983], lv denied 61 NY2d 601 [1983]; see generally *Ensign v Ensign*, 120 NY 655, 656 [1890]; *Streeter Constr. Co. v Kenny*, 209 App Div 697, 703 [1st Dept 1924]). Moreover, it is undisputed that defendant is in possession of the property (see generally *Gibson v Thomas*, 180 NY 483, 493 [1905]; *Ward v Ward*, 52 AD3d 919, 921 [3d Dept 2008]).

We agree with defendant, however, that he raised triable issues of fact sufficient to defeat the motion. " '[I]f an owner purports to convey title to real property as security for a loan; the conveyance is deemed to create a lien rather than an outright conveyance, even though the deed was recorded' " (*RTT Holdings, LLC v Nacht*, 206 AD3d 836, 840-841 [2d Dept 2022]; see *Booth v Landau*, 103 AD2d 733, 734 [2d Dept 1984], appeal dismissed 63 NY2d 764 [1984]). Here, defendant submitted, inter alia, his own affidavit as well as a memorandum prepared by the nonparty that raised issues of fact whether the first transaction between defendant and the nonparty constituted a mortgage. Indeed, the memorandum stated, "[w]e will deal with the \$600,000 loan (plus interest) later when we sell the house back to you" (see generally *Bouffard v Befese, LLC*, 111 AD3d 866, 869 [2d Dept 2013]). Viewing the facts in the light most favorable to defendant as the nonmoving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), we conclude that defendant raised an issue of fact requiring denial of plaintiff's motion.

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

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CA 24-01457

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

JOHN PATRICK WINTER, PLAINTIFF-APPELLANT,

V

ORDER

TOWN OF NEW HARTFORD CENTRAL SCHOOL DISTRICT,
BOARD OF EDUCATION OF TOWN OF NEW HARTFORD
CENTRAL SCHOOL DISTRICT, COSIMO TANGORRA, JR., ED.D.,
SCOTT GAFFNEY, DIRECTOR OF TRANSPORTATION,
MARY MANDEL, ASSISTANT SUPERINTENDENT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

NORMAN P. DEEP, CLINTON, FOR PLAINTIFF-APPELLANT.

FERRARA FIORENZA PC, EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), entered February 15, 2024 in an action seeking damages for employment discrimination and violation of the Human Rights Law. The order granted that part of the motion of defendants-respondents seeking summary judgment dismissing the amended complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Aho*, 39 NY2d 241, 248 [1976]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

459

CA 24-02026

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

JOHN PATRICK WINTER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOWN OF NEW HARTFORD CENTRAL SCHOOL DISTRICT,
BOARD OF EDUCATION OF TOWN OF NEW HARTFORD
CENTRAL SCHOOL DISTRICT, COSIMO TANGORRA, JR., ED.D.,
SCOTT GAFFNEY, DIRECTOR OF TRANSPORTATION,
MARY MANDEL, ASSISTANT SUPERINTENDENT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

NORMAN P. DEEP, CLINTON, FOR PLAINTIFF-APPELLANT.

FERRARA FIORENZA PC, EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (James P. McClusky, J.), entered October 22, 2024 in an action seeking damages for employment discrimination and violation of the Human Rights Law. The judgment dismissed the amended complaint.

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

Memorandum: Plaintiff, a bus driver previously employed by defendant Town of New Hartford Central School District (District), commenced this action seeking, among other things, to recover damages based on allegations that defendant violated the Human Rights Law (Executive Law § 290 *et seq.*) by engaging in age discrimination against him, and violated article 1, § 8 of the New York State Constitution by retaliating against him for, among other things, complaining about failures to follow certain safety precautions. Prior to the commencement of this action, the District had terminated plaintiff's employment, and thereafter plaintiff's union filed a grievance on his behalf. The matter ultimately proceeded to arbitration to determine whether the District had just cause to discipline plaintiff under the terms of the collective bargaining agreement between the District and plaintiff's union and, if so, whether termination or some other discipline was appropriate. The arbitrator concluded, following a hearing, that the District had just cause to terminate plaintiff.

While the arbitration was pending, plaintiff commenced this action. Prior to discovery, defendants-respondents (defendants) moved for, among other things, summary judgment dismissing the amended complaint. In support of the motion, defendants argued that plaintiff's claims were collaterally estopped as a result of the arbitration award. Supreme Court effectively agreed with defendants and granted the motion insofar as it sought summary judgment. Plaintiff appeals from the judgment dismissing the amended complaint, and we reverse.

We conclude that the court erred in granting the motion to the extent that it sought summary judgment based upon the application of collateral estoppel. It is well settled that there are " 'but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling' " (*Zoeller v Lake Shore Sav. Bank*, 140 AD3d 1601, 1602 [4th Dept 2016]). "The party seeking to invoke collateral estoppel has the burden of showing the identity of the issue, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate" (*Bonner v Lynott*, 203 AD3d 1526, 1531 [3d Dept 2022]; see *Bielby v Middaugh*, 120 AD3d 896, 898-899 [4th Dept 2014]).

Here, defendants failed to establish identity of issue necessary for application of that doctrine inasmuch as "the arbitration proceeding concerned whether the allegedly unlawful actions by [the District] violated the collective bargaining agreement between [the] union and the District" and did not address plaintiff's claims of discrimination or retaliation (*Matter of Kruse v New York State Div. of Human Rights*, 85 AD3d 1609, 1609 [4th Dept 2011]; see *Mouscardy v Consolidated Edison Co. of N.Y., Inc.*, 185 AD3d 579, 581 [2d Dept 2020]). We therefore reverse the judgment, deny the motion, and reinstate the amended complaint. Plaintiff's remaining contentions are academic in light of the foregoing.

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

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KA 22-02031

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAFAYEL WRIGHT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Debra L. Givens, A.J.), rendered October 19, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that Supreme Court erred in refusing to suppress physical evidence obtained as a result of an encounter with the police. We reject that contention.

According to the evidence presented at the suppression hearing, an officer was riding in a patrol vehicle driven by his partner when they received information over the computer-aided dispatch system and police radio that an unidentified 911 caller had reported an assault of a female victim in progress in the vicinity of a certain street corner. The officer was advised of the description of the suspect that had been provided by the 911 caller, including the suspect's perceived heritage, sex, age, and other physical characteristics, as well as the suspect's clothing and direction of travel. Within minutes and a few blocks away from the reported incident, the officer observed an individual walking down a sidewalk—later identified as defendant—who fit the description of the suspect. There was no one else in the vicinity who matched that description.

The officer's hearing testimony and his body-worn camera (BWC) footage further established that, after his partner pulled over the patrol vehicle with its overhead lights activated, the officer exited

the vehicle and immediately yelled "stop." Without turning around or otherwise acknowledging the officer's command, defendant began to run down the sidewalk. The officer pursued defendant. During the pursuit, the officer used his radio to report that the suspect had been located and thereafter again shouted "stop." The officer testified that he never removed his service weapon from the holster during the encounter and never told defendant that he needed to stop on account of the officer having a service weapon.

Defendant ran down a driveway between houses and attempted to jump a fence, at which point the officer ordered defendant to the ground. Defendant instead pushed off from the officer following brief physical contact and ran back onto the street, where he was quickly apprehended by other law enforcement personnel. The officer testified that, during the interaction that occurred near the fence, he had observed defendant reach into his waistband and throw a black pistol over his shoulder into a yard. Shortly after defendant was detained, a black pistol was recovered from the area in which the officer had observed defendant throw the firearm.

The court determined that the information possessed by the officer at the outset of the encounter—i.e., his observation of an individual matching the description of the suspect provided by the 911 caller in close proximity to the reported assault—provided the police with a founded suspicion that defendant may have been involved in criminal activity, thereby giving rise to a common-law right of inquiry. The court further reasoned that, as a result of defendant's flight upon the officer's request to stop, the police obtained reasonable suspicion that defendant had committed a crime, thereby justifying the pursuit and forcible detention of defendant. The court thus concluded that the police conduct was justified and refused to suppress the physical evidence obtained as a result of the encounter.

"A court's focus during 'any analysis of a governmental invasion of a citizen's person' must be on the reasonableness of the police conduct" (*People v Cleveland*, — NY3d —, —, 2025 NY Slip Op 02144, *2 [2025]; see *People v De Bour*, 40 NY2d 210, 218 [1976]). "In evaluating police conduct, a court 'must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter' " (*People v Savage*, 137 AD3d 1637, 1638 [4th Dept 2016]; see *De Bour*, 40 NY2d at 222-223). As set forth in *De Bour*, the court uses "a graduated four-level test for evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion [but short of a forcible seizure] and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; [and] level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime" (*People v Moore*, 6 NY3d 496, 498-499 [2006]; see *De Bour*, 40 NY2d at 223).

As particularly relevant here, "[u]nder New York law, one may be seized if the police action results in a 'significant interruption [of the] individual's liberty of movement' " (*People v Bora*, 83 NY2d 531, 534 [1994], quoting *De Bour*, 40 NY2d at 216). "Police pursuit of an individual 'significantly impede[s]' the person's freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Holmes*, 81 NY2d 1056, 1057-1058 [1993]). "[A]n individual's flight from a level one or two police encounter, without more, does not provide the reasonable suspicion necessary to pursue them" (*Cleveland*, — NY3d at —, 2025 NY Slip Op 02144, *1; see *People v May*, 81 NY2d 725, 728 [1992]; *Holmes*, 81 NY2d at 1058). Nevertheless, "a defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929 [1994]; see *People v Parker*, 32 NY3d 49, 56 [2018]; *People v Woods*, 98 NY2d 627, 628 [2002]).

Defendant first asserts that the officer, without the requisite reasonable suspicion to justify the intrusion, immediately engaged in a level three seizure by using a forceful tone in verbally commanding defendant to stop because a reasonable person in defendant's position would have believed that the officer's conduct was a significant limitation on their freedom. We conclude that defendant's assertion lacks merit.

"While the language used by [the] police may, in some instances, be so forceful and intimidating that it constitutes the seizure of an individual," "a verbal command, standing alone, will not usually constitute a seizure" (*Bora*, 83 NY2d at 535-536). "The test is whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on [their] freedom" (*id.* at 535). "Typically the inquiry involves a consideration of all the facts and a weighing of their individual significance: was the officer's gun drawn, was the individual prevented from moving, how many verbal commands were given, what was the content and tone of the commands, how many officers were involved and where the encounter took place" (*id.* at 535-536).

Here, contrary to defendant's assertion, the evidence adduced at the suppression hearing, including the BWC footage, establishes that the officer's first command for defendant to stop was not "so forceful and intimidating that it [alone] constitute[d a] seizure" (*id.* at 536; see *People v Moore*, 93 AD3d 519, 519-522 [1st Dept 2012], *lv denied* 19 NY3d 865 [2012]; *People v Boland*, 89 AD3d 1144, 1145 [3d Dept 2011], *lv denied* 18 NY3d 955 [2012]; see also *People v Simmons*, 149 AD3d 1464, 1465 [4th Dept 2017], *affd* 30 NY3d 957 [2017]; *People v Brown*, 67 AD3d 1439, 1439-1440 [4th Dept 2009], *lv denied* 14 NY3d 798 [2010]). Further, considering all of the facts, we conclude that the officer's first "command to 's[top],' in a public setting, with gun holstered, and without any physical restraint on defendant's freedom of movement, did not constitute a seizure" (*Simmons*, 149 AD3d at 1465;

see *Bora*, 83 NY2d at 535-536; *Moore*, 93 AD3d at 519-522; *Boland*, 89 AD3d at 1145).

Defendant next asserts that, even if he was not immediately seized when the officer first commanded him to stop, his flight was insufficient under the totality of the circumstances to provide the officer with the requisite reasonable suspicion to pursue and detain him. That assertion likewise lacks merit.

Here, "[b]ased upon defendant's physical and temporal proximity to the scene of the reported [assault] incident and the fact that defendant's physical characteristics and clothing matched the description of [the suspected assailant] involved in the incident," we conclude that the officer "had a founded suspicion that criminal activity was afoot," thereby providing a sufficient basis for him to approach and make an inquiry of defendant (*People v Atkinson*, 185 AD3d 1438, 1439 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]; see *People v Gayden*, 126 AD3d 1518, 1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]; see generally *De Bour*, 40 NY2d at 223). Contrary to defendant's assertion, we further conclude that the court properly determined that the officer "thereafter had the requisite reasonable suspicion to pursue and detain [defendant] based on the combination of the abovementioned specific circumstances indicating that defendant may have been engaged in criminal activity and his [immediate] flight in response to the approach by the officer[]" (*Atkinson*, 185 AD3d at 1439; see *Parker*, 32 NY3d at 56-57; *Gayden*, 126 AD3d at 1518; *People v Johnson*, 189 AD3d 2145, 2146-2147 [4th Dept 2020], *lv denied* 36 NY3d 1098 [2021]).

We therefore conclude that the court properly determined that the police conduct was justified and refused to suppress the physical evidence obtained as a result of the encounter.

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

465

KA 21-00875

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVON D. BANKS, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Suzanne Maxwell Barnes, J.), rendered April 29, 2021. The judgment convicted defendant upon a plea of guilty of attempted strangulation 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 strangulation in the second degree (Penal Law §§ 110.00, 121.12). We affirm. Initially, as defendant correctly contends, the record does not establish that he validly waived his right to appeal inasmuch as County Court's oral colloquy mischaracterized the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *People v Zabko*, 206 AD3d 1642, 1642-1643 [4th Dept 2022]; *People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]). Thus, we are not precluded from reviewing defendant's challenge to the court's ruling on his statutory speedy trial motion (*cf. People v Kelly*, 231 AD3d 1515, 1516 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *see generally People v Lyon*, 227 AD3d 1521, 1522 [4th Dept 2024], *lv denied* 42 NY3d 928 [2024]).

Defendant contends that the court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30), arguing that the People's total period of unreadiness for trial exceeded six months. The People contend that defendant's speedy trial motion is not properly before us inasmuch as he withdrew the motion before he pleaded guilty. We reject that contention because, as the record clearly shows, defendant withdrew only his motion to *renew* his speedy trial motion, not the original motion itself. Thus,

defendant's speedy trial contention is properly before us inasmuch as he never withdrew the original motion, and the court expressly ruled on it before defendant pleaded guilty (*cf. People v Gilliam*, 96 AD3d 1650, 1651 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]; *People v Thousand*, 41 AD3d 1272, 1273 [4th Dept 2007], *lv denied* 9 NY3d 927 [2007]).

With respect to the merits, "[i]n felony cases such as this one, CPL 30.30 requires the People to be ready for trial within six months of the commencement of the criminal action (CPL 30.30 [1] [a]). Whether the People have satisfied this obligation is generally determined by computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion" (*People v Cortes*, 80 NY2d 201, 208 [1992], *rearg denied* 81 NY2d 1068 [1993]). "[A] defendant bears the initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]). The People then "bear the burden of demonstrating sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]; *see Allard*, 28 NY3d at 45).

Here, the criminal action was commenced on June 14, 2018, when the felony complaint was filed (*see* CPL 1.20 [17]; *People v Session*, 206 AD3d 1678, 1680 [4th Dept 2022]). Inasmuch as defendant was charged with a felony, the People were permitted no more than six calendar months of delay or, in this case, 183 days (*see* CPL 30.30 [1] [a]; *Cortes*, 80 NY2d at 207 n 3 [1992]). There is no dispute that defendant met his "initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*Allard*, 28 NY3d at 45; *see* CPL 30.30 [1] [a]; *People v Anderson*, 188 AD3d 1699, 1699 [4th Dept 2020], *lv denied* 36 NY3d 1055 [2021]), thereby shifting the burden to the People to demonstrate "sufficient excludable time" (*Kendzia*, 64 NY2d at 338).

Regarding the period of prereadiness delay, we conclude that the People should be charged with 141 days. Defendant was charged by felony complaint on June 14, 2018, and the People announced readiness for trial upon defendant's indictment on November 9, 2018 (*see generally People v Carter*, 91 NY2d 795, 797 [1998]). The day the felony complaints were filed is excluded from the time calculations (*see People v Stiles*, 70 NY2d 765, 767 [1987]; *People v Harrison*, 171 AD3d 1481, 1482 [4th Dept 2019]). We conclude that the People should be charged with the four days that elapsed between June 14, 2018, and June 18, 2018. We further conclude that the People should only be charged with two days between June 18, 2018, and June 27, 2018—the latter date being when the felony hearing was conducted—inasmuch as defendant expressly waived some of that time, and other time was excludable due to a conflict between defendant and counsel (*see* CPL 30.30 [4] [f]; *Harrison*, 171 AD3d at 1482). Further, we conclude that the People should be charged with the 135 days that elapsed between

the felony hearing and the People's statement of readiness.

Next, with respect to the postreadiness periods, the time between the People's statement of readiness on November 9, 2018, and the originally scheduled arraignment date of November 26, 2018, should not be charged to the People. Indeed, it is well settled that the duty to schedule an arraignment remains with the court (*see Carter*, 91 NY2d at 799; *People v Rickard*, 71 AD3d 1420, 1421 [4th Dept 2010], *lv denied* 15 NY3d 809 [2010]; *see also People v Goss*, 87 NY2d 792, 798 [1996]). Defendant contends that the People should be charged with the 21 days that elapsed between the original arraignment date and December 17, 2018—when the arraignment on the indictment ultimately occurred—inasmuch as the People failed to produce defendant in court on November 26, 2018. The People assert that they should be charged with only 10 days of that time period based on their request for an adjournment of that length. We agree with the People. Although defendant argues that the entire 21-day period is chargeable to the People due to an alleged failure to produce defendant in court, he does not dispute the fact that defense counsel also did not appear in court for the originally scheduled arraignment. Thus, we cannot say that the entire 21-day period between the originally scheduled arraignment and the actual arraignment was solely attributable to the People such that they should be charged with any time in excess of the 10-day adjournment they requested (*see generally* CPL 30.30 [4] [f]; *People v Mannino*, 306 AD2d 157, 158 [1st Dept 2003], *lv denied* 100 NY2d 643 [2003]; *People v David*, 253 AD2d 642, 644 [1st Dept 1998], *lv denied* 92 NY2d 948 [1998]).

Defendant further contends that the People are chargeable with the time that elapsed from January 30, 2019, through April 2, 2019, because they did not produce defendant in court during that time period. We reject that contention. For the time period of January 30, 2019, to March 4, 2019, we conclude that such time was excludable because the court had to reschedule the appearances based on its own calendar. Of course, "postreadiness delay attributable to the court is not charged to the People" (*People v Brown*, 28 NY3d 392, 404 [2016] [internal quotation marks omitted]; *see Goss*, 87 NY2d at 797). Additionally, we conclude that the period from March 4, 2019, to April 2, 2019, is not chargeable to the People inasmuch as the matter had been adjourned in anticipation of various pretrial motions—including, relevantly, defendant's motion to suppress statements, requiring the court to conduct a *Huntley* hearing (*see generally* CPL 30.30 [4] [a]; *People v Brown*, 99 NY2d 488, 492 [2003]; *People v Campos*, 124 AD3d 434, 434-435 [1st Dept 2015], *lv denied* 26 NY3d 927 [2015]).

Indeed, although defendant contends that additional periods of postreadiness delay should be charged to the People, we conclude that all of those periods are excludable inasmuch as defendant's filing of the suppression motion stopped the speedy trial clock for the remainder of the time that elapsed until defendant made his speedy trial motion (*see People v Jordan*, 220 AD3d 1187, 1188 [4th Dept 2023]; *People v Edmead*, 197 AD3d 937, 939 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1160 [2022]; *see generally* CPL 30.30 [4] [a]). At all relevant times, the

matter was either adjourned in anticipation of the *Huntley* hearing or adjourned because the motion was still pending (see CPL 30.30 [4] [a]; *Jordan*, 220 AD3d at 1188; *People v Bruno*, 300 AD2d 93, 95 [1st Dept 2002], *lv denied* 100 NY2d 641 [2003]). Because all of that time was excludable due to the court's consideration of the suppression motion, we need not consider the People's alternative argument that some of that time was not chargeable to them due to "exceptional circumstances" (CPL 30.30 [4] [g]).

We also reject defendant's contention that the People should be charged with a period of delay based on their failure to produce the grand jury minutes. That is because "[a]djournments which are otherwise excludable pursuant to CPL 30.30 (4) are excludable from the period of non-production of grand jury minutes" (*People v Hayes*, 180 AD3d 423, 424 [1st Dept 2020], *lv denied* 35 NY3d 993 [2020] [internal quotation marks omitted]). Regardless, we note that such time would also be excludable where, as here, defendant failed to show that the People's failure to produce the grand jury minutes "caused any delay whatsoever in the progress of the case" (*People v Beasley*, 69 AD3d 741, 743 [2d Dept 2010], *affd* 16 NY3d 289 [2011]).

Consequently, because the People could only be charged with a total of 151 days (i.e., 141 days of prereadiness delay, plus 10 days of postreadiness delay), we conclude that the court properly denied defendant's motion to dismiss the indictment on speedy trial grounds (see generally CPL 30.30).

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

467

KA 22-01193

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MIGUEL A. COTTO, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered December 2, 2021. The judgment convicted defendant, upon a nonjury verdict, of predatory sexual assault against 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 nonjury verdict, of predatory sexual assault against a child (Penal Law former § 130.96), arising from defendant's repeated sexual abuse of his girlfriend's daughter (victim). We affirm.

Contrary to defendant's contention, Supreme Court properly denied his motion to dismiss the indictment on speedy trial grounds, without a hearing, because defendant failed to meet his initial burden on the motion. "CPL 30.30 requires dismissal of a felony indictment where the People are not ready for trial within six months of the commencement of the criminal action" (*People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]; see CPL 30.30 [1] [a]). On a motion to dismiss an indictment on speedy trial grounds (see CPL 30.30 [1]; 210.20 [1] [g]), "a defendant bears the initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]). The defendant meets that burden "simply 'by alleging only that the prosecution failed to declare readiness within the statutorily prescribed time period'" (*People v Goode*, 87 NY2d 1045, 1047 [1996]; see *People v Santos*, 68 NY2d 859, 861 [1986]).

Here, although defendant alleged in support of the motion that he was entitled to dismissal of the indictment on the ground that the People's failure to disclose certain material discoverable under CPL

245.20 rendered their certificate of compliance improper and their statement of readiness illusory, defendant did not allege the commencement date of the criminal action, that the statutorily prescribed time period was six months, or that an unexcused delay of more than six months had elapsed since the commencement of the action (see *People v Welch*, 2 AD3d 1354, 1357-1358 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]; cf. *People v Agee*, 235 AD3d 1247, 1248 [4th Dept 2025]). Inasmuch as the motion lacked "sworn allegations that there has been unexcused delay in excess of the statutory maximum" (*Santos*, 68 NY2d at 861), defendant "failed to come forward with sworn allegations supporting all the essential facts" (*People v Simmons*, 135 AD3d 1193, 1194 [3d Dept 2016], *lv denied* 27 NY3d 1006 [2016] [internal quotation marks omitted]; see CPL 210.45 [5] [b]). Defendant thus "failed to satisfy his initial burden under CPL 30.30 of alleging that the prosecution [did not] declare readiness within the statutorily prescribed time period" (*Welch*, 2 AD3d at 1357-1358 [internal quotation marks omitted]; cf. *People v Ryan*, 237 AD3d 754, 755-756 [2d Dept 2025]; *Agee*, 235 AD3d at 1248).

Defendant's further contention that witnesses provided details of the victim's disclosure that exceeded the scope of the prompt outcry exception to the hearsay rule is not preserved for our review inasmuch as defendant either failed to object or made only a general objection to the testimony he now challenges on appeal (see *People v Batista*, 92 AD3d 793, 793 [2d Dept 2012], *lv denied* 19 NY3d 957 [2012]; *People v Edwards*, 90 AD3d 1575, 1576 [4th Dept 2011], *lv denied* 18 NY3d 993 [2012]; *People v Arredondo*, 226 AD2d 322, 323 [1st Dept 1996], *lv denied* 88 NY2d 964 [1996]; see generally CPL 470.05 [2]). In any event, we conclude that the testimony about the victim's disclosure "did not exceed the allowable level of detail" (*People v McDaniel*, 81 NY2d 10, 18 [1993]; see *People v Rath*, 192 AD3d 1600, 1601 [4th Dept 2021], *lv denied* 37 NY3d 959 [2021]; *People v Garrow*, 126 AD3d 1362, 1363 [4th Dept 2015]). Even assuming, arguendo, that the minimal details to which the witnesses testified exceeded the allowable level of detail under the prompt outcry exception, we conclude that the error is harmless (see *People v Sanford*, 148 AD3d 1580, 1583 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]; see generally *People v Rice*, 75 NY2d 929, 932 [1990]). The proof of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (see *Rice*, 75 NY2d at 932; *Sanford*, 148 AD3d at 1583). Contrary to defendant's related contention, defense counsel was not ineffective for failing to object to the testimony as exceeding the scope of the prompt outcry exception because "[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 Healy*, 182 AD3d 1014, 1016 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]; *People v Santana*, 179 AD3d 1299, 1302 [3d Dept 2020], *lv denied* 35 NY3d 973 [2020]).

Defendant next contends that he was deprived of a fair trial by the admission of the victim's unredacted medical records and the testimony of a nurse regarding statements made by the victim during a

sexual assault examination because that evidence exceeded the scope of the diagnosis and treatment exception to the hearsay rule. That contention is not preserved for our review because defendant failed to object to the admission of the evidence on the ground now advanced on appeal (see *People v Emanuel*, 89 AD3d 1481, 1482 [4th Dept 2011], *lv denied* 18 NY3d 882 [2012]; *People v Anderson*, 184 AD2d 1005, 1006 [4th Dept 1992], *lv denied* 80 NY2d 926 [1992]; see generally *Edwards*, 90 AD3d at 1576). In any event, we conclude that the statements recounted in the nurse's testimony and in the medical records were properly admitted in evidence inasmuch as those statements fell within the exception to the hearsay rule for statements relevant to medical diagnosis or treatment (see *People v Spicola*, 16 NY3d 441, 451-453 [2011], *cert denied* 565 US 942 [2011]; *People v Mirabella*, 126 AD3d 1367, 1367 [4th Dept 2015], *lv denied* 25 NY3d 1168 [2015]; *Emanuel*, 89 AD3d at 1482). Even assuming, *arguendo*, that some of the statements went beyond that exception, we conclude that defendant was not deprived of a fair trial because the error was harmless (see *Rath*, 192 AD3d at 1602; see generally *People v Ortega*, 15 NY3d 610, 619-620 [2010]). Finally, contrary to defendant's related contention, defense counsel was not ineffective for failing to object to the statements as exceeding the scope of the exception (see *Mirabella*, 126 AD3d at 1368; see generally *Caban*, 5 NY3d at 152).

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

473

CA 24-00863

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

CONCEPCION T. CONWAY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

EUGENE C. CONWAY, DECEASED, DEFENDANT,
AND NICOLE LUNDER, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

THE SCHUPPENHAUER LAW FIRM, P.C., CANANDAIGUA (JOHN A. SCHUPPENHAUER
OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DUKE LAW FIRM, P.C., LAKEVILLE (SUSAN K. DUKE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County
(Frederick G. Reed, A.J.), entered November 29, 2023 in a postjudgment
matrimonial proceeding. The order, inter alia, dismissed all claims
against defendant Nicole Lunder.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by vacating that part of the order
dismissing the claims against defendant Nicole Lunder, amending the
caption to identify her as "Nicole Lunder, Individually and as
Administrator of the Estate of Decedent Eugene C. Conway," and
granting plaintiff's application for entry of an amended Qualified
Domestic Relations Order (QDRO), and as modified the order is affirmed
without costs and Supreme Court is directed to strike from the
proposed amended QDRO the language "together with interest thereon at
the rate of 9% per annum from January 7, 2019, to the date of the
establishment of the account for the benefit of," and to replace it
with the language "as of January 7, 2019, or the closest valuation
dates thereto from the date of the establishment of the subject
account, which sum shall include all investment gains and losses
associated with said principal sum through the date of distribution
to", and to enter the proposed amended QDRO as modified.

Memorandum: These consolidated appeals arise from a postjudgment
matrimonial proceeding commenced by plaintiff against her deceased ex-
husband (decedent) and his daughter (defendant) in which plaintiff
seeks to amend a Qualified Domestic Relations Order (QDRO). Plaintiff
moved for, inter alia, summary judgment on her application, and
defendant cross-moved for an order, inter alia, dismissing with
prejudice all claims against her and vacating the QDRO. Plaintiff
appeals in appeal No. 1 from an order that dismissed the proceeding

without prejudice to refile in Surrogate's Court and dismissed with prejudice all claims against defendant. Plaintiff appeals in appeal No. 2 from an order that denied her motion for leave to reargue the motion and cross-motion, effectively granted defendant's motion for leave to reargue the cross-motion insofar as the cross-motion sought an order vacating the QDRO, and, upon reargument, vacated the QDRO. We modify in appeal No. 1 and in appeal No. 2.

During their divorce proceeding, plaintiff and decedent entered into a separation and property settlement agreement (PSA) that, *inter alia*, identified and distributed their marital assets (*see generally* Domestic Relations Law § 236 [B] [3]). As part of the stipulated distributive award, the parties agreed that decedent's "pre-tax [IRA] account(s) through Charles Schwab[]" were marital assets, that plaintiff was entitled to 50% of the value of the Schwab IRA accounts, and that plaintiff's equitable share of the Schwab IRA accounts would be transferred into a like account in plaintiff's name alone "plus or minus any losses or gains on said amount as of the date of transfer." Prior to the entry of the judgment of divorce, however, decedent liquidated the Schwab IRA accounts and transferred the remaining qualified funds to an IRA at Equity Trust Company (Equity IRA), investing the principal in precious metals. The Equity IRA was titled solely to decedent and it named defendant as the beneficiary. Plaintiff thereafter obtained the QDRO directing Equity Trust Company to transfer to her the transmuted funds from her marital share of the Schwab IRA accounts. Equity Trust Company, in turn, advised plaintiff that it required an amended QDRO directing the sale of precious metals in order to transfer the transmuted funds. Following decedent's death, plaintiff commenced the instant postjudgment matrimonial proceeding against defendant, individually and as administrator of decedent's estate, seeking amendment of the QDRO.

Preliminarily, we note that no appeal lies from the portion of the order in appeal No. 2 denying plaintiff's motion for leave to reargue (*see OnBank & Trust Co. v Dimovich*, 197 AD2d 857, 857 [4th Dept 1993]).

With respect to the merits, in appeal No. 2, we agree with plaintiff that Supreme Court erred in vacating the QDRO. Contrary to defendant's contention, the funds in the Schwab IRA accounts remained marital assets subject to equitable distribution in accordance with the PSA (*see* Domestic Relations Law § 236 [B] [1] [c]), despite decedent's transfer and transmutation of those funds in violation of the applicable statutory automatic order (*see* § 236 [B] [2] [b] [2]; *Roberson-Fisch v Fisch*, 236 AD3d 554, 555-556 [1st Dept 2025]; *Mage v Mage*, 174 AD3d 884, 887 [2d Dept 2019]), and, thus, the QDRO was properly issued to effectuate the PSA's terms (*see Kraus v Kraus*, 131 AD3d 94, 100 [2d Dept 2015]; *cf. Santillo v Santillo*, 155 AD3d 1688, 1689 [4th Dept 2017]). We therefore modify the order in appeal No. 2 by denying defendant's motion for leave to reargue her cross-motion and denying her cross-motion insofar as it sought to vacate the QDRO.

In appeal No. 1, we agree with plaintiff that the court erred in dismissing her claims against defendant. Inasmuch as Supreme Court's

"subject matter jurisdiction over a matrimonial matter does not end upon the death of one party" (*Perry v McMahan*, 188 AD3d 738, 739 [2d Dept 2020]; see *Charasz v Rozenblum*, 128 AD3d 631, 631 [2d Dept 2015]; *Cristando v Lozada*, 118 AD3d 846, 847 [2d Dept 2014], lv denied 24 NY3d 913 [2015]), plaintiff's application was properly brought in Supreme Court with defendant, as administrator of decedent's estate, substituted as the estate representative (see CPLR 1015 [a]). To the extent that the caption was not properly amended to reflect defendant's substitution, on our own motion we amend the caption accordingly (see *Dougherty v Latorre*, 206 AD3d 1580, 1580 [4th Dept 2022]). We further note that defendant is also a proper defendant in her individual capacity inasmuch as she is a "third-party transferee[] of marital property subject to a distribution dispute" and, thus, a necessary party (*Schmidt v Schmidt*, 99 AD2d 775, 776 [2d Dept 1984]; see *Solomon v Solomon*, 136 AD2d 697, 698 [2d Dept 1988]) and because plaintiff makes direct claims against her for a constructive trust and attorney's fees (see CPLR 1001 [a]; *Matter of Harold*, 112 AD3d 929, 931-932 [2d Dept 2013]; see generally *Solomon*, 136 AD2d at 698).

We also agree with plaintiff that the court erred in effectively denying in its entirety her application to amend the QDRO. "A stipulation of settlement that is incorporated but not merged into a judgment of divorce is a contract subject to the principles of contract construction and interpretation" (*Gay v Gay*, 207 AD3d 1189, 1190 [4th Dept 2022] [internal quotation marks omitted]), must be "construed in accord with the parties' intent" and, where it is "complete, clear and unambiguous on its face[,] must be enforced according to the plain meaning of its terms" (*Sears v Sears*, 138 AD3d 1401, 1401 [4th Dept 2016] [internal quotation marks omitted]). "QDROs are . . . procedural mechanisms for effectuating payment of a spouse's share of the other spouse's pension" in accordance with the terms of a stipulation of settlement (*Kraus*, 131 AD3d at 104), and "where a QDRO fails to distribute property pursuant to an agreement, an amended QDRO may be submitted to effectuate the parties' agreement" (*A.F. v D.F.*, 85 Misc 3d 1214[A], 2025 NY Slip Op 50160[U], *3 [Sup Ct, Nassau County 2025]; see *Kraus*, 131 AD3d at 100). Here, plaintiff and decedent stipulated that 50% of the funds in the Schwab IRA accounts were to be transferred to plaintiff, and plaintiff is therefore entitled to an amended QDRO as necessary to effectuate that agreement. Inasmuch as "[a] proper QDRO obtained pursuant to a stipulation of settlement can convey only those rights to which the parties stipulated as a basis for the judgment" (*Gay*, 207 AD3d at 1190), however, we agree with defendant that plaintiff is not entitled to attorney's fees or statutory interest in the amended QDRO. We modify the order in appeal No. 1 accordingly.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

474

CA 24-01763

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

CONCEPCION T. CONWAY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

EUGENE C. CONWAY, DECEASED, DEFENDANT,
AND NICOLE LUNDER, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

THE SCHUPPENHAUER LAW FIRM, P.C., CANANDAIGUA (JOHN A. SCHUPPENHAUER
OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DUKE LAW FIRM, P.C., LAKEVILLE (SUSAN K. DUKE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County
(Frederick G. Reed, A.J.), entered February 7, 2024 in a postjudgment
matrimonial proceeding. The order, inter alia, denied the motion of
plaintiff for leave to reargue.

It is hereby ORDERED that said appeal from the order insofar as
it denied plaintiff's motion for leave to reargue is unanimously
dismissed and the order is modified on the law by denying defendant
Nicole Lunder's motion for leave to reargue her cross-motion and
denying her cross-motion insofar as it sought to vacate the Qualified
Domestic Relations Order and as modified the order is affirmed without
costs.

Same memorandum as in *Conway v Conway* ([appeal No. 1] – AD3d –
[July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

479

CA 24-00010

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

PAULA A. SCUTELLA, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DANIEL G. DILL, DEFENDANT-RESPONDENT.

ANDREWS, BERNSTEIN & MARANTO, PLLC, BUFFALO (ROBERT J. MARANTO, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered December 19, 2023 in a personal injury action arising from a motor vehicle accident. The order granted defendant's motion for summary judgment dismissing the complaint 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 denying defendant's motion and reinstating the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for the injuries she allegedly sustained when her motor vehicle struck a box truck operated by defendant. At the time of the collision, defendant was backing his box truck into a driveway and blocking plaintiff's lane of traffic. Defendant moved for summary judgment dismissing the complaint, contending that plaintiff's negligence was the sole proximate cause of the collision. Plaintiff cross-moved for, inter alia, partial summary judgment on the issue of negligence. Supreme Court granted the motion and denied the cross-motion, and plaintiff now appeals. We modify by denying the motion and reinstating the complaint.

Defendant had the initial "burden of establishing as a matter of law that he was not negligent or that, even if he was negligent, his negligence was not a proximate cause of the accident" (*Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept 2018]; see also *Burnett v Allen* [appeal No. 3], 218 AD3d 1190, 1191 [4th Dept 2023]; *Galletta v Delsorbo*, 188 AD3d 1641, 1642 [4th Dept 2020]). Here, we note that "defendant was required to establish that he fulfilled his common-law duty to see that which he should have seen [as a driver] through the proper use of his senses . . . and to exercise reasonable care under

the circumstances to avoid an accident . . . , including that he met the obligation to keep a reasonably vigilant lookout Defendant also had the burden of establishing as a matter of law that there was nothing he could do to avoid the accident" (*Pagels*, 167 AD3d at 187 [internal quotation marks omitted]). We further note, in light of that burden, that "summary judgment is seldom appropriate in negligence actions Indeed, even when the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances. This can rarely be decided as a matter of law" (*id.* at 188 [internal quotation marks omitted]). Moreover, it is well settled that there may be more than one proximate cause of an accident or injury (*see Mazella v Beals*, 27 NY3d 694, 706 [2016]; *Spring v Allegany-Limestone Cent. Sch. Dist.*, 221 AD3d 1474, 1479 [4th Dept 2023]) and, thus, "[t]he fact that [a plaintiff] may have also been negligent does not absolve [the defendant] of liability" (*Dunkle v Vakoulich*, 173 AD3d 1662, 1663 [4th Dept 2019]; *see Zbock v Gietz*, 145 AD3d 1521, 1522-1523 [4th Dept 2016]).

Viewing the evidence in the light most favorable to plaintiff and giving her the benefit of every reasonable inference, as we must in the context of defendant's motion (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that defendant failed to meet his initial burden on the motion because his own submissions raise triable issues of fact. In particular, defendant admitted in his deposition testimony that he saw plaintiff's vehicle approaching before he began to cross plaintiff's lane of travel and back his box truck into the driveway but, nonetheless, chose to block that lane because he "thought [he] had enough time to get in the driveway" and avoid an accident. Under those circumstances, triable issues of fact exist whether defendant was negligent and, if so, whether such negligence was a proximate cause of the accident (*see Bermejo v Khaydarov*, 155 AD3d 597, 598 [2d Dept 2017]; *see generally* Vehicle and Traffic Law § 1211 [a]). We further note that defendant's assertion that plaintiff was "speeding" prior to the accident is speculative (*see Stewart v Kier*, 100 AD3d 1389, 1390 [4th Dept 2012]). Inasmuch as defendant "did not meet his initial burden on the motion, the burden never shifted to [plaintiff], and denial of the motion was required regardless of the sufficiency of the opposing papers" (*Walker v Town of Webster*, 197 AD3d 942, 943 [4th Dept 2021] [internal quotation marks omitted]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Defendant's assertion on appeal that his motion was properly granted on the ground that "plaintiff was the sole proximate cause of the accident" is inapt and need not be addressed on the merits "because . . . [it is] merely the converse of defendant's burden on the motion of establishing that [defendant] was not negligent or that [defendant's] negligence was not a proximate cause of the accident" (*Pagels*, 167 AD3d at 189; *see generally Jackson v City of Buffalo*, 144 AD3d 1555, 1556 [4th Dept 2016]). By focusing on "sole proximate cause" in this common-law negligence action, defendant overlooks the fact that, as stated above, his burden on his motion was to establish "as a matter of law that he was not negligent or that, even if he was

negligent, his negligence was not a proximate cause of the accident" (*Pagels*, 167 AD3d at 187). In other words, if a defendant moves for summary judgment in the negligence context and addresses only the issue of proximate cause, the defendant must effectively assume, *arguendo*, that it was negligent (*see id.* at 188-189; *see generally Mylar v Niagara Falls Mem. Med. Ctr.*, 234 AD3d 1262, 1265 [4th Dept 2025]). Inasmuch as defendant here did not address proximate cause in the context of assuming his negligence for the sake of argument, we need not address his proximate cause assertion.

Contrary to plaintiff's further contention, however, the court properly denied her cross-motion for partial summary judgment on the issue of negligence inasmuch as the evidence, including the conflicting expert affidavits, presents a triable issue of fact whether defendant, after stopping in the southbound lane and observing approaching traffic, exercised reasonable care under the circumstances to avoid an accident (*see Robinson v Day*, 265 AD2d 916, 917 [4th Dept 1999]), raising "a classic battle of the experts" that may not be resolved on summary judgment (*Zynda v Waid*, 221 AD3d 1578, 1580 [4th Dept 2023]; *see DeAngelis v Martens Farms, LLC*, 104 AD3d 1125, 1126 [4th Dept 2013]).

Plaintiff's remaining contentions are academic in light of our determination.

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

480

CA 24-00817

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

REBECCA J. KLYMN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SUPREME COURT, MONROE COUNTY, UNIFIED COURT
SYSTEM OF STATE OF NEW YORK, OFFICE OF COURT
ADMINISTRATION AND OFFICE OF THE MANAGING
INSPECTOR GENERAL FOR BIAS MATTERS,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (LINDY KORN OF COUNSEL), AND
LAW OFFICE OF ANNA MARIE RICHMOND, BUFFALO, FOR PLAINTIFF-APPELLANT.

DAVID NOCENTI, OFFICE OF COURT ADMINISTRATION, NEW YORK CITY (PEDRO
MORALES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Michael
Siragusa, A.J.), entered April 30, 2024. The order granted
defendants' motion to dismiss plaintiff's 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, the former secretary to a former New York
State Supreme Court Justice, commenced this action against Supreme
Court, Monroe County, Unified Court System of the State of New York,
Office of Court Administration, and Office of the Managing Inspector
General for Bias Matters (collectively, defendants) alleging, inter
alia, that defendants discriminated against her on the basis of sex in
violation of the Human Rights Law ([NYSHRL] Executive Law § 290 *et*
seq.), in relation to alleged sexual abuse and harassment of plaintiff
by the former Justice. Plaintiff now appeals from an order that,
inter alia, granted defendants' pre-answer motion to dismiss the
complaint pursuant to CPLR 3211 (a) (7) and (c) on the grounds that,
inter alia, plaintiff was not defendants' employee and therefore
defendants were not liable under the NYSHRL. We reverse the order,
deny the motion, and reinstate the complaint.

Initially, absent from the record is any indication that Supreme
Court, Erie County, provided adequate notice to the parties that it
was treating defendants' motion as one for summary judgment and we
therefore review plaintiff's contentions in the context of a motion to
dismiss pursuant to CPLR 3211 (a) (7) (*see* CPLR 3211 [c]; *Mihlovan v*

Grozavu, 72 NY2d 506, 508 [1988]; *Ward v Guardian Indus. Corp.*, 17 AD3d 1100, 1101 [4th Dept 2005]; *Costanza Constr. Corp. v City of Rochester*, 135 AD2d 1111, 1111-1112 [4th Dept 1987]). Here, we agree with plaintiff that the complaint states a cause of action against defendants for a violation under the NYSHRL. "On a motion to dismiss pursuant to CPLR 3211 (a) (7), [this Court] must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . the benefit of every possible favorable inference" (*Van Ostrand v Latham*, 222 AD3d 1382, 1383 [4th Dept 2023] [internal quotation marks omitted]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "The court may also consider affidavits and other evidentiary material to establish conclusively that plaintiff has no cause of action" (*Tauro v Gait*, 158 AD3d 1261, 1262 [4th Dept 2018] [internal quotation marks omitted]). Additionally, as with the allegations of the complaint, this Court must accept as true plaintiff's submissions in opposition to the motion (*see id.*).

Supreme Court granted defendants' motion because it determined, *inter alia*, that "[t]he evidentiary proof conclusively establishes that . . . plaintiff was not the employee of any of the named defendants." Here, however, "accept[ing] the facts as alleged in the complaint as true [and] accord[ing] plaintiff[] the benefit of every possible favorable inference" (*Stevens v Perrigo*, 122 AD3d 1430, 1430 [4th Dept 2014] [internal quotation marks omitted]), we conclude that plaintiff sufficiently alleged that defendants were plaintiff's employers (*see Griffin v Sirva, Inc.*, 29 NY3d 174, 186 [2017]; see *State Div. of Human Rights v GTE Corp.*, 109 AD2d 1082, 1083 [4th Dept 1985]). "[T]he really essential element of the relationship is the right of control, that is, the right of one person, the master, to order and control another, the servant, in the performance of work by the latter" (*Griffin*, 29 NY3d at 186 [internal quotation marks omitted]; see also *PB-20 Doe v St. Nicodemus Lutheran Church*, 228 AD3d 1233, 1234 [4th Dept 2024]). We conclude that plaintiff sufficiently alleged an employment relationship by alleging factors including that defendants paid plaintiff's salary (*see GTE Corp.*, 109 AD2d at 1083) and had the power to control plaintiff's conduct (*see generally PB-20 Doe*, 228 AD3d at 1234-1235).

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

481

KA 21-01584

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHEZERE L. CAMPBELL, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered September 14, 2021. 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: On appeal from a judgment convicting him upon his guilty plea of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that County Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds and that he was deprived of effective assistance of counsel. Defendant further contends that both of those contentions survive his waiver of the right to appeal. Even assuming, arguendo, that defendant's contentions are not encompassed by his waiver of the right to appeal, we conclude that they lack merit.

Defendant's speedy trial motion was based on an alleged failure of the People to comply with their discovery obligations under CPL article 245, which took effect on January 1, 2020, several weeks after the People announced readiness for trial. Although it is an open question whether the CPL article 245 disclosure requirements apply to cases commenced before January 1, 2020 (*see People v King*, 42 NY3d 424, 428 n 2 [2024]), it is clear that the People were not required to file a certificate of compliance as a condition precedent to declaring readiness for trial, and they did not revert "to a state of unreadiness" when article 245 took effect (*id.* at 428). Thus, although the People's alleged discovery violation may have warranted a sanction under CPL 245.80, depending on whether defendant was prejudiced thereby (*see generally People v Gaskin*, 214 AD3d 1353, 1355 [4th Dept 2023]), it provided no basis on which to dismiss the indictment pursuant to CPL 30.30 (*see People v Fox*, 237 AD3d 1523,

1524 [4th Dept 2025]; *People v Perry*, 236 AD3d 1463, 1464 [4th Dept 2025], *lv denied* 43 NY3d 1011 [2025]).

Defendant's remaining contention is that he was deprived of effective assistance of counsel because defense counsel failed to subpoena certain medical records of the victim in a timely manner and may have failed to preserve his speedy trial contention for our review. We reject that contention. Defense counsel did preserve the speedy trial claim, and, inasmuch as counsel obtained the relevant medical records in time for trial and before defendant decided to plead guilty, defendant was not prejudiced by any delay in obtaining the records (*see generally People v Benevento*, 91 NY2d 708, 713-714 [1998]). We conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, reveal that defendant received meaningful representation (*see People v Gross*, 26 NY3d 689, 696 [2016]; *People v Baldi*, 54 NY2d 137, 147 [1981]).

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

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

484

KA 22-01813

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER MOODY, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 12, 2022. The judgment convicted defendant, upon a plea of guilty, of manslaughter in the second degree and leaving the scene of an incident resulting in death without reporting.

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

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of manslaughter in the second degree (Penal Law § 125.15 [1]) and leaving the scene of an incident resulting in death without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [ii]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *People v Williams*, 237 AD3d 1581, 1582 [4th Dept 2025]; *People v Kelly*, 231 AD3d 1515, 1516 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

486

KA 24-00713

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMISON L. EMANUEL, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (JAMES ECKERT OF COUNSEL),
FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO
OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered February 22, 2024. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, criminal possession of a weapon in the second degree (two counts), and grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), and one count of grand larceny in the third degree (§ 155.35 [1]), stemming from two separate incidents. The first three counts relate to allegations that defendant attempted to murder the victim by shooting at her multiple times as she stood in her doorway. The final count relates to defendant's alleged failure to return that victim's vehicle after she allowed him to borrow it for a week or two, prompting her to file a complaint with the police.

Contrary to defendant's contention, County Court did not err in refusing to suppress statements defendant made after being informed of the charges against him. While defendant was in custody and had not yet been provided with *Miranda* warnings, he asked an officer at the police station what crimes he was being charged with. The officer responded, "[t]wo counts of criminal possession of a weapon." The officer's statement, made in direct response to defendant's question, did not constitute interrogation inasmuch as it was not "intended or likely to elicit an incriminating response" (*People v Wearen*, 19 AD3d 1133, 1134 [4th Dept 2005], *lv denied* 5 NY3d 834 [2005] [internal quotation marks omitted]; see *People v Cirino*, 203 AD3d 1661, 1663

[4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]). Indeed, the officer was required by law to inform defendant "of the reason for [his] arrest" (CPL 140.15 [2]).

Defendant further contends that the court erred in admitting in evidence testimony regarding statements made by the victim to others after the shooting. We reject that contention. The statements the victim made to her daughter moments after the shooting were admissible as excited utterances in light of "the nature of the startling event, the amount of time between the event and the statement, and the activities of the declarant in the interim" (*People v Hernandez*, 28 NY3d 1056, 1057 [2016]; *see People v Vernay*, 174 AD3d 1485, 1486 [4th Dept 2019]). The statements the victim made a few minutes later to an officer investigating the incident were further removed in time, but we cannot conclude that the court erred in determining that the victim was still "under the stress of excitement and 'lack[ed] the reflective capacity essential for fabrication' " (*Hernandez*, 28 NY3d at 1057). Even assuming, *arguendo*, that the court erred in admitting testimony about the victim's statements to the officer, we conclude that any such error was harmless. The evidence of defendant's guilt was overwhelming and there was no significant probability that the jury would have reached a different conclusion had the statements been excluded inasmuch as identical statements the victim made to her daughter were properly admitted and defendant was able to cross-examine the victim at trial with respect to all prior statements (*see generally id.* at 1058; *People v Tirado*, 175 AD3d 970, 971 [4th Dept 2019], *lv denied* 34 NY3d 984 [2019], *reconsideration denied* 34 NY3d 1133 [2020]; *People v Swift*, 160 AD3d 1341, 1342 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]).

Although defendant contends that the court erred in directly addressing the jury foreperson (*see generally* CPL 310.30; *People v O'Rama*, 78 NY2d 270, 276-278 [1991]), he failed to preserve that contention for our review because he did not object to the court's procedure in responding to the jury foreperson's oral request for a written copy of the elements of various charges (*see People v Fleming*, 153 AD3d 1648, 1649 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]; *People v Peller*, 8 AD3d 1123, 1124 [4th Dept 2004], *lv denied* 3 NY3d 679 [2004]). The jury made a written request for instruction on the elements of the charges and, after the contents of the note were read verbatim into the record in the presence of defense counsel and the jury, the jury foreperson made an oral request, also in the presence of defense counsel and the jury, for the jurors to have "those elements written down." Inasmuch as the court "complied with its core responsibility to give counsel meaningful notice of the jury's notes" (*People v Nealon*, 26 NY3d 152, 160 [2015]), we conclude that there was no mode of proceedings error and that defense counsel thus "was required to object in order to preserve a claim of error for appellate review" (*id.*). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to object to

the court's procedure. That single error was not " 'sufficiently egregious and prejudicial as to compromise . . . defendant's right to a fair trial' " (*People v Watkins*, 42 NY3d 635, 640 [2024], cert denied – US –, 145 S Ct 459 [2024], quoting *People v Caban*, 5 NY3d 143, 152 [2005]). Viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (see *People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant contends that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject that contention (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim testified unequivocally that, in the early morning hours, she saw defendant firing a gun at her from the front seat of a white Mercedes. Defendant was the front seat passenger in a white Mercedes that was stopped, shortly after the shooting, along the shooter's anticipated route of travel based on the direction the victim saw him traveling after the shooting. The gun used in the shooting was later located along that same route of travel. Moreover, cell phone location data placed defendant near the victim's house at the time of the shooting, and a search of his cell phone revealed that, shortly after the shooting, defendant drafted a text stating "I just tried to gun [sic]."

With respect to the charge of grand larceny, the victim testified that she loaned the vehicle to defendant in exchange for drugs. According to their normal practice, he would return the vehicle within a week or two. After defendant failed to return the vehicle for several months, the victim repeatedly requested its return. Eventually, the victim warned defendant that she would report him to the police, which prompted numerous threatening text messages from defendant to the victim and, allegedly, the retaliatory shooting.

"Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], lv denied 31 NY3d 1011 [2018] [internal quotation marks omitted]).

Finally, at sentencing defendant admitted his prior conviction and did not dispute the relevant period of incarceration listed in the second violent felony offender statement, and thus his contention that he should be resentenced as a first-time felony offender based on the recent Supreme Court decision in *Erlinger v United States* (602 US 821 [2024]) is not preserved for our review (see *People v Hernandez*, – NY3d –, 2025 NY Slip Op 00904 *3 [2025]; *People v Lopez-Nunez*, – AD3d –, 2025 NY Slip Op 03451 *1 [4th Dept 2025]; *People v Cox*, 237 AD3d 1405, 1409 [3d Dept 2025]). We decline to exercise our power to

review that contention as a matter of discretion in the interest of justice.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-01236

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

IN THE MATTER OF WILLIAM C.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHAD C., RESPONDENT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR PETITIONER-RESPONDENT.

WILLIAM D. BRODERICK, JR., ELMA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Thomas D. Williams, J.), entered July 18, 2023, 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.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, revoked a suspended judgment and terminated the father's parental rights with respect to the subject child.

Initially, to the extent that the father claims in his reply brief that the child may have been adopted, such an adoption would render the father's appeal from the order concerning the disposition "moot by the subsequent adoption of the child" (*Matter of Jaxon S. [Jason S.]*, 170 AD3d 1687, 1688 [4th Dept 2019]; see *Matter of Amari F. [Haley F.]*, 217 AD3d 1063, 1063-1064 [3d Dept 2023]).

In any event, Family Court did not err in revoking the suspended judgment and terminating the father's parental rights. "[W]here petitioner establishes by a preponderance of the evidence that there has been noncompliance with any of the terms of [a] suspended judgment, [Family Court] may revoke the suspended judgment and terminate parental rights" (*Matter of Aerielle M. [Ashaley C.]*, 235 AD3d 1257, 1258 [4th Dept 2025] [internal quotation marks omitted]; see Family Ct Act § 633 [f]; *Matter of Zackery S. [Christa P.]*, 224 AD3d 1336, 1336-1337 [4th Dept 2024], lv denied 41 NY3d 909 [2024]; *Matter of Ramel H. [Tenese T.]*, 134 AD3d 1590, 1592 [4th Dept 2015]). Here, the record establishes that the father violated the terms of the

suspended judgment by, among other things, failing to provide proof of income as required and failing to adequately address the anger issues that initially led to the child being removed from the father's care. Thus, the court's determination that the father violated the terms of the suspended judgment is supported by a sound and substantial basis in the record (see *Aerielle M.*, 235 AD3d at 1258). Furthermore, a preponderance of the evidence supports the court's determination that it was in the child's best interests to terminate the father's parental rights (see *Zackery S.*, 224 AD3d at 1337).

The father's contention regarding the timing of the filing of the permanent neglect petition is not properly before us inasmuch as the father did not appeal from the order of disposition on that petition (see *Matter of Harmony W. [Jessica W.]*, 191 AD3d 1251, 1251 [4th Dept 2021]; *Matter of Dominic T.M. [Cassie M.]*, 169 AD3d 1469, 1469 [4th Dept 2019], *lv denied* 33 NY3d 902 [2019]).

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

495

CA 24-00708

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

EDWARD CURRAN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JJML, INC., DOING BUSINESS AS NORTHSTAR
MANAGEMENT, JJML CONSTRUCTION, INC.,
DOING BUSINESS AS NORTHSTAR MANAGEMENT,
AND NORTHSTAR MANAGEMENT, DEFENDANTS-APPELLANTS.

JJML, INC., DOING BUSINESS AS NORTHSTAR
MANAGEMENT, JJML CONSTRUCTION, INC.,
DOING BUSINESS AS NORTHSTAR MANAGEMENT,
AND NORTHSTAR MANAGEMENT, THIRD-PARTY
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

ELMER W. DAVIS, INC., AND ELMER W. DAVIS
OF CENTRAL NY, LLC, THIRD-PARTY
DEFENDANTS-APPELLANTS-RESPONDENTS.

MCGIVNEY KLUGER CLARK & INTOCCIA, P.C., SYRACUSE (ROBERT J. CONNOR,
JR., OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS-RESPONDENTS.

RUPP PFALZGRAF LLC, ROCHESTER (KEVIN J. FEDERATION OF COUNSEL), FOR
DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS-
APPELLANTS.

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Ontario County
(Frederick G. Reed, A.J.), entered April 23, 2024 in a personal injury
action. The order, inter alia, denied the motion of third-party
defendants for summary judgment and denied in part the motion of
defendants-third-party plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting those parts of the motion
of defendants-third-party plaintiffs seeking summary judgment
dismissing the first cause of action in the amended complaint,
dismissing that cause of action, and seeking summary judgment on the
first cause of action in the third-party complaint, and as modified
the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell on an exterior deck attached to commercial office space occupied by his employer, third-party defendant Elmer W. Davis, Inc. (Davis) and owned by defendants-third-party plaintiffs, JJML, Inc., doing business as Northstar Management, JJML Construction, Inc., doing business as Northstar Management, and Northstar Management (JJML defendants). The uncovered deck was attached to the second floor of the office occupied by Davis and was accessible by a door in the kitchenette area. Although there were other tenants in the building, the deck was used exclusively by employees of Davis, and personnel of the JJML defendants could not access the deck without going through Davis's office.

The accident occurred shortly after plaintiff arrived for work early one morning and noticed that the roof was leaking, causing water to drip on to the floor in the kitchenette area. Suspecting that a tree limb or branch might have fallen on the roof and caused the leak, plaintiff stepped out on the deck to look at the roof. It was raining hard that morning, and plaintiff slipped and fell almost immediately after stepping onto the deck, sustaining injuries in the process. According to plaintiff, he slipped on a thin veneer of green moss or algae that had accumulated on the deck and created a dangerous condition when wet.

In his amended complaint, plaintiff asserted causes of action for, inter alia, common-law negligence and violation of Labor Law §§ 200, 240 (1), and 241 (6). The JJML defendants thereafter commenced a third-party action against Davis and third-party defendant Elmer W. Davis of Central NY, LLC (collectively, Davis defendants), asserting causes of action for contractual and common-law indemnification.

Following discovery, the Davis defendants moved for summary judgment dismissing the third-party complaint on the ground that they were not negligent and that the JJML defendants were solely responsible for maintaining the deck. The JJML defendants moved for summary judgment dismissing the amended complaint and for summary judgment on the third-party complaint. Plaintiff abandoned his causes of action under Labor Law §§ 240 (1) and 241 (6), but otherwise opposed the JJML defendants' motion, leaving only the common-law negligence and Labor Law § 200 causes of action in dispute in the first-party action. Supreme Court denied the motion of the Davis defendants in its entirety and denied the motion of the JJML defendants except insofar as they sought summary judgment dismissing the causes of action under Labor Law §§ 240 (1) and 241 (6). The Davis defendants and the JJML defendants both appeal.

Contrary to the JJML defendants' contention on their appeal, we conclude that the court properly denied that part of their motion for summary judgment dismissing plaintiff's fourth cause of action, for negligence. Although "[m]ere wetness on walking surfaces due to rain does not constitute a dangerous condition" for which premises liability may attach (*McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434, 435 [1st Dept 2010]; see *Grinberg v Luna Park Hous. Corp.*,

69 AD3d 793, 793 [2d Dept 2010]), the JJML defendants failed to establish as a matter of law that plaintiff's injuries were caused only by rainwater on the deck as opposed to accumulated moss or algae made more slippery by rain. The JJML defendants also failed to establish as a matter of law that they lacked constructive notice of the allegedly dangerous condition. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Here, although the JJML defendants submitted the deposition testimony of plaintiff, who stated that he did not notice the moss on the deck before his accident, they also submitted deposition testimony from a former Davis employee who testified that it was "pretty typical" for the deck to have a moss-like substance on its surface. Because "the record contains conflicting accounts as to the visibility" of the moss (*Carpenter v Nigro Cos., Inc.*, 203 AD3d 1419, 1420 [3d Dept 2022]), we conclude that the JJML defendants are not entitled to summary judgment on the ground that the moss was not "visible and apparent" so as to permit constructive notice.

We agree with the JJML defendants, however, that the court should have granted that part of their motion with respect to plaintiff's first cause of action, asserting a claim under Labor Law § 200, and we therefore modify the order accordingly. Section 200 of the Labor Law states the general duty to protect the health and safety of employees and "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). "Employee" is defined for Labor Law purposes as "a mechanic, workman or laborer working for another for hire" (§ 2 [5]). Plaintiff was not hired to fix the JJML defendants' roof and was not otherwise engaged in construction or manufacturing work at the time of the accident. Instead, he went to the office on the morning of his accident to perform "administrative tasks." We thus conclude that plaintiff "was not within the class of workers that those statutory provisions were enacted to protect" (*Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108, 1109 [1991]). Essentially, this is a premises liability case, not a Labor Law case.

We further agree with the JJML defendants that the court erred in denying that part of their motion for summary judgment on the first cause of action in the third-party complaint, for contractual indemnification, and we therefore further modify the order accordingly. Under the terms of the lease, the Davis defendants agreed to indemnify the JJML defendants for any claim that arose from "the conduct or management of [Davis's] business . . . or from any act of negligence" by Davis or its agents "in or about the leased premises." Regardless of whether Davis was negligent, the claim here arose from the conduct of Davis's business inasmuch as plaintiff slipped and fell in the Davis office space while employed by Davis. We therefore conclude that, under the terms of the lease, Davis was "obligated to defend and indemnify [the JJML defendants] in the

underlying action" (*Dryden Mut. Ins. Co. v Goessl*, 117 AD3d 1512, 1514 [4th Dept 2014], *affd* 27 NY3d 1050 [2016]).

We have reviewed the Davis defendants' contentions on their appeal and conclude that the court properly denied their motion in its entirety.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

496

CA 24-01246

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

KEITH A. HUNT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

LAURA L. MATTHEWS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JAMES I. MYERS, PLLC, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR
DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), entered July 15, 2024. The order denied the motion of defendant for summary judgment dismissing the complaint and granted the cross-motion of plaintiff for summary judgment seeking, inter alia, specific performance of a real estate contract.

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

Same memorandum as in *Hunt v Matthews* ([appeal No. 2] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

497

CA 24-01267

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

KEITH A. HUNT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

LAURA L. MATTHEWS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JAMES I. MYERS, PLLC, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR
DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), entered August 6, 2024. The order, inter alia, granted the motion of defendant insofar as it sought leave to reargue and, upon reargument, adhered to a prior determination denying defendant's motion for summary judgment dismissing the complaint and granting plaintiff's cross-motion for summary judgment seeking, inter alia, specific performance of a real estate contract.

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

Memorandum: Plaintiff commenced this action seeking specific performance of a real estate contract involving residential property owned by defendant. In appeal No. 1, defendant appeals from an order that, inter alia, denied defendant's motion for summary judgment dismissing the complaint and granted, inter alia, that part of plaintiff's cross-motion for summary judgment on his cause of action for breach of contract. Defendant thereafter moved for leave to renew or reargue her prior motion. In appeal No. 2, defendant appeals from an order that, inter alia, denied her motion insofar as it sought leave to renew, granted her motion insofar as it sought leave to reargue and, upon reargument, adhered to the prior determination.

Initially, we note that the appeal from the order in appeal No. 1 must be dismissed because the order in appeal No. 2 superseded the order in appeal No. 1 (see *Hausrath Landscape Maintenance, Inc. v Caravan Facilities Mgt., LLC*, 219 AD3d 1164, 1164 [4th Dept 2023]; *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Addressing appeal No. 2, defendant contends that the contract was not fully executed because it was not sufficiently approved by her attorney and that the contract thus cannot be enforced against her. Contrary to that contention, the condition precedent requiring her

attorney's approval of the real estate contract was met when, on September 2, 2022, her attorney, in writing, stated without condition that he approved the contract as to its form and legal content (see generally *Moran v Erk*, 11 NY3d 452, 455-457 [2008]; *Chrisantha, Inc. v deBaptiste*, 196 AD3d 1033, 1036 [4th Dept 2021]). Defendant does not dispute that the September 2, 2022 approval was sent by the attorney listed in the contract as her counsel for the purpose of the real estate transaction. Although defendant contends that she did not grant her attorney explicit permission to send the September 2, 2022 approval, the condition precedent within the attorney approval clause, by its terms, was satisfied when her counsel registered his approval in writing, regardless of the specific reason (see generally *Moran*, 11 NY3d at 457-459). The attorney approval clause "means what it says" (*id.* at 456), and the need for clarity and predictability in the interpretation of contracts, especially contracts involving real property, requires us to interpret the attorney approval clause by its terms (see *id.* at 456-457). Here, the attorney approval clause required only that defendant's attorney approve the contract in writing in order to satisfy the condition precedent—an act that he accomplished on September 2, 2022.

We reject defendant's further contention that the September 2, 2022 attorney approval was a nullity, or that it otherwise rendered the approval of the contract ineffective, because it did not explicitly mention an "addendum" signed contemporaneously with the contract itself. Even assuming arguendo that the September 2, 2022 approval had to explicitly reference that addendum in order to constitute an attorney approval thereof, we note that the terms of the contract provided that the contract itself "shall remain in full force and effect" despite counsel's failure to approve an addendum.

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

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

498

CA 24-00843

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

STEVEN J. PARSONS, PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

COUNTY OF STEUBEN, AND MOTOROLA SOLUTIONS, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

MOTOROLA SOLUTIONS, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

MID-STATE COMMUNICATIONS & ELECTRONICS, INC., THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.

STANLEY LAW OFFICES, SYRACUSE (ANTHONY R. MARTOCCIA OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID H. FITCH OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT COUNTY OF STEUBEN.

GORDON, REES, SCULLY, MANSUKHANI, LLP, NEW YORK CITY (GABRIELLA
SCARMATO OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT AND THIRD-
PARTY PLAINTIFF-RESPONDENT MOTOROLA SOLUTIONS, INC.

GOLDBERG SEGALLA, LLP, SYRACUSE (JAMES M. SPECYAL OF COUNSEL), FOR
THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeals from an order of the Supreme Court,
Steuben County (Patrick F. McAllister, A.J.), entered May 30, 2024 in
a Labor Law and common-law negligence action. The order, among other
things, denied plaintiff's motion for partial summary judgment and
denied in part the cross-motions of defendant, defendant-third-party
plaintiff, and third-party defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting those parts of the cross-
motion of defendant-third-party plaintiff seeking summary judgment
dismissing the Labor Law § 200 claim and common-law negligence cause
of action and the cross-claims against it seeking common-law
indemnification and contribution, and as modified the order is
affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law
negligence action seeking damages for injuries he sustained when a

ladder fell on him at a worksite. Plaintiff alleged that defendant County of Steuben (County) had an easement for the property where the accident took place. The County entered into a contract with defendant-third-party plaintiff, Motorola Solutions, Inc. (Motorola), for it to, inter alia, install antennas on a telephone pole. Motorola subcontracted the work to third-party defendant, Mid-State Communications & Electronics, Inc. (Mid-State), plaintiff's employer. At the time of the accident, plaintiff and his coworkers were cleaning up the worksite for the day by, among other things, taking down ladders. Two of plaintiff's coworkers were taking down a 40-foot extension ladder that was leaning against a wooden telephone pole. The first coworker untied the top and middle straps securing the ladder to the pole as he descended the ladder. The second coworker then retracted the ladder while the first coworker held the ladder. Either the first coworker holding the ladder or the ladder itself, or both, slipped on ice on the ground. The ladder fell, striking plaintiff, who was standing nearby ready to carry a different ladder away from the worksite.

Plaintiff moved for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim. The County cross-moved for summary judgment dismissing the amended complaint and Motorola's cross-claims against it. Motorola cross-moved for summary judgment dismissing the amended complaint and the County's cross-claims against it. Mid-State cross-moved for summary judgment dismissing the amended complaint and the third-party complaint. Supreme Court denied plaintiff's motion and granted the cross-motions in part by dismissing the Labor Law § 240 (1) claim against the County and Motorola. Plaintiff appeals, and the County, Motorola, and Mid-State each cross-appeal.

With respect to the Labor Law § 240 (1) claim, we reject plaintiff's contention on his appeal that the court erred in denying his motion and in granting those parts of the cross-motions seeking summary judgment dismissing that claim. The ladder constituted a falling object, and in order to prevail on summary judgment, plaintiff was required to "demonstrate that at the time the object fell, it either was being 'hoisted or secured' . . . or 'required securing for the purposes of the undertaking' " (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014]; see *Vicki v City of Niagara Falls*, 215 AD3d 1285, 1287 [4th Dept 2023]). We conclude that the ladder did not require securing for the purposes of the undertaking (see *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]; *Shaheen v Hueber-Breuer Constr. Co.*, 4 AD3d 761, 762 [4th Dept 2004]; cf. *Vasquez v Gilbane Bldg. Co.*, 224 AD3d 1232, 1233 [4th Dept 2024]), and that securing it "would have been contrary to the objectives of the work plan" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]). It would be illogical to require plaintiff's coworkers to secure to a pole a ladder that they were removing from that pole. In addition, in support of their cross-motions, the County, Motorola, and Mid-State submitted evidence, including the testimony of plaintiff, that the straps had to be removed in order to retract the ladder and that no protective devices could have been used to prevent the ladder from falling while it was being taken down (cf. *Ortiz v Varsity Holdings*,

LLC, 18 NY3d 335, 339 [2011]; see generally *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 11 [2011]). In opposition to the cross-motions, plaintiff failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although plaintiff's expert accurately stated that no mechanical means of securing the ladder to the pole were used at the time that it fell, he did not opine that any such means *should* have been used or *could* have been used as the ladder was being taken down.

With respect to plaintiff's Labor Law § 241 (6) claim, we reject the contentions of the County, Motorola, and Mid-State on their cross-appeals that the court erred in denying those parts of their cross-motions seeking summary judgment dismissing that claim. Plaintiff's claim is predicated on asserted violations of 12 NYCRR 23-1.7 (d) and 12 NYCRR 23-1.21 (b) (4) (ii). 12 NYCRR 23-1.7 (d) states that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Contrary to the contentions of the County, Motorola, and Mid-State, the crushed gravel pad at the base of the telephone pole on which the ladder was situated and on which the workers were standing while setting up, using, and taking down the ladder constituted "the type of work surface enumerated" in the regulation (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 319 [2024]). 12 NYCRR 23-1.21 (b) (4) (ii) states that "[a]ll ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings." The County, Motorola, and Mid-State failed to establish as a matter of law that they did not violate those regulations or that any alleged violation was not a proximate cause of plaintiff's injuries (see *Baker v City of Buffalo*, 90 AD3d 1684, 1685-1686 [4th Dept 2011]).

With respect to plaintiff's Labor Law § 200 claim and his common-law negligence cause of action, plaintiff relies on the theory that his injury was the result of a dangerous condition at the worksite, i.e., the slippery surface caused by snow or ice. Where that theory is alleged, "a defendant landowner has the initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that it did not create or have actual or constructive notice of [the] dangerous condition" (*Menear v Kwik Fill*, 174 AD3d 1354, 1357 [4th Dept 2019]; see *Forman v Carrier Corp.*, 172 AD3d 1920, 1920 [4th Dept 2019]; *Mayer v Conrad*, 122 AD3d 1366, 1367 [4th Dept 2014]). We reject the County's contention on its cross-appeal that the court erred in denying that part of its cross-motion seeking summary judgment with respect to that claim and cause of action. The County did not meet its initial burden of establishing that it did not have actual or constructive notice of the dangerous condition (see *Mayer*, 122 AD3d at 1368). We agree with Motorola on its cross-appeal, however, that the court erred in denying that part of its cross-motion seeking summary judgment dismissing that claim and cause of action against it, and we therefore modify the order accordingly. Plaintiff abandoned that claim and cause of action against Motorola by not

opposing that part of Motorola's cross-motion seeking that relief and by not addressing it on appeal (see *Bacon v Shults Mgt. Group, Inc.*, 233 AD3d 1481, 1483 [4th Dept 2024]).

We agree with Motorola that the court further erred in denying that part of its cross-motion seeking summary judgment dismissing the County's cross-claims against it for common-law indemnification and contribution, and we therefore further modify the order by dismissing those cross-claims. "[T]o establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence . . . but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Provens v Ben-Fall Dev., LLC*, 163 AD3d 1496, 1499 [4th Dept 2018] [internal quotation marks omitted]; see *Lagares v Carrier Term. Servs., Inc.* [appeal No. 2], 204 AD3d 1456, 1459 [4th Dept 2022]). Here, Motorola met its initial burden on its cross-motion of establishing that it was free of any "negligence that contributed to the cause of [plaintiff's] accident" (*York v Thompson Sta. Inc.*, 172 AD3d 1593, 1597 [3d Dept 2019] [internal quotation marks omitted]), and the County did not raise an issue of fact in opposition thereto. The common-law indemnification cross-claim as well as the contribution cross-claim therefore should have been dismissed (see *Dejesus v Downtown Re Holdings LLC*, 217 AD3d 524, 526-527 [1st Dept 2023]; *Barto v NS Partners, LLC*, 74 AD3d 1717, 1719 [4th Dept 2010]).

Contrary to the further contention of Motorola, however, the court properly denied that part of its cross-motion with respect to the County's cross-claim seeking contractual indemnification. "[T]he right to contractual indemnification depends upon the specific language of the contract" (*Vega v FNUB, Inc.*, 217 AD3d 1475, 1479 [4th Dept 2023] [internal quotation marks omitted]; see *Allington v Templeton Found.*, 167 AD3d 1437, 1441 [4th Dept 2018]). Under the contract between the County and Motorola, Motorola agreed to indemnify and hold the County harmless from "any and all liability . . . which may accrue against [the County] to the extent it is caused by the negligence of Motorola, its subcontractors, or their employees or agents." Inasmuch as there is an issue of fact whether plaintiff's injury was caused by the negligence of Mid-State, which was Motorola's subcontractor, Motorola is not entitled to summary judgment dismissing the County's cross-claim for contractual indemnification.

Motorola's further contention on its cross-appeal that it is entitled to a conditional order of contractual indemnification, common-law indemnification, and contribution from Mid-State is raised for the first time on appeal and is therefore not properly before us (see *Sodhi v Dollar Tree Stores, Inc.*, 175 AD3d 914, 917 [4th Dept 2019]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). We have reviewed the parties' remaining contentions and conclude that they are without merit.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

499

CA 24-01071

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

GENESEE COUNTY, ORLEANS COUNTY, NIAGARA COUNTY,
LIVINGSTON COUNTY, WYOMING COUNTY, AND
SENECA COUNTY, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NEW YORK STATE, KATHY HOCHUL, IN HER
OFFICIAL CAPACITY AS NEW YORK STATE GOVERNOR,
LETITIA JAMES, IN HER OFFICIAL CAPACITY AS
NEW YORK STATE ATTORNEY GENERAL, NEW YORK STATE
SENATE, AND NEW YORK STATE ASSEMBLY, DEFENDANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

LIPPES MATHIAS LLP, BUFFALO (DENNIS C. VACCO OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Orleans County (Frank Caruso, J.), entered April 9, 2024 in a declaratory judgment action. The order denied defendants' motion to dismiss plaintiffs' complaint.

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

Memorandum: In this action seeking a declaration that Racing, Pari-Mutuel Wagering and Breeding Law § 502-a is unconstitutional, defendants appeal from an order denying their motion to dismiss plaintiffs' complaint.

In the wake of controversy and claims of fiscal improprieties and mismanagement, the Legislature enacted Racing, Pari-Mutuel Wagering and Breeding Law § 502-a in an attempt to reform the Western Regional Off-Track Betting Corporation (WROTB), a public benefit corporation. Section 502-a terminated the existing WROTB Board of Directors (Board) and set forth the composition of the new Board and the procedure for appointing new Board members to represent each participating county and city (§ 502-a [1], [2]). Most critically, section 502-a changed the voting structure of the Board by weighting each Board member's vote based on the population of the county or city represented by that Board member rather than simply affording each Board member a single vote (§ 502-a [4]). In total, Erie County, Monroe County, the City of Buffalo, and the City of Rochester were apportioned 62 of the 99 votes

(*id.*). Plaintiffs commenced this action seeking a judgment declaring that section 502-a is unconstitutional, claiming, *inter alia*, that § 502-a displaced the "one county, one vote" model of the WROTB with a population-based model that effectively consolidates the power to manage and operate the WROTB in Erie County, Monroe County, the City of Buffalo, and the City of Rochester.

Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (3) and (a) (7), asserting, among other things, that plaintiffs, six counties participating in the WROTB, lacked capacity to maintain the action. Supreme Court denied the motion, and we now reverse.

We agree with defendants that plaintiffs lack capacity to maintain this action. As a general rule, "municipalities lack the capacity to bring suit to invalidate State legislation" (*City of New York v State of New York*, 86 NY2d 286, 290 [1995]; see *Brown v State of New York*, 144 AD3d 88, 92 [4th Dept 2016]). Although four exceptions to the general rule have been recognized to date, those exceptions are "narrow" (*Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 387 [2017]), and we agree with defendants that plaintiffs do not have capacity under either of the two exceptions on which they rely.

The first exception cited by plaintiffs permits a municipality to bring suit "where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys" (*City of New York*, 86 NY2d at 291-292). That exception, however, "does not apply where a municipality has 'a mere hope or expectancy' of receiving funds" (*Aristy-Farar v State of New York*, 143 AD3d 101, 110 [1st Dept 2016], *mod on other grounds* 29 NY3d 501 [2017]; see *Matter of Board of Educ. of Roosevelt Union Free School Dist. v Board of Trustees of State Univ. of N.Y.*, 282 AD2d 166, 173 [3d Dept 2001]). Rather, the type of proprietary interest contemplated relates to funds or property of a municipal corporation in its possession or to which it would have a right to immediate possession (see *Aristy-Farar*, 143 AD3d at 110; *County of Albany v Hooker*, 204 NY 1, 18-19 [1912]). The Court of Appeals has specifically cautioned against finding a proprietary interest "sufficient to confer capacity to sue without regard to a cognizable right in a specific fund" inasmuch as the "narrow proprietary interest exception would then ultimately swallow up the general rule barring suit against the State by local governments" (*City of New York*, 86 NY2d at 295).

Here, the WROTB funds vary from year to year based on, among other things, the number of wagers placed and the WROTB's operating expenses, and thus they do not constitute a "specific sum of money" (*Board of Educ. of Roosevelt Union Free School Dist.*, 282 AD2d at 173; see *Aristy-Farar*, 143 AD3d at 110). Moreover, although plaintiffs may certainly expect to derive income from the WROTB, the funds are not in their possession nor do plaintiffs have "a right to immediate possession" of the funds (*Hooker*, 204 NY at 16 [emphasis added]). Rather, the funds are distributed regularly at an interval determined by the Board (see *Racing, Pari-Mutuel Wagering and Breeding Law* § 516

[2-a)).

Similarly, we conclude that plaintiffs do not have capacity to sue under the exception that applies "where the State statute impinges upon 'Home Rule' powers of a municipality constitutionally guaranteed under article IX of the State Constitution" (*City of New York*, 86 NY2d at 292). Racing, Pari-Mutuel Wagering and Breeding Law § 502-a merely regulates the WROTB, a public benefit corporation (§ 502 [1]), and legislation creating or pertaining to public authorities and public benefit corporations does not fall within the ambit of the home rule protections (see *City of Rye v Metropolitan Transp. Auth.*, 24 NY2d 627, 633-635, 637-638 [1969]; *Whelan v Wagner*, 4 NY2d 575, 580-581 [1958]; *Gaynor v Marohn*, 268 NY 417, 422-425 [1935]; *Town of Hoosick v Eastern Rensselaer County Solid Waste Mgt. Auth.*, 182 AD2d 37, 41 [3d Dept 1992], *appeal dismissed* 80 NY2d 1023 [1992]). Simply put, amending the voting shares of a public benefit corporation did not impact the "property, affairs or government" of the plaintiff counties (*City of Rye*, 24 NY2d at 637; see *Town of Hoosick*, 182 AD2d at 41).

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

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

500

CA 24-00599

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

IN THE MATTER OF HAUNTED FOREST, LLC,
AND TRACY A. QUINN,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOWN OF WILSON AND TOWN OF WILSON ZONING BOARD,
RESPONDENTS-DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

PHILLIPS LYTTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR
RESPONDENTS-DEFENDANTS-APPELLANTS.

LIPPES MATHIAS LLP, CLARENCE (JUSTIN J. ANDREOZZI OF COUNSEL), FOR
PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered April 2, 2024, in a hybrid CPLR article 78 proceeding and action. The judgment granted in part the relief sought in the petition-complaint, annulled the positive declaration issued by respondents, directed respondents to address petitioners-plaintiffs' pending special use permit application and ordered a damages inquest.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, and the first, second, third, and fifth causes of action are dismissed.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and action seeking, among other things, review of the determination of respondents-defendants (respondents) to issue a positive declaration under the State Environmental Quality Review Act ([SEQRA]; ECL art 8), requiring petitioners to submit a draft environmental impact statement (DEIS) in connection with their renewal application for a special use permit to conduct a Halloween-themed event on their rural property. Petitioners' first, second, third, and fifth causes of action were brought pursuant to CPLR article 78. Petitioners also asserted causes of action for tortious interference with business relations, injury to business reputation, and violations of 42 USC § 1983. In appeal No. 1, respondents appeal from a judgment that, inter alia, granted the petition-complaint (petition) in part by annulling respondents' determination to issue a positive declaration and directing respondents to address petitioners' pending special use application

within 30 days "without any SEQRA analysis." In appeal No. 2, respondents appeal from an order that, among other things, denied their motion seeking, inter alia, leave to renew with respect to Supreme Court's determination to grant the petition in part and leave to amend their answer.

Respondents contend in appeal No. 1 that their issuance of a positive declaration under SEQRA did not constitute a final agency action inasmuch as the positive declaration required only the preparation of a DEIS and the special use application remained under their review. Respondents thus contend that petitioners' causes of action challenging respondents' determination pursuant to CPLR article 78 must be dismissed because they are not ripe for judicial review (see *Matter of Agoglia v Benepe*, 84 AD3d 1072, 1076 [2d Dept 2011]; see generally *Matter of State of New York v Calhoun*, 106 AD3d 1470, 1473 [4th Dept 2013]). We agree, and we therefore reverse the judgment and dismiss the first, second, third, and fifth causes of action. A proceeding under CPLR article 78 generally "shall not be used to challenge a determination" that is "not final or can be adequately reviewed by appeal . . . to some other body or officer" (CPLR 7801 [1]). Generally, a positive declaration is not a final agency action (see *Matter of Ranco Sand & Stone Corp. v Vecchio*, 27 NY3d 92, 100 [2016]). Although there are circumstances under which a mere positive declaration will be deemed ripe for review, those circumstances are not present here (see *id.*; *Matter of Gordon v Rush*, 100 NY2d 236, 242-243 [2003]). To permit judicial review under the circumstances of this case would have "the inevitable result" of rendering every positive declaration ripe for review merely "because the preparation of a DEIS by its nature carries financial costs that generally cannot be recouped, regardless of the outcome of the SEQRA process and the ultimate determination on a petitioner's zoning application" (*Ranco Sand & Stone Corp.*, 27 NY3d at 100).

We reject respondents' contention in appeal No. 2 that the court abused its discretion in denying that part of their motion seeking leave to amend the answer to add an affirmative defense based on petitioners' failure to file a summons. Contrary to respondents' contention, petitioners' failure to file a summons is a defect in personal jurisdiction, not subject matter jurisdiction (see *Holst v Liberatore*, 115 AD3d 1216, 1217 [4th Dept 2014]; see also *Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 327 [2011]; *Matter of K & M Motors, Inc. v State of New York Dept. of Motor Vehs.*, 232 AD3d 1264, 1265 [4th Dept 2024]; see generally *Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 407 [1st Dept 2013], *lv dismissed* 21 NY3d 930 [2013], *lv denied* 22 NY3d 854 [2013]), and respondents waived a defense based on that defect by failing to raise it in their pre-answer motion to dismiss (see *McGowan v Hoffmeister*, 15 AD3d 297, 297 [1st Dept 2005]; cf. *Iacovangelo v Shepherd*, 5 NY3d 184, 186-187 [2005]; see also *Holst*, 115 AD3d at 1217).

Respondents also contend in appeal No. 2 that the fourth and tenth causes of action, alleging tortious interference with business

relations and injury to business reputation, respectively, must be dismissed based on petitioners' failure to serve a notice of claim. We agree. Service of a notice of claim is a condition precedent to the commencement of a tort action against a town (see *Cammarella v East Irondequoit Cent. School Bd.*, 41 AD2d 29, 31 [4th Dept 1973], *affd* 34 NY2d 139 [1974]; see generally General Municipal Law § 50-i [1]), and the failure to serve a notice of claim is a defect in subject matter jurisdiction (see *Hey v Town of Napoli*, 265 AD2d 803, 804 [4th Dept 1999]). "[A] court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action" (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008] [internal quotation marks omitted]; see *E. Williamson Roofing & Sheet Metal Co. v Town of Parish*, 139 AD2d 97, 105-106 [4th Dept 1988]). Here, petitioners did not serve a notice of claim within the requisite 90-day period after the claim arose (see § 50-e [1] [a]) and did not move for leave to serve a late notice of claim within one year and 90 days after the claim arose (see §§ 50-e [5]; 50-i [1]; *McCrae v City of New York*, 44 AD3d 306, 306 [1st Dept 2007]). We therefore modify the order by granting respondents' motion insofar as it sought leave to amend the answer to add the fifteenth objection in point of law for failure to timely serve a notice of claim and dismissing the fourth and tenth causes of action (see *Montano v City of Watervliet*, 47 AD3d 1106, 1109 [3d Dept 2008]; *City of New York v 611 W. 152nd St.*, 273 AD2d 125, 127 [1st Dept 2000]; see generally *Financial Indus. Regulatory Auth., Inc.*, 10 NY3d at 17).

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

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

501

CA 24-01568

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

IN THE MATTER OF HAUNTED FOREST, LLC,
AND TRACY A. QUINN,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOWN OF WILSON AND TOWN OF WILSON ZONING BOARD,
RESPONDENTS-DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

PHILLIPS LYTTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR
RESPONDENTS-DEFENDANTS-APPELLANTS.

LIPPES MATHIAS LLP, CLARENCE (JUSTIN J. ANDREOZZI OF COUNSEL), FOR
PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered September 26, 2024, in a hybrid CPLR article 78 proceeding and action. The order denied the motion of respondents-defendants seeking, inter alia, leave to renew and leave to amend their answer.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion insofar as it sought leave to amend the answer to add the fifteenth objection in point of law for failure to timely serve a notice of claim and dismissing the fourth and tenth causes of action, and as modified the order is affirmed without costs.

Same memorandum as in *Matter of Haunted Forest, LLC v Town of Wilson* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

504

KA 22-01655

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRY EVERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SERVICE, SYRACUSE, BANASIAK LAW OFFICE,
PLLC (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered September 13, 2022. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and burglary in the second degree.

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

Memorandum: In appeal No. 1, defendant was convicted following a jury trial of rape in the first degree (Penal Law former § 130.35 [1]) and burglary in the second degree (§ 140.25 [2]) and, in appeal No. 2, he was convicted following the same jury trial of burglary in the second degree (§ 140.25 [2]) and grand larceny in the fourth degree (§ 155.30 [4]). The charges arose from two burglaries of residences that occurred three days apart. In the first burglary, defendant entered the residence of the victim (first victim) and stole a purse. In the second burglary, defendant entered the residence of the victim (second victim) and raped her.

In both appeals, defendant contends that Supreme Court erred in permitting the prosecution to exercise a peremptory challenge out of order. After the selection of 12 jurors, the prosecutor challenged for cause a prospective alternate juror, and the court denied that challenge. The prosecutor declined to exercise a peremptory challenge but, after defense counsel did not exercise a peremptory challenge with respect to that prospective alternate juror, the prosecutor stated that they would exercise a peremptory challenge. Defense counsel objected that it was "too late" for the People to do so, but after the prosecutor argued that they had tried to challenge the juror for cause, the court stated it would "allow . . . it."

Initially, we reject the People's assertion that the court in fact granted the People's challenge for cause with respect to the prospective alternate juror. Rather, the record supports defendant's contention that the court allowed the People to exercise a belated peremptory challenge. Both the People and defendant were given two peremptory challenges per alternate juror and, after the prosecutor exercised a peremptory challenge with respect to another prospective alternate juror, the court remarked that "the People have used their peremptories for the first alternate."

CPL 270.15 (2) provides that the People "must exercise their peremptory challenges first and may not, after the defendant has exercised [their] peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box." Defendant, relying on, *inter alia*, *People v Alston* (88 NY2d 519, 529 [1996]) and *People v De Conto* (172 AD2d 684, 685 [2d Dept 1991], *affd* 80 NY2d 943 [1992]), contends that the court violated CPL 270.15 (2), thus requiring a reversal of the judgments of conviction. We conclude, however, that defendant's contention is moot inasmuch as "no alternates participated in the deliberation" (*People v Pinero*, 143 AD3d 428, 429 [1st Dept 2016], *lv denied* 29 NY3d 1000 [2017]; *see also* *People v Haardt*, 129 AD3d 1322, 1322-1323 [3d Dept 2015]; *People v Rivera*, 7 AD3d 358, 359 [1st Dept 2004], *lv denied* 3 NY3d 741 [2004]). The failure to follow the procedure set forth in CPL 270.15 (2) with respect to the prospective alternate juror "did not in any way affect or impact upon the composition of the defendant's jury nor, indeed, did it affect the selection of those who had previously been empanelled to sit on the jury" (*People v Stephens*, 255 AD2d 532, 533 [2d Dept 1998], *lv denied* 92 NY2d 1039 [1998]). Defendant's contention that the alleged error was prejudicial because it may have impacted defense counsel's decision not to object to keeping two sworn jurors on the panel later in the trial is without merit. Any objection to the two sworn jurors continuing on the jury based on their passing remarks to a witness outside of the courtroom regarding the length of the court recess would not be likely to succeed inasmuch as the inquiry by the court showed that the jurors did not "engage[] in misconduct of a substantial nature" (CPL 270.35 [1]).

Defendant next contends with respect to both appeals that the court erred in refusing to strike the testimony of a detective who compared defendant's fingerprints to the ones recovered from the window at the residence of the first burglary, or to grant a mistrial or an adjournment, based on the People's failure to disclose certain materials that the detective relied on and generated in the course of his fingerprint analysis. The court found, and the People do not dispute, that the People failed to comply with CPL 245.20 (1) with respect to those materials. We conclude, however, that the court did not abuse its discretion in fashioning an appropriate sanction (*see* CPL 245.80 [1] [a]; *People v Jenkins*, 98 NY2d 280, 284 [2002]; *People v Pugh*, 236 AD3d 1298, 1298-1299 [4th Dept 2025]; *People v Bookman*, 224 AD3d 1269, 1270 [4th Dept 2024]). We reject defendant's contention that the only "appropriate and proportionate" remedy to the prejudice suffered by him (CPL 245.80 [1] [a]) would be striking the detective's testimony, an adjournment to potentially hire an expert to

review the materials, or a new trial.

Defendant's contention with respect to both appeals that the search warrant was overbroad is not preserved for our review (see *People v Myles*, 216 AD3d 1419, 1421 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]; *People v Navarro*, 158 AD3d 1242, 1243-1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]). 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]). Finally, we reject defendant's contention with respect to both appeals that the sentence is unduly harsh and severe.

All concur except OGDEN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent in both appeals inasmuch as I conclude that Supreme Court abused its discretion in denying defense counsel's request for an adjournment once it was revealed during trial that the prosecution's latent fingerprint examiner used documents that had not been turned over to the defense. Initially, I agree with the majority that defendant's contention concerning the search warrant is not preserved for our review (see *People v Navarro*, 158 AD3d 1242, 1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]).

At trial, once it was revealed that documents used by the latent fingerprint examiner had not been disclosed, defense counsel, *inter alia*, requested an adjournment of the trial. The court found that the People exercised due diligence, and it further determined that it would give an adverse inference charge concerning the fingerprint evidence. The trial continued without the requested adjournment.

CPL 245.80 (1) (a) provides: "When material or information is discoverable under this article but is disclosed belatedly, the court shall impose a remedy or sanction that is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure. Regardless of a showing of prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material."

The first sentence requires the court to impose a prejudice-based remedy or sanction (see CPL 245.80 [1] [a]). The second sentence requires that the court provide "reasonable time to prepare and respond to the new material" without regard for the prejudice suffered by the party entitled to disclosure (*id.*). The plain language of the statute is clear. In my view, the court failed to comply with the second requirement prescribed in CPL 245.80 (1) (a) when it denied defense counsel's request for an adjournment. Contrary to the conclusion reached by the majority, nothing in the plain language of the statute suggests that a court can fulfill its duty under the first sentence of CPL 245.80 (1) (a) and dispense with its duty under the second sentence.

Defendant contends that the adjournment was necessary to ensure fair process, and I agree. "The constitutional right to present a defense encompasses 'the right to put before a jury evidence that

might influence the determination of guilt' " (*People v Cerda*, 40 NY3d 369, 377 [2023], quoting *Taylor v Illinois*, 484 US 400, 408 [1988]). As defense counsel argued at trial, the court's refusal impacted defense counsel's ability to effectively cross-examine the latent fingerprint examiner and also impacted defendant's decision to potentially secure an expert to rebut the latent fingerprint examiner's analysis. That error "deprived defendant of 'a meaningful opportunity to present a complete defense' " (*People v Deverow*, 38 NY3d 157, 168 [2022], quoting *Crane v Kentucky*, 476 US 683, 690 [1986]).

In my view, the error is not harmless. First, the evidence at trial was not overwhelming. Defendant testified at trial, and his testimony offered a competing narrative to the People's theory. Defendant was tried on six counts contained in two consolidated indictments relating to three separate burglaries. The jury found defendant not guilty of two counts, which related to one of the three burglaries. As a result, "there is no occasion for consideration of any doctrine of harmless error" (*People v Mosley*, 41 NY3d 640, 653 [2024]). In any event, even assuming, arguendo, that the proof of guilt is overwhelming as to some or all of the counts of which defendant was convicted, I conclude that the error still cannot be considered harmless because there is a reasonable possibility that the error contributed to defendant's conviction in each appeal (*see id.*; *People v Crimmins*, 36 NY2d 230, 237, 240-241 [1975]). I would therefore reverse the judgment in each appeal and grant a new trial on the four counts of which defendant was convicted (*see Cerda*, 40 NY3d at 378).

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

505

KA 22-01656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRY J. EVERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered September 13, 2022. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and grand larceny in the fourth degree.

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

Same memorandum as in *People v Everson* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

All concur except OGDEN, J., who dissents and votes to reverse in accordance with the same dissenting memorandum as in *People v Everson* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

506

KA 24-01151

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY R. BONANZA, DEFENDANT-APPELLANT.

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

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (KAREN A. MOWERS OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered November 21, 2022. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree (two counts), criminal sexual act in the first degree, rape in the first degree and endangering the welfare of a child (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]), one count of criminal sexual act in the first degree (former § 130.50 [4]), one count of rape in the first degree (former § 130.35 [4]), and four counts of endangering the welfare of a child (§ 260.10 [1]).

Defendant contends that the evidence is legally insufficient to establish his guilt and that the verdict is against the weight of the evidence. We reject those contentions. 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 from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), 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 People v Roche*, 231 AD3d 1531, 1533 [4th Dept 2024], *lv denied* 42 NY3d 1081 [2025]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although defendant contends that the testimony of the victim was incredible as a matter of law, we note that

"[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Delacruz*, 193 AD3d 1340, 1341 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022] [internal quotation marks omitted]; see *People v Perkins*, 196 AD3d 1107, 1109 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]; *People v Arnold*, 107 AD3d 1526, 1528 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013]), and we see no reason to disturb the jury's resolution of those issues.

Defendant further contends that he was deprived of a fair trial by the admission of certain expert testimony. In accordance with CPL 245.20 (1) (f), the People had disclosed to the defense the name of two experts and the report from the victim's medical examination, which showed that the victim had a healed laceration in her hymen, but the People neglected to turn over to defense counsel the curricula vitae and proficiency tests of those experts. Upon defendant's objection, County Court precluded one expert from testifying and held that the second expert, who actually conducted the medical examination, could provide only limited testimony. However, after defense counsel's opening statement in which she stated that the victim had been medically examined and that there was "[n]o indication of trauma," the court revisited its ruling and held that the second expert could give testimony regarding the examination. On appeal, defendant contends that the court abused its discretion in not precluding the testimony of the second expert and that the People offered testimony of the expert that was in violation of the court's ruling limiting her testimony. We reject that contention inasmuch as defendant "ignores the fact that he initially benefitted from a favorable ruling barring introduction of the [testimony regarding the examination], and then sought to utilize that ruling as a sword, to his advantage, by mischaracterizing [the victim's medical examination]" (*People v Rojas*, 97 NY2d 32, 36 [2001]; see *People v Spellicy*, 217 AD3d 1359, 1360 [4th Dept 2023], *lv denied* 41 NY3d 1021 [2024]; *People v Duplessis*, 16 AD3d 846, 847 [3d Dept 2005], *lv denied* 4 NY3d 853 [2005]).

Defendant's contention that he was denied a fair trial by prosecutorial misconduct on summation is not preserved for our review (see *People v Brooks*, 214 AD3d 1425, 1427 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023]; *People v Cirino*, 203 AD3d 1661, 1664 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Finally, the sentence is not unduly harsh or severe.

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

507

KA 23-01577

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHALISE B., DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 25, 2023. The judgment convicted defendant, upon her 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: On appeal from a judgment convicting her, upon her plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that County Court abused its discretion in denying her request to adjourn sentencing to allow defense counsel more time to research whether the Domestic Violence Survivors Justice Act (DVSJA) applied in this case. We reject that contention.

" 'A granting of an adjournment for any purpose is a matter of discretion for the trial court' " (*People v Williams*, 302 AD2d 903, 903 [4th Dept 2003], quoting *People v Singleton*, 41 NY2d 402, 405 [1977]). Under the circumstances here, where the defense had almost five months after entering a plea to research the issue, yet waited until the day of sentencing to request time to meet with a DVSJA expert to ascertain whether the statute might apply in the present case, the court did not abuse its discretion in denying defendant's request (*see generally id.*; *People v Payne*, 176 AD2d 827, 827 [2d Dept 1991], *lv denied* 79 NY2d 862 [1992]).

We reject defendant's further contention that her sentence is unduly harsh and severe.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

510

CA 24-00011

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

P.M., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

HELIO HEALTH, INC., DEFENDANT-RESPONDENT,
AND LAMAR K. FITCH, DEFENDANT.

HERMAN LAW FIRM, P.A., NEW YORK CITY (STUART MERMELSTEIN OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered October 2, 2023. The order granted the motion of defendant Helio Health, Inc. for summary judgment dismissing plaintiff's complaint against it.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendant Helio Health, Inc.

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained as the result of an incident that occurred at an apartment building owned by Helio Health, Inc. (defendant), during which three individuals engaged in nonconsensual sexual activities with her after providing her with drugs. At the time of the incident, two of those individuals resided in the apartment building and were current participants in defendant's supportive living program for individuals with substance use disorders. The third individual had been recently discharged from defendant's program. Defendant moved for summary judgment dismissing the complaint against it, and Supreme Court granted the motion. Plaintiff appeals, and we reverse.

It is well settled that " 'landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition' " (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004], quoting *Tagle v Jakob*, 97 NY2d 165, 168 [2001]). As a corollary of that duty, landowners have the "duty to protect tenants, patrons or invitees from foreseeable harm caused by the criminal conduct of others while they are on the premises" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 233 [2001]). Although landowners are "not the insurers of a visitor's safety" and are not required to protect visitors from unforeseeable injuries (*Maheshwari*,

2 NY3d at 294), they do "have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*D'Amico v Christie*, 71 NY2d 76, 85 [1987]; see *Lasek v Miller*, 306 AD2d 835, 835 [4th Dept 2003]).

Initially, we agree with plaintiff that residents of the supportive living program were not tenants over whom defendant had no control (see *Fowler v Yonkers Gospel Mission*, 67 AD3d 635, 637 [2d Dept 2009]; see also *Brown v University of Rochester*, 216 AD3d 1328, 1332 [3d Dept 2023]). We conclude that defendant had a legal duty to take appropriate action to protect against foreseeable harm, including a third party's foreseeable criminal conduct (see *Brown*, 216 AD3d at 1331-1332) and, here, defendant's own submissions raise issues of fact regarding the foreseeability of the incident that occurred (see *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 304 [1st Dept 2001]). It is for a jury to decide whether the incident was foreseeable and, if so, whether defendant failed to take reasonable actions to prevent the foreseeable harm (see *Fowler*, 67 AD3d at 636-637; *Jenkins v Ehmer*, 272 AD2d 976, 977 [4th Dept 2000]; see also *Jane Doe v Turnmill LLC*, 193 AD3d 618, 618-619 [1st Dept 2021]).

All concur except WHALEN, P.J., and GREENWOOD, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm the order granting the motion of Helio Health, Inc. (defendant) for summary judgment dismissing the complaint against it. Defendant owns apartment buildings, including the building where the incident here occurred, that give adults supportive living services to help them recover from substance abuse and addiction. Late one weekend evening, plaintiff, then a minor, and two of her friends went to the apartment of one of the residents to buy and consume drugs. While there, plaintiff was sexually assaulted by two residents and one former resident of the building. Plaintiff commenced this action against defendant, among others, alleging that defendant owed a duty to supervise the acts and conduct of the residents of its buildings to prevent foreseeable harm to others, including plaintiff while she was on the premises, and to implement policies and procedures to prevent foreseeable harms, including child sexual abuse.

"Although landowners . . . have a common-law duty to minimize foreseeable dangers on their property, including the criminal acts of third parties, they are not insurers of a visitor's safety" (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]; see *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]). Landowners "have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*D'Amico v Christie*, 71 NY2d 76, 85 [1987]; see *Pink v Rome Youth Hockey Assn., Inc.*, 28 NY3d 994, 997-998 [2016]). Landowners are not held to a duty to take protective measures "unless it is shown that [they] either know[] or [have] reason to know from past experience that there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor" (*Nallan*, 50 NY2d at 519 [internal quotation

marks omitted]; see *Pink*, 28 NY3d at 998). "Although the precise manner in which the harm occurred need not be foreseeable, liability does not attach unless the harm is within the class of reasonably foreseeable hazards that the duty exists to prevent" (*Sanchez v State of New York*, 99 NY2d 247, 252 [2002]).

In our view, defendant established as a matter of law, and plaintiff failed to raise an issue of fact, that the sexual assault on plaintiff by the residents and former resident of the building was not reasonably foreseeable (see *Lazarus v Wildlife Preserves, Inc.*, 229 AD3d 454, 456 [2d Dept 2024]; *Goris v New York City Hous. Auth.*, 227 AD3d 498, 498 [1st Dept 2024]; *Virella v 245 N. St. Hous. Dev. Fund Corp.*, 188 AD3d 1618, 1620 [4th Dept 2020]; see generally *Sanchez*, 99 NY2d at 254), and we would therefore affirm the order. There is no evidence that the two residents and former resident had a history of assault or sexual misconduct, and there is no evidence that similar prior crimes had occurred at the buildings (*cf. Brown v University of Rochester*, 216 AD3d 1328, 1332 [3d Dept 2023]).

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

511

CA 24-00921

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

HEARTBEAT INTERNATIONAL, INC., ON BEHALF OF
ITSELF AND ITS MEMBERS AND CLIENTS, ET AL.,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

LETITIA JAMES, IN HER OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF STATE OF NEW YORK,
DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF
COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER A. FERRARA, THOMAS MORE SOCIETY, WHITESTONE, FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered May 24, 2024. The order, inter alia, granted the motion of plaintiff to consolidate two actions in Supreme Court, Monroe County.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by denying plaintiffs' motion to the extent that it seeks an order designating Supreme Court, Monroe County, as the place of trial for the consolidated action and designating Supreme Court, New York County, as the place of trial of the consolidated action and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, New York County, for further proceedings.

Memorandum: On April 22, 2024, defendant Letitia James, in her official capacity as Attorney General of the State of New York (AG), sent notice of proposed action letters to various entities, including plaintiff Heartbeat International, Inc., and its members (HBI parties). The HBI parties were afforded, upon receipt of the letters, five business days to provide a reason why the litigation should not be commenced (see General Business Law § 349 [c]). The HBI parties did not respond to the letters and instead commenced the instant action in Supreme Court, Monroe County, seeking declaratory and injunctive relief from the litigation anticipated in the letters. Thereafter, on May 6, 2024, the AG commenced an action against the HBI parties in Supreme Court, New York County, consistent with her notice letters. The HBI parties moved in this action to, inter alia, consolidate this action with the AG's action and transfer the AG's

action to Monroe County. Supreme Court, Monroe County, granted the HBI parties' motion, consolidated the actions, designated Monroe County as the place of trial for the consolidated action, and deemed the AG to be the plaintiff and the HBI parties the defendants. The AG now appeals, as limited by her brief, from that part of the order that designated Monroe County as the appropriate venue.

"[C]onsolidated actions are generally tried where the first action was commenced, although the placement of venue rests in the sound discretion of the motion court" (*Di Pasquale v Security Mut. Life Ins. Co. of N.Y.*, 273 AD2d 621, 622 [3d Dept 2000]). This Court, moreover, "is vested with the same power and discretion as the [motion court] possesses" and we may substitute our own discretion even absent a finding that the motion court abused its discretion (*Phoenix Mut. Life Ins. Co. v Conway*, 11 NY2d 367, 370 [1962]; see *O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 171-172 [2d Dept 1995]; see generally *Smith v MDA Consulting Engrs., PLLC*, 210 AD3d 1448, 1448-1449 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023]). To that end, the first-in-time rule is not to be applied mechanically and exceptions may apply to the rule, including where the first-filed action constitutes an improper anticipatory filing (see *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 8-9 [1st Dept 2007]; *White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 99-100 [1st Dept 1997]).

Here, we agree with the AG that the HBI parties commenced this action preemptively and that the first-in-time rule should not apply (see *L-3 Communications Corp.*, 45 AD3d at 8-9). It is undisputed that the HBI parties received the notice of intent to sue letters and were given five days to respond to the letters but instead chose to immediately commence this action seeking, inter alia, declarations that the AG's anticipated causes of action against them are without merit. Application of the first-in-time rule under circumstances such as these, which evince a race to the courthouse, "would create disincentives to responsible litigation, by discouraging settlements due to fear of a preemptive strike and by providing a tactical advantage to defendants seeking a more favorable forum for litigation" (*id.* at 8). We therefore conclude that the preemptive filing by the HBI parties warrants a departure from the first-in-time rule and we modify the order by designating Supreme Court, New York County, the chosen venue of the AG as the acknowledged plaintiff (see generally *Matter of Zelazny Family Enters., LLC v Town of Shelby*, 180 AD3d 45, 47 [4th Dept 2019]), as the place of trial of the consolidated action.

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

512

CA 24-00692

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

JACQUELYN GOODSON AND DANIEL REHM,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

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

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (ZACHARY C. OREN OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Julie G. Denton, J.), entered April 1, 2024 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant City of Utica for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Jacquelyn Goodson (plaintiff) when she allegedly tripped and fell on a sidewalk in defendant City of Utica (City). The City moved for summary judgment dismissing the complaint against it, and Supreme Court denied the motion. We affirm.

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective [sidewalk] . . . condition unless it has received prior written notice of the defect, or an exception to the written notice requirement applies" (*Szuba v City of Buffalo*, 193 AD3d 1386, 1387 [4th Dept 2021] [internal quotation marks omitted]; see *Piotrowski v Town of Cheektowaga*, 232 AD3d 1280, 1282-1283 [4th Dept 2024]). The City had the initial burden on its motion of establishing that no prior written notice of the defect was given to the Commissioner of Public Works (Commissioner) (see *Utica City Code* § C-1.016 [a]; see also *Piotrowski*, 232 AD3d at 1283; *Garcia v Town of Tonawanda*, 210 AD3d 1483, 1484 [4th Dept 2022]), and we conclude that the City failed to meet that burden.

The City submitted an affidavit of a receptionist in the office

of the Commissioner, who averred that she searched the files in the Department of Public Works (DPW) and determined that the DPW did not receive any prior notice of the condition of the sidewalk. The City also submitted the deposition of the Commissioner, who testified that, if any written notice was sent to him, it would "sit[] on [his] desk"; the DPW did not generate any computer records and had no other filing system for such documents. If the DPW caseload permitted it, a staff member would look into the issue identified in a complaint. If a member of the staff looked into an issue, the DPW may not thereafter retain the written complaint that prompted the investigation. The document may instead be sent to another department.

With regard to plaintiff's fall, the Commissioner testified that he checked his desk after receiving the notice of claim and did not find any written notice regarding the condition of the sidewalk at issue. However, his testimony raised an issue of fact whether the written notice had been given to him but had not been saved with the DPW records of complaints "on [his] desk." The City thus failed to meet its initial burden of establishing that the Commissioner did not receive prior written notice of the alleged defect (*see Garcia*, 210 AD3d at 1484; *see also Murphy v City of Corning*, 302 AD2d 1006, 1007 [4th Dept 2003]).

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

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CA 24-01893

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

ESPERANZA MANSION GROUP LLC, TODD ALEXANDER
ENTERPRISES, INC., TODD ALEXANDER AND MARY OLIVO,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

LAWRENCE MEHLENBACHER, ELIZABETH MEHLENBACHER,
ESPERANZA MANSION & INN LLC, AND ESPERANZA
MANSION ESTATES, LLC, DEFENDANTS-APPELLANTS.

LIPPES MATHIAS LLP, ROCHESTER (KELLY S. FOSS OF COUNSEL), AND HARRIS
BEACH PLLC, PITTSFORD, FOR DEFENDANTS-APPELLANTS.

WEBSTER SZANYI, LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Yates County (Daniel J. Doyle, J.), entered October 9, 2024. The order, *inter alia*, denied the cross-motion of defendants for, among other things, summary judgment on their counterclaims for willful exaggeration of a mechanic's lien and abuse of process.

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

Memorandum: This dispute arises from an oral agreement between defendants Lawrence and Elizabeth Mehlenbacher and plaintiffs Todd Alexander and Mary Olivo regarding the purchase and renovation of a historic property (Mansion). As described by Alexander and Olivo, they reached an informal agreement with the Mehlenbachers whereby Alexander and Olivo, together with Alexander's contracting company, plaintiff Todd Alexander Enterprises, Inc. (TAEI), would renovate the Mansion at a reduced rate in exchange for an ownership interest in the real property and a share of the Mansion's revenues as a hotel and wedding venue. Following a breakdown in communications between the parties, the Mehlenbachers took control of the Mansion in March 2020, leaving plaintiffs with no ownership interest in the real property or the Mansion's future revenues. Shortly thereafter, TAEI filed a mechanic's lien for the value of unpaid labor and materials incurred by plaintiffs during renovation of the Mansion, and plaintiffs commenced this action for, *inter alia*, enforcement of that lien against defendants. In response, defendants filed counterclaims for, *inter alia*, willful exaggeration of the mechanic's lien pursuant to Lien Law § 39-a and abuse of process.

After the action was consolidated with two related actions involving largely the same parties, plaintiffs moved to, inter alia, dismiss the willful exaggeration counterclaim against Alexander in his individual capacity pursuant to CPLR 3211 (a) (7), and defendants cross-moved for, inter alia, summary judgment on their willful exaggeration and abuse of process counterclaims. Defendants now appeal from an order that, among other things, denied their cross-motion and granted plaintiffs' motion in part. On appeal, defendants contend that Supreme Court erred in denying their cross-motion with respect to the relevant counterclaims and in granting plaintiffs' motion insofar as it sought to dismiss the willful exaggeration counterclaim against Alexander. We reject those contentions.

To meet their initial burden on the cross-motion with regard to the counterclaim for willful exaggeration of the mechanic's lien, defendants were required to demonstrate as a matter of law "that the amounts set forth [in the lien] were 'intentionally and deliberately exaggerated' " (*Garrison v All Phase Structure Corp.*, 33 AD3d 661, 662 [2d Dept 2006]; see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). " 'The fact that a lien may contain improper charges [or mistakes] does not, in and of itself, establish that a plaintiff wilfully exaggerated a lien' " (*Park Place Carpentry & Bldrs., Inc. v DiVito*, 74 AD3d 928, 929 [2d Dept 2010]; see *Howdy Jones Constr. Co. v Parklaw Realty*, 76 AD2d 1018, 1018 [3d Dept 1980], *affd* 53 NY2d 718 [1981]; *Goodman v Del-Sa-Co Foods*, 15 NY2d 191, 194 [1965]). Further, "Section 39-a of the Lien Law is penal in nature, and must be strictly construed in favor of the person upon whom the penalty is sought to be imposed" (*Goodman*, 15 NY2d at 195 [internal quotation marks omitted]; see *Blair v Ferris*, 150 AD3d 1365, 1372 [3d Dept 2017]).

"[T]he issue of wilful and/or fraudulent exaggeration is . . . one which ordinarily must be determined at . . . trial" (*Coppola Gen. Contr. Corp. v Noble House Constr. of N.Y.*, 224 AD2d 856, 857 [3d Dept 1996]; see *Washington 1993 v Reles*, 255 AD2d 745, 747 [3d Dept 1998]), in part, because proof of willfulness "necessarily involves proof as to the credibility of the lienor" (*On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500, 500 [1st Dept 2013]). Evidence from which willfulness might be inferred is not sufficient to meet a moving party's burden, because "every available inference must be drawn in the [non-moving party's] favor" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). Thus, summary judgment is appropriate only where " 'the evidence that the amount of the lien was wilfully exaggerated is conclusive' " (*Casella Constr. Corp. v 322 E. 93rd St. LLC*, 211 AD3d 458, 459 [1st Dept 2022]).

Defendants failed to make such a showing here, and thus the court properly denied their cross-motion with respect to the willful exaggeration counterclaim. Although defendants submitted conclusive evidence that the lien contained certain non-lienable charges, their submissions failed to establish as a matter of law that the inclusion of such charges was attributable to something other than good faith mistake (see generally *Pelc v Berg*, 68 AD3d 1672, 1673 [4th Dept 2009]; *P. J. Panzeca, Inc. v Alizio*, 52 AD2d 919, 919 [2d Dept 1976]).

With regard to the remaining allegedly exaggerated amounts, because no formal agreement was reached between the parties as to how plaintiffs would be compensated for their work on the Mansion, numerous questions of fact remain as to whether the lien sought more than the reasonable value of the labor plaintiffs expended (*see generally* Lien Law § 3). Questions of fact also exist whether "any errors were the result of ignorance or honest mistake" (*On the Level Enters., Inc.*, 104 AD3d at 501).

We further conclude that defendants did not meet their initial burden on the cross-motion with respect to the abuse of process counterclaim. "Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). Here, defendants failed to establish that the lien was filed for some other purpose than to secure debts due for work done on the Mansion (*see generally SRS Enters., Inc. v Rosemex, Inc.*, 223 AD3d 419, 420 [1st Dept 2024]; *Weaver v Acampora*, 227 AD2d 727, 728 [3d Dept 1996]; *New York State Props. v Clark*, 183 AD2d 1003, 1004-1005 [3d Dept 1992]). Given that defendants failed to meet that burden, the court also properly denied the cross-motion with respect to the abuse of process counterclaim.

Moreover, the court properly granted plaintiffs' motion insofar as it sought to dismiss the willful exaggeration counterclaim against Alexander in his individual capacity. TAEI was the sole lienor, and thus Alexander was not liable in his individual capacity (*see* Lien Law § 39-a).

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

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CA 24-00877

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

IN THE MATTER OF THE APPOINTMENT OF
HON. RANDOLPH F. TREECE (RET.) AS ATTORNEY TRUSTEE
OF THE PETER AND ELIZABETH C. TOWER
IRREVOCABLE TRUST

CYNTHIA T. DOYLE AND MOLLIE T. BYRNES,
PETITIONERS-APPELLANTS;

MEMORANDUM AND ORDER

JOHN N. BLAIR, INTERVENOR-RESPONDENT.

BARCLAY DAMON LLP, BUFFALO (JENNIFER G. FLANNERY OF COUNSEL), AND
PILLSBURY WINTHROP SHAW PITTMAN LLP, NEW YORK CITY, FOR
PETITIONERS-APPELLANTS.

PHILLIPS LYTTLE LLP, BUFFALO (ERIC M. KRAUS OF COUNSEL), FOR
INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered May 23, 2024 in a proceeding pursuant to CPLR article 77. The order granted the motion of John N. Blair insofar as he sought leave to intervene as a party to this proceeding and transfer of the proceeding to Surrogate's Court, Erie County.

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

Memorandum: Petitioners, trustees and sole beneficiaries of the Peter and Elizabeth C. Tower Irrevocable Trust, commenced this special proceeding pursuant to CPLR article 77 seeking the appointment of a successor attorney trustee. Petitioners allege that intervenor, who served as the attorney trustee, was removed from that position by a unanimous vote of the required trustees on account of alleged breaches of his fiduciary duties. Intervenor moved, inter alia, for leave to intervene in the proceeding. Petitioners appeal from an order that, among other things, granted intervenor's motion. We affirm.

Upon a timely motion, a person is permitted to intervene as of right in a proceeding when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment (see CPLR 1012 [a] [2]). In addition, a court, in its discretion, may permit a person to intervene, inter alia, when the person's claim or defense and the main action have a common question of law or fact (see CPLR 1013). " Whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of

discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings' " (*Jones v Town of Carroll*, 158 AD3d 1325, 1327 [4th Dept 2018], *lv dismissed* 31 NY3d 1064 [2018]; *see Wells Fargo Bank, N.A. v McLean*, 70 AD3d 676, 677 [2d Dept 2010]). Here, intervenor has a real and substantial interest in the outcome of the proceeding inasmuch as he contends that he was wrongly removed as the attorney trustee and that there should not be an appointment of a successor attorney trustee (*see generally Matter of Norstar Apts. v Town of Clay*, 112 AD2d 750, 751 [4th Dept 1985]).

Contrary to petitioners' contention, intervenor's motion is not barred by collateral estoppel. The equitable doctrine of collateral estoppel precludes a party from relitigating in a subsequent proceeding an issue raised in a prior proceeding and decided against that party or those in privity (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). "Collateral estoppel applies only if the issue in the second [proceeding] is identical to an issue which was raised, necessarily decided and material in the first [proceeding], and the [party] had a full and fair opportunity to litigate the issue in the earlier [proceeding]" (*Utica Mut. Ins. Co. v American Re-Insurance Co.*, 218 AD3d 1283, 1284 [4th Dept 2023] [internal quotation marks omitted]; *see City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128 [2007]; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]). "The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination" (*Jones v Town of Carroll*, 122 AD3d 1234, 1237 [4th Dept 2014], *lv denied* 25 NY3d 910 [2015] [internal quotation marks omitted]), and "the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior [proceeding]" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]). Collateral estoppel does not apply where the prior determination was based on different facts (*see Utica Mut. Ins. Co.*, 218 AD3d at 1284; *Matter of Henson v City of Syracuse*, 119 AD3d 1340, 1341 [4th Dept 2014]). Here, petitioners failed to meet the burden of demonstrating that the issue of intervenor's removal as attorney trustee was necessarily decided in a prior proceeding, which involved intervenor's position in an entirely different entity, and intervenor established that he did not have a full and fair opportunity to litigate the issue.

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

515

CA 24-01455

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

VINCENT C. AUBERTINE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KEITH A. AUBERTINE AND TRACY L. AUBERTINE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

TREVETT CRISTO, ROCHESTER (DAVID H. EALY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

SCHWERZMANN & WISE, P.C., WATERTOWN (KEITH B. CAUGHLIN OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 13, 2024. The order granted the motion of defendants to the extent that it sought summary judgment dismissing the causes of action seeking to impose a constructive trust.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against defendants, who are his brother and his brother's wife, seeking, inter alia, to impose a constructive trust on certain real property. Defendants moved for, inter alia, summary judgment dismissing plaintiff's amended complaint. Supreme Court granted the motion to the extent that it sought summary judgment dismissing plaintiff's causes of action seeking to impose a constructive trust. Defendants subsequently cross-moved for summary judgment on their counterclaims, an award of possession, and a declaration that they are the rightful owners of the real property. The court effectively granted the cross-motion and, inter alia, granted defendants full and immediate possession of the land. In appeal No. 1, plaintiff appeals from the order dismissing his constructive trust causes of action. In appeal No. 2, plaintiff appeals from the later order insofar as it effectively granted the cross-motion.

In support of the first cause of action for a constructive trust, plaintiff alleges that his parents sold him the property, an approximately 108-acre parcel, as well as another parcel for a

purchase price of \$165,000. Plaintiff alleges that his parents promised to hold title to the 108-acre parcel "for [p]laintiff's benefit if and until they decided whether to subdivide" so as to put a house on a smaller parcel. Plaintiff further alleges that, in reliance on the promise, he paid the purchase price to his parents, but that, when his father died, his mother transferred title to the 108-acre parcel to defendants, who paid her \$50,000.

Generally, there are four requirements for the imposition of a constructive trust: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Barker v Gervera*, 236 AD3d 1318, 1325 [4th Dept 2025]). A constructive trust is applied in situations where "an unfulfilled promise to convey an interest in land induces another, in the context of a confidential or fiduciary relationship, to make a transfer resulting in unjust enrichment" (*McGrath v Hilding*, 41 NY2d 625, 628-629 [1977]). Courts do not rigidly apply the elements constituting a constructive trust but use them as flexible guidelines (*see Simonds v Simonds*, 45 NY2d 233, 241 [1978]; *Beason v Kleine*, 96 AD3d 1611, 1613 [4th Dept 2012]; *Kaufman v Cohen*, 307 AD2d 113, 127 [1st Dept 2003]; *see also Nastasi v Nastasi*, 26 AD3d 32, 38 [2d Dept 2005]). The purpose of a constructive trust is to prevent unjust enrichment (*see Simonds*, 45 NY2d at 242; *Cruz v McAneney*, 31 AD3d 54, 58-59 [2d Dept 2006]).

Here, we conclude that defendants did not meet their initial burden on their motion insofar as it sought summary judgment dismissing plaintiff's first cause of action. Although the parents never transferred title of the 108-acre parcel to plaintiff, "courts have extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no transfer [of that property] actually occurred" (*Moak v Raynor*, 28 AD3d 900, 902 [3d Dept 2006]; *see generally Mei Yun Chen v Mei Wan Kao*, 97 AD3d 730, 730 [2d Dept 2012]). Thus, contrary to defendants' contention, we conclude that "the fact that . . . plaintiff never held any previous interest in the disputed parcel was not fatal to [his] claim" (*Mendel v Hewitt*, 161 AD2d 849, 850 [3d Dept 1990]).

Further, although defendants were not parties to the original promise between plaintiff and his parents, "if a constructive trust is otherwise appropriate, it will be imposed [on a third-party transferee] unless th[at] party . . . is a bona fide purchaser" (*Majer v Schmidt*, 169 AD2d 501, 503 [1st Dept 1991]; *see Bronowski v Magnus Enters.*, 61 AD2d 879, 880 [4th Dept 1978]). Defendants failed to establish, as a matter of law, that they were bona fide purchasers, and there are questions of fact whether defendants were unjustly enriched by the transfer of the 108-acre parcel (*see Simonds*, 45 NY2d at 242; *Istel v Istel*, 258 AD2d 506, 507 [2d Dept 1999]).

Plaintiff's contentions regarding the second cause of action are improperly raised for the first time in plaintiff's reply brief and therefore not properly before us (*see Francis v Posa*, 21 AD3d 1335, 1336 [4th Dept 2005]). In any event, assuming arguendo that plaintiff

did not abandon any challenge to the dismissal of the second cause of action by failing to raise any argument regarding that cause of action in his main brief on appeal, we conclude that those contentions are without merit.

We therefore modify the order in appeal No. 1 by denying the motion in part and reinstating the first cause of action. In light of our determination in appeal No. 1 that defendants did not meet their initial burden on their motion insofar as it sought summary judgment dismissing plaintiff's first cause of action, we also conclude that, in appeal No. 2, the court erred in effectively granting defendants' cross-motion, and we consequently reverse the order in appeal No. 2 insofar as appealed from and deny the cross-motion.

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

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CA 24-01564

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

VINCENT C. AUBERTINE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KEITH A. AUBERTINE AND TRACY L. AUBERTINE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

TREVETT CRISTO, ROCHESTER (DAVID H. EALY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

SCHWERZMANN & WISE, P.C., WATERTOWN (KEITH B. CAUGHLIN OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County
(James P. McClusky, J.), entered June 11, 2024. The order, insofar as
appealed from, granted the cross-motion of defendants for summary
judgment on their first and second counterclaims.

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

Same memorandum as in *Aubertine v Aubertine* ([appeal No. 1] –
AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00417

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

CANFIELD FUNDING, LLC, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

FOCALPOINTE GROUP, LLC, MICHAEL MANN, DEFENDANTS,
UNITEDHEALTH GROUP INCORPORATED, OPTUM, INC., AND
OPTUMINSIGHT, INC., DEFENDANTS-APPELLANTS-RESPONDENTS.

CONNORS LLP, BUFFALO (RANDALL D. WHITE OF COUNSEL), FOR
DEFENDANTS-APPELLANTS-RESPONDENTS.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL),
FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January 23, 2024. The order, among other things, denied in part the motion of defendants UnitedHealth Group Incorporated, Optum, Inc. and Optuminsight, Inc. to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking to dismiss the fraudulent misrepresentation cause of action to the extent that it is based on fraudulent acts occurring prior to August 15, 2016, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages it sustained in a fraudulent scheme perpetrated by defendant Focalpointe Group, LLC (Focalpointe) and its principal, defendant Michael Mann. Plaintiff also named as defendants UnitedHealth Group Incorporated, Optum, Inc., and Optuminsight, Inc. (UHG/Optum defendants), whose employees allegedly assisted Mann in his fraudulent scheme. As against UHG/Optum defendants, plaintiff asserted causes of action for fraudulent misrepresentation, aiding and abetting fraud, and negligent supervision. UHG/Optum defendants moved to dismiss the complaint against them pursuant to, inter alia, CPLR 3211 (a) (5), (7), and (8). Plaintiff did not contest the dismissal of the aiding and abetting fraud cause of action, and Supreme Court granted the motion insofar as it sought dismissal of that cause of action as well as the cause of action for negligent supervision against UHG/Optum defendants, but otherwise denied the motion. UHG/Optum defendants appeal, and plaintiff cross-appeals.

Contrary to UHG/Optum defendants' contention on their appeal, the

court properly denied that part of the motion seeking to dismiss the fraudulent misrepresentation cause of action against them for failure to state a cause of action. On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, we must "accept the facts as alleged in the complaint as true, accord [the] plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). "Whether a plaintiff can ultimately establish [their] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; see *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]).

"Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [internal quotation marks omitted]).

Here, plaintiff alleges that it provides accounts receivable factoring to businesses whereby it purchases accounts receivable from clients at a discount, the invoices are assigned to plaintiff, and plaintiff then collects those receivables from the third-party debtors. Plaintiff entered an agreement with Focalpointe in October 2013 for plaintiff to purchase accounts receivable from Focalpointe for alleged information technology (IT) services it provided to UHG/Optum defendants. Focalpointe would generate invoices for those services it provided and give those invoices to plaintiff for factoring. Plaintiff verified with UHG/Optum defendants that those invoices from Focalpointe were due and payable. But as it turned out, between November 2013 and September 2019, UHG/Optum defendants did not have a legitimate business relationship with Focalpointe and the invoices were a sham. Mann created accounts to make it appear as if UHG/Optum defendants were making payments on the fraudulent invoices, and he obtained financing from another factoring company to build a pyramid scheme.

Plaintiff alleges that it relied on representations made by UHG/Optum defendants through four of their employees. Plaintiff's primary contact at UHG/Optum defendants was employee number one, a "Director" whose responsibilities included "staffing" and "financial analysis." Employee number one represented that he was responsible for verifying Focalpointe's invoices and verified them on hundreds of occasions over six years. Plaintiff alleges that it also communicated with three other employees of UHG/Optum defendants. In October 2014, employee number two, a "Director" at the New York office of Optum, Inc. and Optuminsight, Inc., confirmed that UHG/Optum defendants' ledger showed open Focalpointe invoices in the same amount as shown by plaintiff and confirmed that plaintiff was noted to be the proper assignee of Focalpointe's open invoices with UHG/Optum defendants. In

February 2015, employee number three, a "Vice President" with responsibilities including "vendor management" and "IT delivery," confirmed that Focalpointe had an account balance with UHG/Optum defendants in the amount of \$3.4 million and further noted that employee number one was the appropriate contact at UHG/Optum defendants with respect to financial matters. In July 2015, employee number four confirmed that Focalpointe had an account balance with UHG/Optum defendants in the amount of \$3.2 million and purported to "approve" additional Focalpointe invoices.

UHG/Optum defendants contend that plaintiff's allegations are insufficient to establish that the four employees had apparent authority to bind UHG/Optum defendants. We disagree. "[A] principal may be held liable in tort for the misuse by its agent of [their] apparent authority to defraud a third party who reasonably relies on the appearance of authority, even if the agent commits the fraud solely for [their] personal benefit, and to the detriment of the principal" (*Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 113 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]; *see American Socy. of Mech. Engrs., Inc. v Hydrolevel Corp.*, 456 US 556, 566 [1982], *reh denied* 458 US 1116 [1982]; *News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 148 [1st Dept 2005]). "[L]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to [them]" (*American Socy. of Mech. Engrs., Inc.*, 456 US at 566 [internal quotation marks omitted]). "The reason for this rule is that the principal, by virtue of its ability to select its agents and to exercise control over them . . . , is in a better position than third parties to prevent the perpetration of fraud by such agents through the misuse of their positions" (*Parlato*, 299 AD2d at 113). "Thus, the principal should not escape liability when an innocent third person suffers a loss as the result of an agent's abuse, for [their] own fraudulent purposes, of the third person's reasonable reliance on the apparent authority with which the principal has invested the agent" (*id.*).

"Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]; *see Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551 [1997]; *Regency Oaks Corp. v Norman-Spencer McKernan, Inc.*, 129 AD3d 1454, 1456 [4th Dept 2015], *appeal dismissed & lv dismissed* 26 NY3d 980 [2015]). "The agent cannot by [their] own acts imbue [themselves] with apparent authority" (*Hallock*, 64 NY2d at 231; *see Regency Oaks Corp.*, 129 AD3d at 1456; *Federal Ins. Co. v Diamond Kamvakis & Co.*, 144 AD2d 42, 45 [1st Dept 1989], *lv denied* 74 NY2d 604 [1989]). "Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal—not the agent" (*Hallock*, 64 NY2d at 231 [internal quotation marks omitted]; *see Regency Oaks Corp.*, 129 AD3d at 1456; *Federal Ins.*

Co., 144 AD2d at 45).

Here, plaintiff alleges that the four employees had apparent authority to bind UHG/Optum defendants. Plaintiff alleges that UHG/Optum defendants allowed the four employees to use email accounts and telephones of UHG/Optum defendants during work hours to communicate with plaintiff over a six-year period. The job titles and responsibilities that UHG/Optum defendants gave to the four employees aligned with the transaction that plaintiff sought to verify, i.e., payment for IT staffing, and UHG/Optum defendants, through employee number three, a Vice President, confirmed the existence of a debt owed to Focalpointe and that employee number one was the appropriate contact with respect to financial matters concerning UHG/Optum defendants (*see generally Federal Ins. Co.*, 144 AD2d at 46-47). Thus, plaintiff sufficiently alleges that UHG/Optum defendants "created an appearance of authority on which . . . plaintiff reasonably relied, thereby enabling the agent[s] to successfully perpetrate the tort" of fraudulent misrepresentation (*Parlato*, 299 AD2d at 114).

UHG/Optum defendants further contend on their appeal that the court erred in failing to grant the motion in its entirety on the basis of lack of personal jurisdiction. We reject that contention. "As the party seeking to assert personal jurisdiction, the plaintiff bears the burden of proof on [that] issue . . . but, [i]n order to defeat a motion to dismiss based upon lack of jurisdiction, a plaintiff need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant[s]" (*People v Frisco Mktg. of NY LLC*, 93 AD3d 1352, 1353 [4th Dept 2012] [internal quotation marks omitted]; *see Altman v DiPreta*, 204 AD3d 965, 967 [2d Dept 2022], *lv denied* 38 NY3d 913 [2022]; *Tucker v Sanders*, 75 AD3d 1096, 1096 [4th Dept 2010]).

UHG/Optum defendants are foreign corporations with their principal place of business in Minnesota, and plaintiff relies on long-arm jurisdiction under CPLR 302, which provides, in relevant part, that "a court may exercise personal jurisdiction over any non-domiciliary, or [their] executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. commits a tortious act within the state" (CPLR 302 [a] [1], [2] [emphasis added]). Here, as noted above, plaintiff sufficiently alleges that UHG/Optum defendants created an appearance of authority with respect to the four employees on which plaintiff reasonably relied, and thus there is an unresolved issue whether those employees were agents acting with apparent authority. We conclude that plaintiff has set forth sufficient facts to render UHG/Optum defendants subject to the court's jurisdiction based on their agents' allegedly tortious conduct in New York (*see Frisco Mktg. of NY LLC*, 93 AD3d at 1353-1354; *Tucker*, 75 AD3d at 1097).

We agree with UHG/Optum defendants, however, that the court erred in denying the motion to the extent it sought partial dismissal of the fraudulent misrepresentation cause of action on the basis of the statute of limitations. Plaintiff commenced this action on August 15,

2022. A claim for fraudulent misrepresentation is governed by CPLR 213 (8), which sets forth a statute of limitations that is the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud, or could with reasonable diligence have discovered it (see *Boardman v Kennedy*, 105 AD3d 1375, 1376 [4th Dept 2013]). Plaintiff alleges that the fraud occurred from November 2013 to September 2019 and that it discovered the fraud in early September 2019. Inasmuch as this action was commenced more than two years after the discovery of the fraud, the two-year discovery provision is not relevant (see *Parlato*, 299 AD2d at 114 n 2). We conclude that the motion to the extent it sought partial dismissal on the basis of statute of limitations should have been granted, and we therefore modify the order by granting that part of the motion seeking to dismiss the fraudulent misrepresentation cause of action to the extent that it is based on any fraudulent acts occurring prior to August 15, 2016 (see *Lane's Floor Coverings & Interiors, Inc. v DiLalla*, 226 AD3d 593, 595 [1st Dept 2024]; *Krog Corp. v Vanner Group, Inc.*, 158 AD3d 914, 918 [3d Dept 2018]; *Parlato*, 299 AD2d at 114).

With respect to plaintiff's cross-appeal, we reject plaintiff's contention that the court erred in granting the motion to the extent it sought dismissal of the negligent supervision cause of action. Assuming, arguendo, that New York and not Minnesota law applies to that cause of action, as plaintiff contends, we conclude that plaintiff fails to allege the first required element of that cause of action. Under New York law, to state a negligent supervision cause of action, the complaint "must include allegations that: (1) the employer had actual or constructive knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm; (2) the employer knew or should have known that it had the ability to control the employee and of the necessity and opportunity for exercising such control; and (3) the employee engaged in tortious conduct on the employer's premises or using property or resources available to the employee only through their status as an employee, including intellectual property and confidential information" (*Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 157 [2023]). "[A] defendant is on notice of an employee's propensity to engage in tortious conduct when it knows or should know of the employee's tendency to engage in such conduct" (*id.* at 158). "An employer 'should know' of an employee's dangerous propensity if it has reason to know of the facts or events evidencing that propensity, and may be liable if it nonetheless 'place[s] the employee in a position to cause foreseeable harm' " (*id.*). "Put differently, the notice element is satisfied if a reasonably prudent employer, exercising ordinary care under the circumstances, would have been aware of the employee's propensity to engage in the injury-causing conduct" (*id.* at 158-159).

Here, plaintiff does not allege that UHG/Optum defendants had actual or constructive knowledge of the four employees' propensity to commit fraudulent acts (see *106 N. Broadway, LLC v Lawrence*, 189 AD3d 733, 737 [2d Dept 2020]). At most, plaintiff alleges UHG/Optum

defendants should have been aware of *Mann's* propensity for fraudulent conduct, but Mann was not their employee.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

518

CA 23-02041

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

CELESTE R. HELD, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CHEEKTOWAGA-SLOAN UNION FREE SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

DAN CHIACCHIA ATTORNEYS, PLLC, HAMBURG (TIFFANY M. KOPACZ OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING PLLC, BUFFALO (KEVIN G. COPE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered December 1, 2023 in a personal injury action pursuant to the Child Victims Act. The order dismissed the complaint upon a jury verdict.

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

Same memorandum as in *Held v Cheektowaga-Sloan Union Free Sch. Dist.* ([appeal No. 3] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

519

CA 24-01152

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

CELESTE R. HELD, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CHEEKTOWAGA-SLOAN UNION FREE SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

DAN CHIACCHIA ATTORNEYS, PLLC, HAMBURG (TIFFANY M. KOPACZ OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING PLLC, BUFFALO (KEVIN G. COPE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Daniel Furlong, J.), entered July 3, 2024 in a personal injury action pursuant to the Child Victims Act. The amended order denied plaintiff's motion to set aside the jury verdict.

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

Same memorandum as in *Held v Cheektowaga-Sloan Union Free Sch. Dist.* ([appeal No. 3] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

520

CA 24-01659

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

CELESTE R. HELD, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CHEEKTOWAGA-SLOAN UNION FREE SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

DAN CHIACCHIA ATTORNEYS, PLLC, HAMBURG (TIFFANY M. KOPACZ OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING PLLC, BUFFALO (KEVIN G. COPE OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Daniel Furlong, J.), entered June 28, 2024 in a personal injury action pursuant to the Child Victims Act. The judgment dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that she was sexually abused on one occasion by her fourth grade teacher while she was a student in defendant, Cheektowaga-Sloan Union Free School District (District), in the early 1970s. A trial was held, and the jury found that the District was negligent in retaining, supervising, or directing the teacher but that its negligence was not a substantial factor in causing plaintiff's injuries. In appeal No. 1, plaintiff appeals from an order dismissing her complaint upon the jury verdict. In appeal No. 2, plaintiff appeals from an amended order denying her posttrial motion pursuant to CPLR 4404 (a) to set aside the verdict and direct judgment in her favor or, in the alternative, order a new trial on the ground that the verdict is inconsistent and against the weight of the evidence. In appeal No. 3, plaintiff appeals from a judgment dismissing the complaint.

As an initial matter, the appeal from the judgment in appeal No. 3 brings up for review the propriety of the order in appeal No. 1 and the amended order in appeal No. 2, and thus the appeals from the order in appeal No. 1 and the amended order in appeal No. 2 must be dismissed (*see Gumas v Niagara Frontier Tr. Metro Sys., Inc.*, 189 AD3d 2095, 2095-2096 [4th Dept 2020]; *see also* CPLR 5501 [a] [1], [2]).

We reject plaintiff's contention that Supreme Court erred in precluding the testimony of certain nonparty witnesses regarding the teacher's acts of sexual abuse of them before plaintiff was abused, but who did not report their abuse until after plaintiff was abused. It is well settled that "[t]rial courts are accorded wide discretion in making evidentiary rulings . . . [and that,] absent an abuse of discretion, those rulings should not be disturbed on appeal" (*Mazella v Beals*, 27 NY3d 694, 709 [2016] [internal quotation marks omitted]). "To be admissible [at trial], evidence must be relevant and its probative value outweigh the risk of any undue prejudice" (*id.*). We conclude that the court did not abuse its discretion in precluding the testimony of plaintiff's former classmates (see 2006905 *Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 222 AD3d 1436, 1437-1438 [4th Dept 2023], *lv denied* 42 NY3d 904 [2024]). Moreover, even assuming, arguendo, that the court erred in precluding the testimony, we conclude that the error is harmless under the circumstances of this case, where the jury found that the District was negligent in retaining, supervising, or directing the teacher (see CPLR 2002; *Saraiva v New York State Thruway Auth.*, 234 AD3d 1325, 1326 [4th Dept 2025]).

Plaintiff next contends that the court erred in denying her posttrial motion to set aside the verdict as contrary to the weight of the evidence because the issues of negligence and proximate cause were inextricably interwoven. She further contends that the court erred in denying her motion because the evidence so preponderated in her favor that the verdict could not have been reached on any fair interpretation of the evidence. We reject those contentions. "A verdict is not against the weight of the evidence merely because the jury finds a defendant negligent but determines that [its] negligence is not a proximate cause of the [plaintiff's injuries]" (*Berner v Little*, 137 AD3d 1675, 1676 [4th Dept 2016] [internal quotation marks omitted]; see *Butterfield v Caputo*, 108 AD3d 1162, 1163 [4th Dept 2013]). "Instead, [a] jury's finding that a party was at fault but that such fault was not a proximate cause of the [injuries] is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Berner*, 137 AD3d at 1676 [internal quotation marks omitted]; see *Almuganahi v Gonzalez*, 174 AD3d 1492, 1493 [4th Dept 2019]; *Butterfield*, 108 AD3d at 1163). In addition, it is well settled that a motion to set aside a jury verdict as against the weight of the evidence should not be granted unless "the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]; see *Sauter v Calabretta*, 103 AD3d 1220, 1220 [4th Dept 2013]).

We conclude that the verdict is not against the weight of the evidence inasmuch as the issues of negligence and causation were not inextricably interwoven (see generally *Pavlou v City of New York*, 8 NY3d 961, 963 [2007]) and that the jury's finding that the District's negligence was not a proximate cause of plaintiff's injuries was based

on a fair interpretation of the evidence (see *LaMacchia v City of New Rochelle*, 125 AD3d 817, 818 [2d Dept 2015]). “The overarching principle governing determinations of proximate cause is that a defendant’s negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury” (*Hain v Jamison*, 28 NY3d 524, 528-529 [2016] [internal quotation marks omitted]; see *Mirand v City of New York*, 84 NY2d 44, 50 [1994]). Under the facts of this case, it was logically possible for the jury to find negligence without also finding proximate cause (see generally *Berner*, 137 AD3d at 1676). The jury could have concluded that the District’s negligence was not a *substantial factor* in bringing about plaintiff’s injuries and that the teacher was the sole proximate cause of those injuries (see generally *Furch v Klinger*, 173 AD3d 1672, 1672-1673 [4th Dept 2019]). Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view (see *Kunsmann v Baroody*, 60 AD3d 1369, 1370 [4th Dept 2009]; see also *Schreiber v University of Rochester Med. Ctr.*, 88 AD3d 1262, 1263 [4th Dept 2011]), and we conclude that the District is entitled to that presumption here.

We have considered plaintiff’s remaining contention and conclude that it does not warrant modification or reversal of the judgment.

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

522

KA 24-00425

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT BUCKMASTER, DEFENDANT-APPELLANT.

ANDREW J. DIPASQUALE, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Steuben County Court (Chauncey J. Watches, J.), entered March 4, 2024. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the interest of justice and on the law without costs and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points against him under risk factor 11 because the People failed to establish by clear and convincing evidence that he has a history of drug or alcohol abuse. We reject that contention. Although there is no evidence that defendant was under the influence of drugs or alcohol when he committed the qualifying offenses, the court properly determined that the People met their burden by relying on evidence that defendant said during his interview for the presentence investigation report that he had "a significant drinking problem" from 1978 to 1984 and that he continued to drink until he was incarcerated (*see People v Anemaet*, 235 AD3d 1298, 1298 [4th Dept 2025], *lv denied* 43 NY3d 907 [2025]; *see generally People v Palmer*, 20 NY3d 373, 376 [2013]; *People v Carrington*, 219 AD3d 1701, 1702 [4th Dept 2023]).

As the People correctly concede, however, the court violated defendant's due process rights by failing to notify him that it intended to assess points under risk factor 12 (failure to accept responsibility) that were not recommended by the Board of Examiners of Sex Offenders or requested by the People (*see People v Costa*, 225 AD3d 1257, 1259-1260 [4th Dept 2024]; *People v Wilde*, 181 AD3d 1324, 1325 [4th Dept 2020]; *People v Chislev*, 172 AD3d 1914, 1915-1916 [4th Dept 2019]). Although defendant failed to object to the assessment of

points under risk factor 12 when the court rendered its oral decision, we "review defendant's contention in the interest of justice in light of the substantial infringement upon [his] due process and statutory rights" (*Chislev*, 172 AD3d at 1915 [internal quotation marks omitted]). Upon our review, we reverse the order, vacate defendant's risk level determination, and remit the matter to County Court for a new risk level determination, and a new hearing if necessary, in compliance with Correction Law § 168-n (3) (see *id.* at 1916).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

523

KA 22-00640

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAMAR BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered March 17, 2022. The judgment convicted defendant upon a nonjury verdict of 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 nonjury verdict of criminal possession of a firearm (Penal Law § 265.01-b [1]). Defendant contends that the evidence is legally insufficient to support the conviction because the People failed to establish that he constructively possessed the subject firearm. We conclude, however, that there is a "valid line of reasoning and permissible inferences from which a rational [trier of fact] could have found the element[of constructive possession] proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). Contrary to defendant's contention, the People established more than his "mere presence" in the residence in which the firearm was found (*People v King*, 206 AD3d 1593, 1594 [4th Dept 2022]; *cf. People v Mighty*, 203 AD3d 1687, 1687-1688 [4th Dept 2022]; *People v Hunt*, 185 AD3d 1531, 1532-1533 [4th Dept 2020]). Rather, the People established through circumstantial evidence (*see People v Torres*, 68 NY2d 677, 678 [1986]; *People v Boyd*, 145 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]) that defendant "exercised 'dominion or control' over the [firearm] by a sufficient level of control over the area in which the [firearm was] found" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see People v Torrance*, 206 AD3d 1722, 1723 [4th Dept 2022]).

To the extent that defendant on appeal implicitly challenges the admission of certain evidence on the basis that the People failed to establish an adequate chain of custody with respect to the firearm,

that contention is unpreserved for our review (see *People v Carey*, 162 AD3d 1476, 1478 [4th Dept 2018], lv denied 32 NY3d 936 [2018]; *People v Irizarry*, 160 AD3d 1384, 1386 [4th Dept 2018], lv denied 31 NY3d 1149 [2018]; *People v Alexander*, 48 AD3d 1225, 1226 [4th Dept 2008], lv denied 10 NY3d 859 [2008]). 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 further conclude, after viewing the evidence in light of the elements of the crime in this nonjury trial (see *Danielson*, 9 NY3d at 349), that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable—e.g., if the factfinder had declined to credit the evidence connecting defendant to the area where the firearm was discovered—we cannot conclude on this record that the factfinder “failed to give the evidence the weight it should be accorded” (*id.*).

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

524

KA 24-00642

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES ROSS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), dated February 28, 2024. The order denied the petition of defendant to modify his risk level 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 denying his petition pursuant to Correction Law § 168-o (2) seeking to modify the prior determination that he is a level three risk pursuant to the Sex Offender Registration Act (SORA) (§ 168 *et seq.*). We affirm.

Defendant contends that he was denied due process because Supreme Court violated Correction Law § 168-o (4) by prematurely forwarding his unsubstantiated pro se letter, rather than his subsequent modification petition and accompanying submissions, to the Board of Examiners of Sex Offenders for its consideration in preparing an updated recommendation. We conclude that defendant failed to preserve that contention for our review inasmuch as he did not raise an objection to the alleged statutory and procedural due process violation before the SORA court (*see People v Singleton*, 221 AD3d 1517, 1517-1518 [4th Dept 2023], *lv denied* 41 NY3d 906 [2024]; *People v Leach*, 192 AD3d 1507, 1508 [4th Dept 2021]; *People v Willis*, 130 AD3d 1470, 1471-1472 [4th Dept 2015]; *see generally People v Poleun*, 26 NY3d 973, 974-975 [2015]; *People v Charache*, 9 NY3d 829, 830 [2007]). We decline to follow the Third Department precedent advanced by defendant that preservation is not required for alleged procedural violations of Correction Law § 168-o (4) (*see e.g. People v Kaminski*, 184 AD3d 951, 952 [3d Dept 2020]). We further decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see People v Ellis*, 204 AD3d 1388, 1389 [4th

Dept 2022]; *People v Turner*, 188 AD3d 1746, 1746 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]).

Contrary to defendant's additional contention, we conclude that he failed to meet his "burden of demonstrating by clear and convincing evidence that a modification of [his] risk level is warranted" (*People v Shader*, 43 NY3d 129, 137 [2024]; *see People v Ross*, 210 AD3d 1444, 1444 [4th Dept 2022], *lv denied* 39 NY3d 908 [2023]; *People v Bentley*, 186 AD3d 1135, 1136 [4th Dept 2020], *lv denied* 36 NY3d 903 [2020]). Although defendant submitted some evidence of changed conditions subsequent to his initial risk level classification, including his advancing age and lack of sexual recidivism, the court, in determining that defendant's risk of reoffense and dangerousness to the community remained high, properly considered the heinous nature of the underlying sex offense and defendant's subsequent conviction for murder and other crimes arising from his fatal stabbing of a woman with whom he had been in a relationship in the presence of her young children (*see Shader*, 43 NY3d at 134-137; *Ross*, 210 AD3d at 1444; *Bentley*, 186 AD3d at 1136). We conclude on this record that the court did not abuse its discretion in denying defendant's modification petition, and we also decline to exercise our own discretion to grant defendant's petition (*see generally Shader*, 43 NY3d at 134, 137).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

525

KA 24-01849

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALFONSO DAVIS, DEFENDANT-APPELLANT.

FRANK POLICELLI, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered March 20, 2024. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon a nonjury verdict, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [8]), defendant contends that he was subject to selective prosecution. That contention is unpreserved for our review because defendant failed to make a pretrial motion to dismiss on that ground (*see People v Morton*, 198 AD3d 1176, 1180 [3d Dept 2021], *lv denied* 37 NY3d 1163 [2022]; *see generally* CPL 210.40 [1]; 255.10 [1] [a]).

Defendant further contends that the evidence is legally insufficient to support his conviction. At the close of the People's proof, defendant moved for a trial order of dismissal, and County Court reserved decision. Although defendant renewed the motion at the close of his proof, the court never ruled on the motion and, at a later appearance, rendered a guilty verdict. Thus, we may not address defendant's contention because " 'we cannot deem the court's failure to rule on the . . . motion as a denial thereof' " (*People v Roach*, 213 AD3d 1274, 1274 [4th Dept 2023]; *see People v Capitano*, 198 AD3d 1324, 1325 [4th Dept 2021]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]). Thus, we hold the case, reserve decision, and remit the matter to County Court for a ruling on defendant's motion (*see Roach*, 213 AD3d at 1274). In light of our

determination, we do not address defendant's remaining challenge to the verdict.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

526

KA 22-01814

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GERALD BRINSON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Julie M. Hahn, J.), rendered September 16, 2022. 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]). We affirm.

Contrary to defendant's contention, the record establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]; *People v Edmonds*, 229 AD3d 1275, 1276-1277 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]). We note that County Court used the appropriate model colloquy with respect to the waiver of the right to appeal (*see* NY Model Colloquies, Waiver of Right to Appeal; *see generally Thomas*, 34 NY3d at 567; *People v Hoose*, 236 AD3d 1294, 1295 [4th Dept 2025]; *Edmonds*, 229 AD3d at 1277). Contrary to defendant's assertion, the court did not mischaracterize the appeal waiver as "an absolute bar to the taking of a first-tier direct appeal" (*Thomas*, 34 NY3d at 558; *see Figueroa*, 230 AD3d at 1582; *Edmonds*, 229 AD3d at 1277). Instead, the court followed the model colloquy nearly verbatim, explaining that defendant retained the right to take an appeal and that he was giving up "most of [defendant's] claims of error," but not the "limited number of claims [that] survive [defendant's] waiver of appeal," such as those relating to the voluntariness of the plea and the legality of the sentence (*see*

Thomas, 34 NY3d at 567; *Edmonds*, 229 AD3d at 1277; *People v Jackson*, 198 AD3d 1317, 1318 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]). Any deficiency by the court in ascertaining on the record defendant's understanding of the contents of the written waiver (see *Thomas*, 34 NY3d at 563, 566; *People v Bradshaw*, 18 NY3d 257, 266-267 [2011]; see also *People v Lomax*, 161 AD3d 1454, 1455 [3d Dept 2018], *lv denied* 32 NY3d 1113 [2018]) is of no moment where, as here, the oral waiver was adequate (see *Lopez*, 6 NY3d at 257; *People v Witherow*, 203 AD3d 1595, 1595-1596 [4th Dept 2022]; *People v Thomas*, 178 AD3d 1461, 1461 [4th Dept 2019], *lv denied* 35 NY3d 945 [2020]).

Defendant's valid waiver of the right to appeal precludes our review of his contention that he was denied his statutory right to a speedy trial (see *People v Kelly*, 231 AD3d 1515, 1516 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *People v Gore*, 224 AD3d 848, 848-849 [2d Dept 2024], *lv denied* 42 NY3d 938 [2024]).

With respect to defendant's challenge to the state's gun licensing scheme, we conclude that defendant has not demonstrated that he has standing to assert that challenge (see *People v Davis*, 234 AD3d 1356, 1356 [4th Dept 2025]; *People v Vega*, 228 AD3d 467, 467 [1st Dept 2024], *lv denied* 42 NY3d 1082 [2025]; *People v Liriano*, 226 AD3d 520, 521 [1st Dept 2024], *lv denied* 41 NY3d 1019 [2024]; see generally *United States v Decastro*, 682 F3d 160, 164 [2d Cir 2012], *cert denied* 568 US 1092 [2013]). Furthermore, we reject defendant's contention that Penal Law § 265.03 (3) is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). "The decision in *Bruen* had no impact on the constitutionality of New York State's criminal possession of a weapon statutes" (*Davis*, 234 AD3d at 1356-1357 [internal quotation marks omitted]; see *People v Cabrera*, 41 NY3d 35, 49-50 [2023]; *People v Joyce*, 219 AD3d 627, 628 [2d Dept 2023], *lv denied* 40 NY3d 1013 [2023]).

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

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CA 24-00450

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, SMITH, AND NOWAK, JJ.

KIMBERLY J. SALTER, INDIVIDUALLY AND AS
EXECUTOR OF THE ESTATE OF AARON W.
SALTER, JR., DECEASED,
ET AL., PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

META PLATFORMS, INC., FORMERLY KNOWN AS
FACEBOOK, INC., ET AL., DEFENDANTS,
AND MEAN L.L.C., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RENZULLI LAW FIRM, LLP, WHITE PLAINS (JEFFREY M. MALSCH OF COUNSEL),
FOR DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (JAMES W. GRABLE, JR., OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered February 9, 2024. The order denied the motion of defendant MEAN L.L.C. to dismiss the complaint against it.

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

Memorandum: In May 2022, an 18-year-old man (shooter) committed a racially motivated mass shooting at a grocery store in Buffalo. Multiple people were killed or injured in the attack. These four appeals arise from four separate actions commenced by various plaintiffs, consisting of surviving victims of the shooting, the survivors and estates of those who died, and those who were in the store on the day of the attack. The defendants in these actions consist of numerous entities and individuals, including those allegedly involved in arming the shooter with firearms and body armor as well as various social media platforms that allegedly radicalized the shooter to commit the racially motivated crimes.

We have had several related appeals regarding these actions (see *Patterson v Meta Platforms, Inc.* [appeal No. 1], – AD3d – [July 25, 2025] [4th Dept 2025] [decided herewith]; *Salter v Meta Platforms, Inc.*, – AD3d – [June 27, 2025] [4th Dept 2025]). The instant appeals concern, in particular, defendant MEAN L.L.C. (MEAN), which manufactured and sold the magazine lock on the Bushmaster XM-15 semiautomatic rifle the shooter used during the incident. It is

undisputed that the shooter removed that lock, thereby illegally modifying the firearm so as to allow it to have detachable high capacity magazines not permitted in New York (see Penal Law §§ 265.00 [22] [a], [g] [ii]; 265.02 [7]; 265.10). With respect to MEAN, plaintiffs in these actions asserted various causes of action, including negligence, public nuisance and violations of General Business Law §§ 349 and 350.

According to plaintiffs' allegations, MEAN manufactured a magazine lock that was intended to permanently lock a limited-capacity magazine into the Bushmaster firearm, so that the firearm would be compliant with the New York State Secure Ammunition and Firearms Enforcement Act ([SAFE Act] L 2013, ch 1; see Penal Law § 265.00 [22], [23]; see generally *Schulz v State of N.Y. Exec.*, 134 AD3d 52, 54-55 [3d Dept 2015], appeal dismissed 26 NY3d 1139 [2016], reconsideration denied 27 NY3d 1047 [2016]). At the time the shooter purchased the Bushmaster, the MEAN lock had already been installed on the firearm. Plaintiffs further alleged that MEAN marketed that lock and similar locks to New York customers, under the auspices that it would make their firearm compliant with New York law. Despite the lock's alleged permanence, MEAN also included instructions on its packaging and its website on how to remove the lock, thereby allowing the shooter to illegally modify the firearm and remove the lock in order to load large-capacity magazines, like the one the shooter used on the day of the shooting.

MEAN filed four separate CPLR 3211 motions seeking to dismiss against it the operative complaints (complaints) filed by the plaintiffs in these actions, i.e., the complaint filed in the action in appeal No. 1 by the plaintiffs therein, the complaint filed in the action in appeal No. 2 by the plaintiffs therein, the amended complaint filed in the action in appeal No. 3 by the plaintiff therein (Jones), and the second amended complaint filed in the action in appeal No. 4 by the plaintiffs therein (Stanfield plaintiffs). In appeal Nos. 1 through 4, MEAN appeals from the respective orders denying those four motions. We reject MEAN's contentions and affirm the orders in all four appeals.

MEAN based all four motions on the same grounds, contending that it was entitled to immunity under the Protection of Lawful Commerce in Arms Act ([PLCAA] 15 USC § 7901 et seq.), that plaintiffs lacked standing to bring the General Business Law causes of action (see CPLR 3211 [a] [3]), that the complaints failed to state a cause of action (see CPLR 3211 [a] [7]), and that Supreme Court lacked personal jurisdiction over MEAN (see CPLR 3211 [a] [8]). MEAN advances all of those same contentions on these appeals.

It is well established that, "[w]hen reviewing a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Williams v Beemiller, Inc.*, 100 AD3d 143, 148 [4th Dept 2012], amended on rearg 103 AD3d 1191 [4th Dept 2013])

[internal quotation marks omitted]; see generally *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Here, addressing first the issue of jurisdiction, we reject MEAN's contention that the court may not exercise personal jurisdiction over it. New York's long-arm statute confers personal jurisdiction over "any non-domiciliary . . . who in person or through an agent" either "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302 [a] [1]). Jurisdiction may also be exerted over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state . . . if [it] (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce" (CPLR 302 [a] [3]; see *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 339 [2012]; see generally *International Shoe Co. v Washington*, 326 US 310, 316 [1945]).

MEAN purposefully availed itself of the New York market by making representations about the effects of its lock for New York residents, and it received the benefits of that intentional connection regardless of whether the particular lock in question here was actually sold in New York (see *Aybar v US Tires & Wheels of Queens, LLC*, 211 AD3d 40, 50-51 [2d Dept 2022]). In light of all the circumstances, we conclude that plaintiffs' allegations establish the requisite " 'articulable nexus' . . . or 'substantial relationship' . . . between the business transaction and the claim[s] asserted" (*Licci*, 20 NY3d at 339).

MEAN next contends that it is entitled to immunity from suit as a result of the PLCAA and that no exception to immunity exists. We reject that contention. The PLCAA immunizes, to some degree, "manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended" (15 USC § 7901 [b] [1]). In enacting the legislation, Congress determined that such entities "are not, and should not, be [sic] liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended" (§ 7901 [a] [5]; see § 7902 [a]; *Ileto v Glock, Inc.*, 565 F3d 1126, 1135 [9th Cir 2009], cert denied 560 US 924 [2010]), and that there was a need "[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce" (§ 7901 [b] [4]).

Under the PLCAA, a manufacturer is any entity "who is engaged in the business of manufacturing [a qualified product] in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under [18 USC § 921 et seq.]" (15 USC § 7903 [2]). We reject MEAN's contention that the phrase "manufacturer or seller of a qualified product" in section 7903 (5) (A) should be read to divorce

"manufacturer" from "qualified product" and grant immunity to any manufacturer in the firearms industry from suit based on the misuse of a qualified product. Inasmuch as the statute defines "manufacturer" only by reference to a qualified product (§ 7903 [2]), we do not agree that the term "manufacturer" can ever encompass an entity that does not make or sell a qualified product.

We agree with MEAN, however, that it does not fall outside the "engaged in the business" prong of 15 USC § 7903 (2). The PLCAA defines that phrase by reference to section 921 (a) (21) of the Gun Control Act of 1968 ([GCA] 18 USC § 921 [a] [21]), and we see no basis to incorporate other sections of the GCA that limit its application to importers, manufacturers, or dealers of *firearms* and *ammunition* (see § 923 [a]). The PLCAA provision regarding manufacturers incorporated only the GCA definition of the phrase "engaged in the business" and, as a result, we rely on only that definition in evaluating plaintiffs' allegations. As a result, we conclude that MEAN established that it is "engaged in the business" of manufacturing a qualified product under the PLCAA by establishing that it "devotes time, attention, and labor to manufacturing [its qualified product] as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution [thereof]" (§ 921 [a] [21] [A], [B]).

Thus, we conclude that MEAN met the first prong of the definition of "manufacturer" under the PLCAA by establishing that it is an entity "engaged in the business" of manufacturing what it asserts to be a "qualified product" in interstate commerce (15 USC § 7903 [1], [2]). Inasmuch as MEAN submitted its federal license to manufacture firearms in support of its motions, we further conclude that MEAN met the second prong by establishing that it is licensed to engage in business as such a manufacturer (see § 7903 [2]). It would defy the intent of the statute to deny PLCAA immunity to MEAN simply because a federal firearms manufacturing license is not actually required to manufacture the *lock*.

Having determined that MEAN qualifies as a manufacturer under the PLCAA, we next address whether its lock constitutes a "qualified product" under the statute. We answer that question in the affirmative, contrary to the court's determination. A "qualified product" is "a firearm . . . or ammunition . . . or a *component part* of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce" (15 USC § 7903 [4] [emphasis added]; see *Prescott v Slide Fire Solutions, L.P.*, 341 F Supp 3d 1175, 1187 [D Nev 2018]). Here, as in *Prescott*, the question is whether the lock is a "component part of a firearm" (§ 7903 [4]) or a "mere firearm accessory" (*Prescott*, 341 F Supp 3d at 1187; see *Duncan v Bonta*, 133 F4th 852, 860 [9th Cir 2025]).

"Because the PLCAA does not define 'component part,' [courts] must employ the traditional rules of statutory interpretation" (*Prescott*, 341 F Supp 3d at 1188, citing *United States v Laursen*, 847 F3d 1026, 1032 [9th Cir 2017]) and, in so doing, " 'assum[e] that the

ordinary meaning of th[e] language [employed by Congress] accurately expresses the legislative purpose' " (*id.*, quoting *Gross v FBL Fin. Servs., Inc.*, 557 US 167, 175-176 [2009]). That analysis begins with the " 'plain and common meaning of the word derived from dictionary definitions' " (*id.*, quoting *Laursen*, 847 F3d at 1032).

A "component" is defined as a "constituent part" or "ingredient" (Merriam-Webster.com Dictionary, component). A "constituent" is defined, as relevant here, as "[o]ne part of something that makes up a whole; an element" (Black's Law Dictionary [11th ed 2019], constituent). Courts that have engaged in such analysis have concluded that a component part of a firearm is one that is essential or integral to its use or operation (*see Prescott*, 341 F Supp 3d at 1188; *Duncan*, 133 F4th at 868). Unlike cable locks (*see Sambrano v Savage Arms, Inc.*, 338 P3d 103, 105 [NM Ct App 2014]), the MEAN lock, once installed, becomes "an integral part of the firing mechanism" of the rifle and "necessary for the ordinary operation of a protected weapon" (*Duncan*, 133 F4th at 867-868). Like the bump stock in *Prescott*, the item at issue here is an aftermarket feature that replaces an existing component part, " 'rendering [it a] component part[], even if [it is an] after-market enhancement[]' " (*Lowy v Daniel Defense, LLC*, 2024 WL 3521508, *3, 2024 US Dist LEXIS 131253, *12 [ED Va, July 24, 2024, No. 1:23-CV-1338], quoting *Prescott*, 341 F Supp 3d at 1190; *see United States v Gonzalez*, 792 F3d 534, 537 [5th Cir 2015]).

In *Lowy*, the court determined that, "when a firearm user substitutes the original components of their firearm for defendants' magazines and grips, defendants' magazines and grips then become component parts of the newly assembled firearm" (2024 WL 3521508, *3, 2024 US Dist LEXIS 131253, *12). Here, the original magazine release button, a component, was substituted with MEAN's magazine lock. As a result, we conclude that the MEAN lock became a qualified product under the PLCAA and, unless an exception applies, MEAN is entitled to PLCAA immunity.

In opposition to the motions and in opposition to the current appeals, all plaintiffs rely on two statutory exceptions to immunity under the PLCAA, namely, the negligence per se exception (15 USC § 7903 [5] [A] [ii]), which exempts actions brought against a "seller" for "negligent entrustment or negligence per se," and the predicate exception (§ 7903 [5] [A] [iii]), which exempts manufacturers and sellers from immunity in actions "in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." Jones and the Stanfield plaintiffs also asserted that MEAN aided and abetted the shooter's violation of the SAFE Act.

Addressing the predicate exception first, we reject MEAN's contention that the predicate exception does not apply to General Business Law §§ 349 and 350. MEAN contends that the predicate exception does not apply to "laws of general applicability" like General Business Law §§ 349 and 350, which forbid "[d]eceptive acts or

practices" (§ 349 [a]) and "[f]alse advertising" (§ 350) in the conduct of any commerce in New York (see generally *Ileto*, 565 F3d at 1133-1138; *City of New York v Beretta U.S.A. Corp.*, 524 F3d 384, 400-404 [2d Cir 2008], cert denied 556 US 1104 [2009]). The cases upon which MEAN relies are distinguishable because those cases involve general criminal or negligence statutes. Here, in contrast, plaintiffs rely on statutes that specifically deal with the sale or marketing of any product in New York.

General Business Law §§ 349 and 350 involve the general marketing and sale of products in New York and, as a result, bring plaintiffs' actions within the ambit of the predicate exception because those provisions target conduct expressly aimed at conducting business within New York (see *Soto v Bushmaster Firearms Intl., LLC*, 331 Conn 53, 70, 118-158, 202 A3d 262, 275, 302-325 [2019], cert denied – US –, 140 S Ct 513 [2019]; compare General Business Law §§ 349, 350, with Conn Gen Stat § 42-110b [a]; see also *Doyle v Combined Sys., Inc.*, 2023 WL 5945857, *10-11, 2023 US Dist LEXIS 161087, *30-31 [ND Tex, Sept. 11, 2023, No. 3:22-CV-01536-K]; *Goldstein v Earnest*, 2021 WL 12321922, *4-5 [Cal Super Ct, July 2, 2021, No. 37-2020-00016638-CU-PO-CTL]; *Prescott v Slide Fire Solutions, LP*, 410 F Supp 3d 1123, 1137-1139 [D Nev 2019]).

With respect to whether MEAN "knowingly" violated General Business Law §§ 349 and 350 for purposes of 15 USC § 7903 (5) (A) (iii), we conclude that the allegations in the complaints are sufficient to withstand CPLR 3211 dismissal. In the context of these motions to dismiss, plaintiffs' allegations that MEAN knowingly and falsely promoted its lock with claims that it would bring customers' rifles into compliance with New York law are sufficient to permit application of the predicate exception with respect to violations of General Business Law §§ 349 and 350 (see *Williams*, 100 AD3d at 148-151; see generally *People v Steinmetz*, 177 AD3d 1292, 1293 [4th Dept 2019], lv denied 34 NY3d 1133 [2020]).

Furthermore, with respect to the assertions of Jones and the Stanfield plaintiffs, we conclude that, even assuming, arguendo, that the predicate exception to the PLCAA applies only to firearm-specific statutes, and not general statutes such as those set forth in the General Business Law, the SAFE Act is undisputedly a firearm-specific statute, and Jones and the Stanfield plaintiffs sufficiently alleged that MEAN aided and abetted violation of that statute. MEAN's contention that generalized aiding and abetting statutes are "clearly not sufficient to be classified as predicate statutes" under the PLCAA is belied by *Smith & Wesson Brands, Inc. v Estados Unidos Mexicanos* (– US –, –, 145 S Ct 1556, 1562 [2025]), where the Supreme Court stated that "the predicate violation PLCAA demands may come from aiding and abetting someone else's firearms offense."

Although the Supreme Court determined that the complaint in *Smith & Wesson Brands, Inc.* did not sufficiently allege that the defendant gun manufacturers aided and abetted the unlawful sales of firearms by gun dealers to Mexican drug cartels, the aiding and abetting allegations in the complaints of Jones and the Stanfield plaintiffs

are stronger and more direct than those found wanting in *Smith & Wesson Brands, Inc.* Specifically, their complaints allege in sum and substance that MEAN knew that its "permanent" lock was not at all permanent and could easily be removed so as to convert a lawful rifle with a fixed 10-round magazine into an unlawful assault rifle with a detachable high capacity magazine. Indeed, their complaints alleged, inter alia, that MEAN instructed people, through videos and on its packaging, on how to remove the "permanent" lock and thereby facilitate a violation of the SAFE Act, and that it is because of those instructions that the shooter chose to buy an AR-15 with a MEAN lock attached. Whether Jones and the Stanfield plaintiffs can establish their allegations of aiding and abetting will be determined on summary judgment or at trial, but for purposes of pleading we conclude that their complaints sufficiently state a cause of action under the predicate exception to the PLCAA.

With respect to the causation element of 15 USC § 7903 (5) (A) (iii), we reject MEAN's contention that it is entitled to dismissal at this stage. It is too early to determine as a matter of law whether "only one conclusion can be drawn" on the issue of causation (*Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946 [1997]). "Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries . . . turns upon questions of foreseeability[,] and what is foreseeable and what is normal may be the subject of varying inferences" (*Hain v Jamison*, 28 NY3d 524, 529 [2016] [internal quotation marks omitted]). Although the shooter's act of modifying the Bushmaster to remove the lock could be an intervening cause, the criminal act of a third party may be "a 'reasonably foreseeable' consequence of circumstances created by [a] defendant" (*Bell*, 90 NY2d at 946; see *Williams*, 100 AD3d at 152).

In light of our conclusion that plaintiffs' actions may fall within the PLCAA's predicate exception and therefore are not precluded by the PLCAA, we "need not address [whether these] action[s] fall[] within the PLCAA's negligent entrustment or negligence per se exception" (*Williams*, 100 AD3d at 151).

MEAN further contends that plaintiffs' causes of action under General Business Law §§ 349 and 350 should have been dismissed for failure to state a cause of action. We reject that contention. Plaintiffs sufficiently alleged that " '[MEAN] has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff[s] suffered injury as a result of the allegedly deceptive act or practice' " (*Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 [2012]; see *Karlin v IVF Am.*, 93 NY2d 282, 293 [1999], *rearg denied* 93 NY2d 989 [1999]). Plaintiffs alleged that MEAN knowingly misrepresented its lock to New York customers—including the shooter specifically—in order to bring rifles into compliance with state gun laws. The Court of Appeals "has recognized that General Business Law §§ 349 and 350 'on their face apply to virtually all economic activity, and their application has been correspondingly broad' " (*Plavin v Group Health Inc.*, 35 NY3d 1, 9 [2020], quoting *Karlin*, 93 NY2d at 290).

Contrary to MEAN's further contention, plaintiffs have the requisite standing to bring their General Business Law causes of action against MEAN, i.e., they were the persons injured by the alleged violations of General Business Law § 349 (h), and their allegations are not, as MEAN contends, just "derivative of other consumers' exposure to the alleged misleading statements." What is required for standing purposes is only "that the party actually injured be the one to bring suit" (*Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 208 [2004]; see *Soto*, 331 Conn at 96-100, 202 A3d at 289-291). As noted above, MEAN's challenge to the causal connection between MEAN's allegedly tortious acts and plaintiffs' injuries cannot, at this stage, be determined in MEAN's favor as a matter of law.

Finally, MEAN contends that the negligence and public nuisance causes of action, which are asserted by some but not all of the plaintiffs in these actions, should have been dismissed. We reject that contention (see *Williams*, 100 AD3d at 151-152). With respect to the negligence causes of action, the relevant plaintiffs have alleged that the shooter used MEAN's own instructions to remove the lock from the firearm (*cf. Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 233 [2001]), and the shooter's "intervening criminal act does not necessarily sever the causal connection between the alleged negligence of [MEAN] and plaintiff[s'] injur[ies]" (*Williams*, 100 AD3d at 152; see *Bell*, 90 NY2d at 947).

With respect to the public nuisance causes of action, we conclude that the allegations made by the relevant plaintiffs are sufficient to withstand CPLR 3211 dismissal. As stated above, plaintiffs all alleged that MEAN violated New York law by manufacturing a lock that was removable, thereby posing a danger to the general public, and that plaintiffs or their relatives were injured by the firearm from which the lock was removed (see *Williams*, 100 AD3d at 152; see generally *Bell*, 90 NY2d at 946). As in *Williams*, the relevant plaintiffs here "have alleged that [MEAN] engaged in unlawful conduct that endangered the lives of 'a considerable number of persons' " (100 AD3d at 152, quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977], *rearg denied* 42 NY2d 1102 [1977]), and that they "suffered special injury beyond that suffered by the community at large" (*id.* [internal quotation marks omitted]; see generally *Beretta U.S.A. Corp.*, 524 F3d at 389-390).

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

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CA 24-00514

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, SMITH, AND NOWAK, JJ.

DIONA PATTERSON, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF HEYWARD
PATTERSON, ET AL., PLAINTIFFS-RESPONDENTS.

V

MEMORANDUM AND ORDER

META PLATFORMS, INC., FORMERLY KNOWN AS
FACEBOOK, INC., ET AL., DEFENDANTS,
AND MEAN L.L.C., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RENZULLI LAW FIRM, LLP, WHITE PLAINS (JEFFREY M. MALSCH OF COUNSEL),
FOR DEFENDANT-APPELLANT.

LAW OFFICE OF JOHN V. ELMORE, P.C., BUFFALO (KRISTEN ELMORE-GARCIA OF
COUNSEL), BELLUCK LAW, LLP, NEW YORK CITY, AND GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered February 9, 2024. The order denied the motion of defendant MEAN L.L.C. to dismiss the complaint against it.

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

Same memorandum as in *Salter v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-01334

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, SMITH, AND NOWAK, JJ.

WAYNE JONES, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF CELESTINE CHANEY,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MEAN L.L.C., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

RENZULLI LAW FIRM, LLP, WHITE PLAINS (JEFFREY M. MALSCH OF COUNSEL),
FOR DEFENDANT-APPELLANT.

EVERYTOWN LAW, NEW YORK CITY (ERIC TIRSCHWELL OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered August 7, 2024. The order denied the motion of defendant MEAN L.L.C. to dismiss the amended complaint against it.

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

Same memorandum as in *Salter v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

530

CA 24-01335

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, SMITH, AND NOWAK, JJ.

FRAGRANCE HARRIS STANFIELD, ET AL.,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

MEAN L.L.C., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 4.)

RENZULLI LAW FIRM, LLP, WHITE PLAINS (JEFFREY M. MALSCH OF COUNSEL),
FOR DEFENDANT-APPELLANT.

EVERYTOWN LAW, NEW YORK CITY (ERIC TIRSCHWELL OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered August 7, 2024. The order denied the motion of defendant MEAN L.L.C. to dismiss the second amended complaint against it.

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

Same memorandum as in *Salter v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CAF 24-00140

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

IN THE MATTER OF NOLIN X.A.C.

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICKY C., RESPONDENT-APPELLANT.

ANDREW J. DIPASQUALE, ROCHESTER, FOR RESPONDENT-APPELLANT.

LISA A. BOWMAN, AUBURN, FOR PETITIONER-RESPONDENT.

HEIDI S. CONNOLLY, SKANEATELES, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cayuga County (Jon E. Budelmann, A.J.), entered October 31, 2023, 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.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect. We affirm.

Contrary to the mother's contention, Family Court did not abuse its discretion in declining to enter a suspended judgment. A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; see Family Ct Act § 633) and is not warranted where the parent has not made sufficient progress in addressing the issues that led to the child's removal from custody (see *Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], lv denied 29 NY3d 908 [2017]; *Matter of Sapphire A.J. [Angelica J.]*, 122 AD3d 1296, 1297 [4th Dept 2014], lv denied 24 NY3d 916 [2015]). Here, the court's findings concerning the mother's continuing issues with visitation, her persisting lack of transportation, her financial concerns, and her unstable living condition demonstrate that the court was properly focused on the child's best interests (see *Matter of Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766 [4th Dept 2017]). Based on its findings, the court determined that a suspended judgment was unwarranted inasmuch as the steps taken by the mother to address the issues that led to the child's removal were "not sufficient to warrant

any further prolongation of the child's unsettled familial status" (*Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525 [4th Dept 2013] [internal quotation marks omitted]; see *Matter of Zackery S. [Christa P.]*, 224 AD3d 1336, 1337 [4th Dept 2024], *lv denied* 41 NY3d 909 [2024]). The court's findings are entitled to great deference (see *Matter of Matthew S., Jr. [Matthew S.]*, 169 AD3d 1456, 1456 [4th Dept 2019]; *Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]), and we conclude that the evidence supports the court's determination that termination of the mother's parental rights is in the best interests of the child (see *Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

532

CAF 24-00141

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

IN THE MATTER OF AYDEN G.

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICKY C., AND JUSTIN G., RESPONDENTS-APPELLANTS.

ANDREW J. DIPASQUALE, ROCHESTER, FOR RESPONDENT-APPELLANT NICKY C.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL),
FOR RESPONDENT-APPELLANT JUSTIN G.

LISA A. BOWMAN, AUBURN, FOR PETITIONER-RESPONDENT.

HEIDI S. CONNOLLY, SKANEATELES, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Cayuga County (Jon E. Budelmann, A.J.), entered October 31, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondents 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 respondent father each appeal from an order that, inter alia, terminated their parental rights with respect to the subject child on the ground of permanent neglect, transferred guardianship and custody of the child to petitioner, and freed the child for adoption. We affirm.

Contrary to the father's contention on his appeal, we conclude that petitioner established by clear and convincing evidence (see Social Services Law § 384-b [3] [g] [i]) that it exercised diligent efforts to encourage and strengthen his relationship with the child (see *Matter of Zander W. [Lisa M.]*, 222 AD3d 1395, 1396 [4th Dept 2023], lv denied 41 NY3d 909 [2024]; see generally Social Services Law § 384-b [7] [a]). The evidence adduced at the fact-finding hearing, including the testimony of a caseworker, established that petitioner, inter alia, provided referrals to mental health care and parenting classes; offered transportation assistance in the form of bus tickets to enable respondents to attend medical appointments; encouraged respondents to attend medical appointments for both the child and his half-sibling; provided prepaid phone cards to enable communication;

and facilitated supervised and unsupervised visitation (see *Matter of Soraya S. [Kathryne T.]*, 158 AD3d 1305, 1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]; see also *Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1359 [4th Dept 2021]; *Matter of Dante S. [Kathryne T.]*, 189 AD3d 2148, 2149 [4th Dept 2020], *lv denied* 37 NY3d 901 [2021]; *Matter of Michael S. [Timothy S.]*, 159 AD3d 1378, 1379 [4th Dept 2018]). Contrary to the father's related assertion that the caseworker acted baselessly in telling the foster parents to cease driving respondents to medical appointments, the context of the caseworker's testimony makes clear that she viewed it as inappropriate for respondents to rely on the foster parents' resources to obtain transportation, and we conclude that the caseworker acted diligently by instead offering bus tickets to alleviate respondents' transportation issues (see *Soraya S.*, 158 AD3d at 1306; *Matter of Melissa DD.*, 45 AD3d 1219, 1220 [3d Dept 2007], *lv denied* 10 NY3d 701 [2008]; *Matter of Aldin H.*, 39 AD3d 914, 915 [3d Dept 2007]). To the extent that there was conflicting testimony between the caseworker and respondents regarding whether respondents appropriately asked for and received the offered transportation assistance, Family Court resolved that conflict in favor of petitioner. "In a matter which turns almost entirely on assessments of the credibility of the witnesses and particularly on the assessment of the character and temperament of the parent[s], the findings of the nisi prius court must be accorded the greatest respect" (*Matter of Irene O.*, 38 NY2d 776, 777 [1975]; see *Matter of Kerensa D.* [appeal No. 2], 278 AD2d 878, 879 [4th Dept 2000], *lv denied* 96 NY2d 707 [2001]), and we perceive no reason to disturb the court's credibility determination here.

The father next contends that the court, in rendering its bench decision in the presence of the parties and their counsel, erred in considering information contained in records from prior proceedings that had not been properly received in evidence at the fact-finding hearing. Inasmuch as there was no objection to the court's alleged error in considering material that had not been properly received in evidence, the father's evidentiary contention is not preserved for our review (see *Matter of Colin R. [Marsha R.]*, 101 AD3d 1430, 1431 [3d Dept 2012], *lv denied* 20 NY3d 862 [2013]; see generally *Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]).

Contrary to the father's further contention, the court did not err in determining that petitioner established by clear and convincing evidence that, despite its diligent efforts, the father failed to adequately plan for the return of the child (see Social Services Law § 384-b [7] [a]; *Matter of Steven D., Jr. [Steven D., Sr.]*, 188 AD3d 1770, 1771 [4th Dept 2020], *lv denied* 36 NY3d 908 [2021]). The record establishes that, "[a]lthough [the father] participated in some parts of the program, [he] failed to address or mitigate on a consistent basis the problems preventing the return of the child and thus failed to plan for the future of the child" (*Matter of Rasyn W.*, 254 AD2d 827, 827 [4th Dept 1998]). The court also properly determined that the father failed to maintain a stable employment and housing situation inasmuch as he was unemployed and respondents were \$6,000

behind in rental payments (see *Matter of Dileina M.F. [Rosa F.]*, 88 AD3d 998, 999 [2d Dept 2011], *lv denied* 18 NY3d 804 [2012]). Respondents' attendance at medical appointments was inconsistent (see *Soraya S.*, 158 AD3d at 1306). Moreover, although respondents initially attended the required parenting skills class, the caseworker explained that respondents did not benefit from that service inasmuch as unsupervised visitation went poorly even after completion of the course, as evidenced by the fact that the child's behavior deteriorated and the half-sibling was injured (see *Matter of Jaileen X.M. [Annette M.]*, 111 AD3d 502, 502 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]). Indeed, the record establishes that, despite having obtained less restrictive visitation, respondents could not appropriately handle unsupervised visitation with the child and the half-sibling and, on at least one occasion, the half-sibling returned from unsupervised visitation with bruising on his buttocks for which respondents provided inconsistent explanations, which the court found implausible and indicative of inadequate supervision (see *id.*; *Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573, 574 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]). In sum, the court properly concluded that the father permanently neglected the child inasmuch as the record establishes that the father "did not improve [his] ability to accept responsibility and modify [his] behavior accordingly . . . , nor did [he] gain insight into the problems that led to the removal of the [child] and continued to prevent the [child's] safe return" (*Steven D.*, 188 AD3d at 1771 [internal quotation marks omitted]).

With respect to the disposition, the father initially contends that the court, in determining that termination of his parental rights was in the best interests of the child, erred in failing to elicit and consider additional evidence beyond that presented at the fact-finding hearing. That contention lacks merit inasmuch as the record establishes that respondents expressly consented to allowing the court to "dispense with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing" (Family Ct Act § 625 [a]; see *Matter of Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766 [4th Dept 2017]; *Matter of Jessica FF.*, 232 AD2d 891, 891-892 [3d Dept 1996]).

We reject respondents' contentions on their respective appeals that a suspended judgment was warranted. A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; see *Danaryee B.*, 151 AD3d at 1766; *Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], *lv denied* 29 NY3d 908 [2017]; see also Family Ct Act § 633), and "is only appropriate where the parent has clearly demonstrated that [they] deserve[] another opportunity to show that [they have] the ability to be a fit parent" (*Matter of Matthew S., Jr. [Matthew S.]*, 169 AD3d 1456, 1456 [4th Dept 2019] [internal quotation marks omitted]). "The determination of whether to grant a suspended judgment must be based solely on the best interests of the child" (*id.*; see § 631).

Here, the record establishes that respondents "made only minimal

progress in addressing the issues that resulted in the [child's] removal from [their] custody, which was not sufficient to warrant any further prolongation of the [child's] unsettled familial status" (*James P.*, 148 AD3d at 1527 [internal quotation marks omitted]). The court's determination that, even if given more time, respondents were not likely to change sufficiently to enable them to parent the child is entitled to great deference (see *Matthew S., Jr.*, 169 AD3d at 1456; see also *Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], lv denied 11 NY3d 707 [2008]). Contrary to respondents' assertions, the court's findings concerning respondents' problems with ensuring successful and safe unsupervised visitation, unresolved transportation issues, and financial issues and related unstable housing situation demonstrate that the court was properly concerned with and addressed the child's best interests, and we conclude that the court properly determined that a suspended judgment was unwarranted (see *Danaryee B.*, 151 AD3d at 1766).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

533

CAF 24-00443

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

IN THE MATTER OF JEANNA N. CLARK,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

MAXIM L. STRASSBURG, RESPONDENT-APPELLANT.

JENNIFER M. LORENZ, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR PETITIONER-RESPONDENT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Genesee County (Sanford A. Church, A.J.), entered January 30, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject children.

It is hereby ORDERED that said appeal insofar as it concerns the oldest child is unanimously dismissed, the order is modified on the law by vacating the sixteenth ordering paragraph, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Genesee County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that modified the parties' prior custody arrangement by, inter alia, awarding petitioner mother sole custody of the parties' three children and setting forth provisions governing each child's attendance at church. Preliminarily, we note that the parties' oldest child has attained the age of majority, and we therefore dismiss as moot the appeal from the order insofar as it concerns that child (*see Matter of Latray v Hewitt*, 181 AD3d 1175, 1176 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]).

With respect to the parties' younger children, we conclude that "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[ren], and thus joint custody would be inappropriate" (*Matter of Thomas v Osinski*, – AD3d –, 2025 NY Slip Op 03452, *1 [4th Dept 2025]; *see Matter of King v King*, 236 AD3d 1509, 1510 [4th Dept 2025]). We further conclude that a sound and substantial basis in the record supports Family Court's determination to award sole custody to the mother (*see Matter of Keller v Keller*, 176 AD3d 1573, 1574 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020]),

and we therefore decline to disturb that determination (*see Matter of Williams v Grau*, 230 AD3d 1539, 1540 [4th Dept 2024]).

The father further contends that Family Court erred in modifying the parties' religion clause, which provided that "the children will be raised pursuant to the standards and beliefs of the Church of Jesus Christ of Latter Day Saints." Contrary to the father's contention, the modification with respect to the parties' youngest child, which in effect permitted "each parent to exercise his or her discretion while the child[is] in his or her care or custody" (*Weisberger v Weisberger*, 154 AD3d 41, 55 [2d Dept 2017]), is supported by a sound and substantial basis in the record. We agree with the father, however, that the court's order that the parties' middle child "shall attend the Church of Jesus Christ of Latter-Day Saints every Sunday" except for six Sundays per year when the mother has access with the child, is unconstitutional insofar as it mandates specific religious exercise (*see Lee v Weisman*, 505 US 577, 587 [1992]; *Weichman v Weichman*, 199 AD3d 865, 867 [2d Dept 2021], *lv denied* 39 NY3d 910 [2023]). We therefore modify the order by vacating the sixteenth ordering paragraph, and we remit the matter to Family Court to designate which parent will have decision-making authority for that child's religious education and practice.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

534

CA 23-01659

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

IN THE MATTER OF PEARL G. SIMMONS,
AS SETTLOR OF AN IRREVOCABLE LIVING TRUST
OF EUGENE M. SIMMONS AND PEARL G. SIMMONS,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

THE EUGENE AND PEARL SIMMONS IRREVOCABLE
INCOME ONLY TRUST, RESPONDENT-RESPONDENT.

JARROD W. SMITH, ESQ., P.L.L.C., JORDAN (JARROD W. SMITH OF COUNSEL),
FOR PETITIONER-APPELLANT.

WESTFALL LAW PLLC, SYRACUSE (MELODY D. WESTFALL OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Onondaga County
(Mary Keib Smith, S.), entered August 22, 2023. The order, among
other things, dismissed the petition seeking, inter alia, dissolution
of a trust.

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

Memorandum: In this proceeding seeking, inter alia, dissolution
of a trust, petitioner appealed from an order dismissing her petition.
We note at the outset that petitioner passed away during the pendency
of this appeal. Inasmuch as the trust in question dissolved by its
terms upon petitioner's death, we dismiss the appeal as moot. "[A]n
appeal will be considered moot unless the rights of the parties will
be directly affected by the determination of the appeal and the
interest of the parties is an immediate consequence of the [order]"
(*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; see
generally *Matter of O'Brien*, 204 AD2d 983, 983-984 [4th Dept 1994]).
We further conclude that this case does not fall within the exception
to the mootness doctrine (see generally *Hearst Corp.*, 50 NY2d at 714-
715).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

535

CA 24-00513

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, SMITH, AND NOWAK, JJ.

DIONA PATTERSON, INDIVIDUALLY, AND AS
ADMINISTRATOR OF THE ESTATE OF HEYWARD PATTERSON,
ET AL., PLAINTIFFS-RESPONDENTS,

V

OPINION AND ORDER

META PLATFORMS, INC., FORMERLY KNOWN AS FACEBOOK, INC.,
SNAP, INC., ALPHABET, INC., GOOGLE, LLC, YOUTUBE, LLC,
DISCORD, INC., AMAZON.COM, INC., 4CHAN COMMUNITY SUPPORT,
LLC, REDDIT, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

ORRICK, HERRINGTON & SUTCLIFFE LLP, WASHINGTON D.C. (ERIC A. SHUMSKY,
ADMITTED PRO HAC VICE, OF COUNSEL), WILSON SONSINI GOODRICH & ROSATI,
P.C., NEW YORK CITY, WEBSTER SZANYI LLP, BUFFALO, AND PERKINS COIE
LLP, NEW YORK CITY, FOR DEFENDANTS-APPELLANTS META PLATFORMS, INC.,
FORMERLY KNOWN AS FACEBOOK, INC., ALPHABET, INC., GOOGLE, LLC,
YOUTUBE, LLC, AND REDDIT, INC.

MORRISON & FOERSTER LLP, NEW YORK CITY (JOSEPH R. PALMORE OF COUNSEL),
FOR DEFENDANT-APPELLANT DISCORD, INC.

HUESTON HENNIGAN LLP, NEW YORK CITY (MOEZ M. KABA OF COUNSEL), AND
GIBSON, MCASKILL & CROSBY, LLP, BUFFALO, FOR DEFENDANT-APPELLANT
AMAZON.COM, INC.

HARRIS BEACH MURTHA CULLINA PLLC, NEW YORK CITY (LISA ANNE LECOIRS OF
COUNSEL), FOR DEFENDANT-APPELLANT 4CHAN COMMUNITY SUPPORT, LLC.

O'MELVENY & MEYERS LLP, NEW YORK CITY (JONATHAN P. SCHNELLER OF
COUNSEL), AND HAGERTY & BRADY, BUFFALO, FOR DEFENDANT-APPELLANT SNAP,
INC.

THE LAW OFFICE OF JOHN V. ELMORE, P.C., BUFFALO (JOHN V. ELMORE OF
COUNSEL), AND SOCIAL MEDIA VICTIMS LAW CENTER PLLC, SEATTLE,
WASHINGTON, FOR PLAINTIFFS-RESPONDENTS.

HOGAN LOVELLS US LLP, NEW YORK CITY (JASMEET K. AHUJA OF COUNSEL), FOR
CHAMBER OF PROGRESS, ENGINE ADVOCACY, AND WIKIMEDIA FOUNDATION, AMICUS
CURIAE.

HOLWELL SHUSTER & GOLDBERG LLP, NEW YORK CITY (DANIEL M. SULLIVAN OF
COUNSEL), FOR PRODUCTS LIABILITY ADVISORY COUNCIL, AMICUS CURIAE.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ISABELLA S. JANKOWSKI OF COUNSEL), FOR CENTER FOR DEMOCRACY AND TECHNOLOGY, AMICUS CURIAE.

Appeals from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered March 18, 2024. The order denied the motions of defendants-appellants to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motions are granted and the complaint is dismissed against defendants-appellants.

Opinion by LINDLEY, J.P.:

These consolidated appeals arise from four separate actions commenced in response to the mass shooting on May 14, 2022 at a grocery store in a predominately Black neighborhood in Buffalo. The shooter, a teenager from the Southern Tier of New York, spent months planning the attack and was motivated by the Great Replacement Theory, which posits that white populations in Western countries are being deliberately replaced by non-white immigrants and people of color. After driving more than 200 miles from his home to Buffalo, the shooter arrived at the store and opened fire on Black individuals in the parking lot and inside the store with a Bushmaster XM-15 semiautomatic rifle, killing 10 people and wounding three others.

The shooter fired approximately 60 rounds from high-capacity magazines attached to his rifle, upon which he had written several racist messages, including "Here's your reparations!" and "Buck status: Broken." Apprehended at the scene, the shooter was charged with multiple felonies in both state court and federal court, where prosecutors are seeking the death penalty. The shooter pleaded guilty in state court to 10 counts of intentional murder and has been sentenced to life in prison without the possibility of parole. As of this writing, the federal charges are still pending.

Plaintiffs in these civil actions are survivors of the attack and family members of the victims, while defendants include the shooter's parents and numerous other parties whose actions or inactions allegedly played a role in the shooting. We are concerned in these appeals only with plaintiffs' causes of action against the so-called "social media defendants," i.e., Meta Platforms, Inc., formerly known as Facebook (Facebook); Instagram LLC (Instagram); Snap, Inc. (Snap); Alphabet, Inc.; Google, LLC (Google); YouTube, LLC (YouTube); Discord, Inc. (Discord); Reddit, Inc.; Twitch Interactive, Inc. (Twitch); Amazon.com, Inc. (Amazon); and 4chan Community Support, LLC (4chan), all of whom have social media platforms that were used by the shooter at some point before or during the attack.

The complaints, amended complaint and second amended complaint (hereafter complaints) in these actions assert various tort causes of action against the social media defendants, including negligence, unjust enrichment and strict products liability based on defective design and failure to warn. According to plaintiffs, the social media

platforms in question are defectively designed to include content-recommendation algorithms that fed a steady stream of racist and violent content to the shooter, who over time became motivated to kill Black people. Plaintiffs further allege that the content-recommendation algorithms addicted the shooter to the social media defendants' platforms, resulting in his isolation and radicalization, and that the platforms were designed to stimulate engagement by exploiting the neurological vulnerabilities of users like the shooter and thereby maximize profits.

Although plaintiffs recognize that some of the social media defendants—e.g., 4chan, Discord, Twitch and Snap—do not use content-recommendation algorithms, they nevertheless allege that the platforms of those defendants are designed with the same core defect contained in the platforms of the social media defendants that use such algorithms: namely, they are designed to be addictive. According to plaintiffs, the addictive features of the social media platforms include “badges,” “streaks,” “trophies,” and “emojis” given to frequent users, thereby fueling engagement. The shooter’s addiction to those platforms, the theory goes, ultimately caused him to commit mass murder.

The social media defendants moved to dismiss the complaints against them for failure to state a cause of action (see CPLR 3211 [a] [7]), contending, *inter alia*, that they are immune from liability under section 230 of the Communications Decency Act of 1934, enacted as part of the Communications Decency Act of 1996 (section 230) (see 47 USC § 230 [c] [1], [2]) and the First Amendment of the Federal Constitution, applicable to the states through the Fourteenth Amendment. Supreme Court denied the relevant motions, leading to these appeals. We conclude that the complaints should be dismissed against the social media defendants.

Plaintiffs concede that, despite its abhorrent nature, the racist content consumed by the shooter on the Internet is constitutionally protected speech under the First Amendment, and that the social media defendants cannot be held liable for publishing such content. Plaintiffs further concede that, pursuant to section 230, the social media defendants cannot be held liable merely because the shooter was motivated by racist and violent third-party content published on their platforms. According to plaintiffs, however, the social media defendants are not entitled to protection under section 230 because the complaints seek to hold them liable as product designers, not as publishers of third-party content.

The motion court agreed with plaintiffs, but we do not. Accepting as true all of the facts alleged in the operative complaints, and according plaintiffs the benefit of every possible favorable inference (see *Williams v Beemiller, Inc.*, 100 AD3d 143, 148 [4th Dept 2012], amended on rearg 103 AD3d 1191 [4th Dept 2013]; see generally *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that plaintiffs do not have a valid cause of action against the social media defendants (see CPLR 3211 [a] [7]). More specifically, we hold that section 230 affords immunity to the social media defendants from

plaintiffs' tort causes of action against them. In our view, a contrary ruling would be inconsistent with the language of section 230 and eviscerate the expressed purpose of the statute.

As the United States Supreme Court has observed, the Internet is the most important place in society for the exchange of diverse viewpoints (see *Packingham v North Carolina*, 582 US 98, 104 [2017]). The Internet is the modern public square, containing content "as diverse as human thought" (*Reno v American Civ. Liberties Union*, 521 US 844, 852 [1997] [internal quotation marks omitted]), and section 230 is the scaffolding upon which the Internet is built. Enacted by Congress in 1996 to "preserve the vibrant and competitive free market" for the Internet (47 USC § 230 [b] [2]), the statute immunizes providers of interactive computer services from civil lawsuits arising from user-generated content published on their platforms.

Section 230 provides, in pertinent part, that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" (47 USC § 230 [c] [1]). It further provides that "[n]o provider or user of an interactive computer service shall be held liable on account of[:] (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)" (§ 230 [c] [2]).

"The primary purpose of the proposed legislation that ultimately resulted in the Communications Decency Act ('CDA') 'was to protect children from sexually explicit Internet content' . . . Section 230, though-added as an amendment to the CDA bill . . . -was enacted 'to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum' . . . Indeed, Congress stated in [s]ection 230 that '[i]t is the policy of the United States . . . (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation' " (*Force v Facebook, Inc.*, 934 F3d 53, 63 [2d Cir 2019], *cert denied* - US -, 140 S Ct 2761 [2020]; see 47 USC § 230 [b] [1], [2]). "In light of Congress's objectives, the [federal circuit courts] are in general agreement that the text of [s]ection 230 (c) (1) should be construed broadly in favor of immunity" (*Force*, 934 F3d at 64; see *Jane Doe No. 1 v Backpage.com, LLC*, 817 F3d 12, 18 [1st Cir 2016], *cert denied* 580 US 1083 [2017]; *Almeida v Amazon.com, Inc.*, 456 F3d 1316, 1320-1321 [11th Cir 2006]).

"By its plain language, [section 230] creates a federal immunity to any cause of action that would make service providers liable for

information originating with a third-party user of the service" (*Zeran v America Online, Inc.*, 129 F3d 327, 330 [4th Cir 1997], cert denied 524 US 937 [1998]; see *Force*, 934 F3d at 63-64; see also *Shiamili v Real Estate Group of N.Y., Inc.*, 17 NY3d 281, 289 [2011]; *M.P. By & Through Pinckney v Meta Platforms, Inc.*, 127 F4th 516, 523 [4th Cir 2025] [*M.P.*]). If applicable, section 230 immunity should be applied "at the earliest possible stage of the case" (*Nemet Chevrolet, Ltd. v Consumeraffairs.com, Inc.*, 591 F3d 250, 255 [4th Cir 2009]; see *Word of God Fellowship, Inc. v Vimeo, Inc.*, 205 AD3d 23, 29 [1st Dept 2022], lv denied 38 NY3d 912 [2022], cert denied – US –, 143 S Ct 746 [2023]).

With respect to state law claims, section 230 "protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider" (*Barnes v Yahoo!, Inc.*, 570 F3d 1096, 1100-1101 [9th Cir 2009]; see *Shiamili*, 17 NY3d at 286-287).

Here, it is undisputed that the social media defendants qualify as providers of interactive computer services. The dispositive question is whether plaintiffs seek to hold the social media defendants liable as publishers or speakers of information provided by other content providers. Based on our reading of the complaints, we conclude that plaintiffs seek to hold the social media defendants liable as publishers of third-party content. We further conclude that the content-recommendation algorithms used by some of the social media defendants do not deprive those defendants of their status as publishers of third-party content. It follows that plaintiffs' tort causes of action against the social media defendants are barred by section 230.

Even assuming, *arguendo*, that the social media defendants' platforms are products (as opposed to services), and further assuming that they are inherently dangerous, which is a rather large assumption indeed, we conclude that plaintiffs' strict products liability causes of action against the social media defendants fail because they are based on the nature of content posted by third parties on the social media platforms. The immunity test established by *Barnes* focuses not on the name given to a cause of action but instead on "whether a plaintiff's 'theory of liability would treat a defendant as a publisher or speaker of third-party content'" (*Calise v Meta Platforms, Inc.*, 103 F4th 732, 740 [9th Cir 2024]; see *Federal Trade Commn. v LeadClick Media, LLC*, 838 F3d 158, 175 [2d Cir 2016]).

We are not persuaded by plaintiffs' assertion that the social media defendants' algorithms render their products defective, thus depriving them of section 230 protection. Our determination in that regard is consistent with *Force*, wherein the Second Circuit found no basis in law or logic for "concluding that an interactive computer service is not the 'publisher' of third-party information [within the meaning of section 230] when it uses tools such as algorithms that are designed to match that information with a consumer's interests" (934

F3d at 66). The court reasoned that “[m]erely arranging and displaying others’ content to users of Facebook through such algorithms—even if the content is not actively sought by those users—is not enough to hold Facebook responsible as the ‘develop[er]’ or ‘creat[or]’ of that content” (*id.* at 70). “Plaintiffs’ suggestion that publishers must have no role in organizing or distributing third-party content in order to avoid ‘develop[ing]’ that content is both ungrounded in the text of [s]ection 230 and contrary to its purpose” (*id.* at 70-71). Applied here, the reasoning of *Force*, which we find persuasive, compels dismissal of the tort causes of action premised on harm caused by the social media defendants’ algorithms.

The appeals at hand are on all fours with *M.P.*, which arose from the killing of nine Black people by a white supremacist at Mother Emanuel AME Church in Charleston, South Carolina. The plaintiff in that action sued Facebook, among other parties, alleging that it was civilly liable for the shooter’s crimes. As here, the complaint asserted a cause of action for strict products liability and alleged that the shooter was “radicalized online by white supremacist propaganda that was directed to him” by Facebook (*M.P.*, 127 F4th at 521 [internal quotation marks omitted]). The plaintiff further alleged that Facebook’s content-recommendation algorithms, along with its quest for user engagement and profits, turned the shooter into a dangerous racist who committed mass murder (see *id.* at 521-522).

Citing *Force*, the Fourth Circuit in *M.P.* affirmed the dismissal of the complaint based on section 230, reasoning that “[d]ecisions about whether and how to display certain information provided by third parties are traditional editorial functions of publishers, notwithstanding the various methods they use in performing that task” (*id.* at 526). The court likened “Facebook’s use of its algorithm to arrange and sort racist and hate-driven content” to newspaper editors deciding which articles to place on front pages and which opinion pieces to place opposite the editorial page, all of which “are integral to the function of publishing” (*id.* at 525).

Recognizing that the rationale of *M.P.* compels dismissal of their strict products liability causes of action against the social media defendants, plaintiffs ask us instead to follow *Anderson v TikTok, Inc.* (116 F4th 180 [3d Cir 2024]), which is the only appellate authority supporting their position regarding the social media defendants’ use of algorithms. In *Anderson, TikTok, Inc. (TikTok)*, via its algorithm, recommended and promoted a “Blackout Challenge” video to the “For You Page” of the plaintiff’s child, who watched the video and inadvertently killed herself while accepting the challenge (*id.* at 181 [internal quotation marks omitted]). Based on *Moody v NetChoice, LLC* (603 US 707 [2024]), the Third Circuit determined that TikTok’s algorithm constituted “expressive activity” within the meaning of the First Amendment, thus rendering the video first-party speech by TikTok (*Anderson*, 116 F4th at 184). Because section 230 protects Internet service providers (including TikTok) from publishing third-party speech or content, the court concluded that TikTok was not immune from liability for the child’s death (see *id.*).

We do not find *Anderson* to be persuasive authority. If content-recommendation algorithms transform third-party content into first-party content, as the *Anderson* court determined, then Internet service providers using content-recommendation algorithms (including Facebook, Instagram, YouTube, TikTok, Google, and X) would be subject to liability for every defamatory statement made by third parties on their platforms. That would be contrary to the express purpose of section 230, which was to legislatively overrule *Stratton Oakmont, Inc. v Prodigy Servs. Co.* (1995 WL 323710, 1995 NY Misc LEXIS 229 [Sup Ct, Nassau County 1995]), where "an Internet service provider was found liable for defamatory statements posted by third parties because it had voluntarily screened and edited some offensive content, and so was considered a 'publisher' " (*Shiamili*, 17 NY3d at 287-288; see *Free Speech Coalition, Inc. v Paxton*, - US -, -, 145 S Ct 2291, 2305 n 4 [2025]).

Although *Anderson* was not a defamation case, its reasoning applies with equal force to all tort causes of action, including defamation. One cannot plausibly conclude that section 230 provides immunity for some tort claims but not others based on the same underlying factual allegations. There is no strict products liability exception to section 230.

In any event, even if we were to follow *Anderson* and conclude that the social media defendants engaged in first-party speech by recommending to the shooter racist content posted by third parties, it stands to reason that such speech ("expressive activity" as described by the Third Circuit) is protected by the First Amendment under *Moody*. While TikTok did not seek protection under the First Amendment, our social media defendants do raise the First Amendment as a defense in addition to section 230.

In *Moody*, the Supreme Court determined that content-moderation algorithms result in expressive activity protected by the First Amendment (see 603 US at 744). Writing for the majority, Justice Kagan explained that "[d]eciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own" (*id.* at 731). While the *Moody* Court did not consider social media platforms "with feeds whose algorithms respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards" (*id.* at 736 n 5 [emphasis added]), our plaintiffs do not allege that the algorithms of the social media defendants are based "solely" on the shooter's online actions. To the contrary, the complaints here allege that the social media defendants served the shooter material that they chose for him for the purpose of maximizing his engagement with their platforms. Thus, per *Moody*, the social media defendants are entitled to First Amendment protection for third-party content recommended to the shooter by algorithms.

Although it is true, as plaintiffs point out, that the First Amendment views expressed in *Moody* are nonbinding dicta, it is recent dicta from a supermajority of Justices of the United States Supreme

Court, which has final say on how the First Amendment is interpreted. That is not the type of dicta we are inclined to ignore even if we were to disagree with its reasoning, which we do not.

As the Center for Democracy and Technology explains in its amicus brief, content-recommendation algorithms are simply tools used by social media companies "to accomplish a traditional publishing function, made necessary by the scale at which providers operate." Every method of displaying content involves editorial judgments regarding which content to display and where on the platforms. Given the immense volume of content on the Internet, it is virtually impossible to display content without ranking it in some fashion, and the ranking represents an editorial judgment of which content a user may wish to see first. All of this editorial activity, accomplished by the social media defendants' algorithms, is constitutionally protected speech.

Thus, the interplay between section 230 and the First Amendment gives rise to a "Heads I Win, Tails You Lose" proposition in favor of the social media defendants. Either the social media defendants are immune from civil liability under section 230 on the theory that their content-recommendation algorithms do not deprive them of their status as publishers of third-party content, per *Force* and *M.P.*, or they are protected by the First Amendment on the theory that the algorithms create first-party content, per *Anderson*. Of course, section 230 immunity and First Amendment protection are not mutually exclusive, and in our view the social media defendants are protected by both. Under no circumstances are they protected by neither.

Plaintiffs' reliance on *Lemmon v Snap, Inc.* (995 F3d 1085 [9th Cir 2021]) is misplaced. The design defect in the defendant's program in *Lemmon* was its "Speed Filter," which indicated how fast users were traveling when sending messages on Snapchat (*id.* at 1088). The filter allegedly induced users to drive recklessly while recording videos, and the plaintiffs' harm arose from reckless driving, which flowed directly from the alleged design defect. Because the plaintiffs' causes of action had nothing to do with the content of the messages sent or received by the users (Snap itself created the filter), section 230 did not apply (*see id.* at 1093). The Ninth Circuit made clear, however, that the plaintiffs "would not be permitted under § 230 (c) (1) to fault Snap for publishing other Snapchat-user content (e.g., snaps of friends speeding dangerously) that may have incentivized . . . dangerous behavior" (*id.* at 1093 n 4). Here, in contrast, plaintiffs seek to do just that, i.e., to hold the social media defendants liable for content posted by other people that allegedly incentivized dangerous behavior by the shooter.

With respect to the applicability of section 230, our dissenting colleagues agree with Chief Judge Katzmann's dissent in *Force*, which focuses primarily on Facebook's algorithm that suggests friends, groups and events to users, i.e., a "friend- and content-suggestion" algorithm (934 F3d at 76 [Katzmann, Ch. J., concurring in part and dissenting in part]). According to Chief Judge Katzmann, Facebook, by using that algorithm, "is doing more than just publishing content: it

is proactively creating networks of people," activity that is not protected by section 230 (*id.* at 83 [Katzmann, Ch. J., concurring in part and dissenting in part]). Here, plaintiffs do not allege that the social media defendants use "friend- and content-suggestion" algorithms; as noted above, the strict products liability causes of action in question here are based on content-recommendation algorithms in the social media defendants' platforms.

To the extent that Chief Judge Katzmann concluded that Facebook's content-recommendation algorithms similarly deprived Facebook of its status as a publisher of third-party content within the meaning of section 230, we believe that his analysis, if applied here, would *ipso facto* expose most social media companies to unlimited liability in defamation cases. That is the same problem inherent in the Third Circuit's first-party/third-party speech analysis in *Anderson*. Again, a social media company using content-recommendation algorithms cannot be deemed a publisher of third-party content for purposes of libel and slander claims (thus triggering section 230 immunity) and not at the same time a publisher of third-party content for strict products liability claims.

In the broader context, the dissenters accept plaintiffs' assertion that these actions are about the shooter's "addiction" to social media platforms, wholly unrelated to third-party speech or content. We come to a different conclusion. As we read them, the complaints, from beginning to end, explicitly seek to hold the social media defendants liable for the racist and violent content displayed to the shooter on the various social media platforms. Plaintiffs do not allege, and could not plausibly allege, that the shooter would have murdered Black people had he become addicted to anodyne content, such as cooking tutorials or cat videos.¹

Instead, plaintiffs' theory of harm rests on the premise that the platforms of the social media defendants were defectively designed because they failed to filter, prioritize, or label content in a manner that would have prevented the shooter's radicalization. Given that plaintiffs' allegations depend on the *content* of the material the shooter consumed on the Internet, their tort causes of action against the social media defendants are "inextricably intertwined" with the social media defendants' role as publishers of third-party content (*M.P.*, 127 F4th at 525).

If plaintiffs' causes of action were based merely on the shooter's addiction to social media, which they are not, they would fail on causation grounds. It cannot reasonably be concluded that the allegedly addictive features of the social media platforms (regardless of content) caused the shooter to commit mass murder, especially

¹ We note that plaintiffs' addiction-only theory, even if valid, would not apply to all social media defendants. For instance, plaintiffs do not allege that the shooter was addicted to the livestream service of Twitch and Amazon, which he used during the shooting and only several times prior.

considering the intervening criminal acts by the shooter, which were not “not foreseeable in the normal course of events” and therefore broke the causal chain (*Tennant v Lascelle*, 161 AD3d 1565, 1566 [4th Dept 2018]; see *Turturro v City of New York*, 28 NY3d 469, 484 [2016]). It was the shooter’s addiction to white supremacy content, not to social media in general, that allegedly caused him to become radicalized and violent.²

At stake in these appeals is the scope of protection afforded by section 230, which Congress enacted to combat “the threat that tort-based lawsuits pose to freedom of speech [on the] Internet” (*Shiamili*, 17 NY3d at 286-287 [internal quotation marks omitted]). As a distinguished law professor has noted, section 230’s immunity “particularly benefits those voices from underserved, underrepresented, and resource-poor communities,” allowing marginalized groups to speak up without fear of legal repercussion (*Enrique Armijo, Section 230 as Civil Rights Statute*, 92 U Cin L Rev 301, 303 [2023]). Without section 230, the diversity of information and viewpoints accessible through the Internet would be significantly limited.

We believe that the motion court’s ruling, if allowed to stand, would gut the immunity provisions of section 230 and result in the end of the Internet as we know it. This is so because Internet service providers who use algorithms on their platforms would be subject to liability for all tort causes of action, including defamation. Because social media companies that sort and display content would be subject to liability for every untruthful statement made on their platforms, the Internet would over time devolve into mere message boards.

Although the motion court stated that the social media defendants’ section 230 arguments “may ultimately prove true,” dismissal at the pleading stage is essential to protect free expression under Section 230 (see *Nemet Chevrolet, Ltd.*, 591 F3d at 255 [the statute “protects websites not only from ‘ultimate liability,’ but also from ‘having to fight costly and protracted legal battles’ ”]). Dismissal after years of discovery and litigation (with ever mounting legal fees) would thwart the purpose of section 230.

While everyone of goodwill condemns the shooter’s actions and the vile content that motivated him to assassinate Black people simply because of the color of their skin, there is in our view no reasonable interpretation of section 230 that allows plaintiffs’ tort causes of action to survive as against the social media defendants, who are entitled to immunity under the statute as the publishers of third-party content on their platforms.

² The social media addiction cases cited by plaintiffs involve psychological harm allegedly caused to users, not, as here, harm caused by addicted users to third parties (see e.g. *In re Social Media Adolescent Addiction/Personal Injury Prod. Liab. Litig.*, 702 F Supp 3d 809, 836-854 [ND Cal 2023]).

We therefore reverse the orders in appeal Nos. 1, 3, 5, and 6. Inasmuch as the complaint in appeal No. 2 and the amended complaint in appeal No. 4 were superseded by an amended complaint and a second amended complaint, respectively, the appeals in appeal Nos. 2 and 4 must be dismissed (see *Carcone v Noon* [appeal No. 1], 214 AD3d 1306, 1306 [4th Dept 2023]). In light of our determination, the remaining contentions advanced by the social media defendants are rendered academic.

All concur except BANNISTER and NOWAK, JJ., who dissent and vote to affirm in the following dissenting opinion: “[W]hy do I always have trouble putting my phone down at night? . . . It’s 2 in the morning . . . I should be sleeping . . . I’m a literal addict to my phone[.] I can’t stop cons[u]ming.” These are the words of a teenager who, on May 14, 2022, drove more than 200 miles to Buffalo to shoot and kill 10 people and injure three more at a grocery store in the heart of a predominantly Black community.

Plaintiffs in these consolidated appeals allege that the shooter did so only after years of exposure to the online platforms of the so-called “social media defendants”—Meta Platforms, Inc., formerly known as Facebook, Inc.; Instagram LLC; Snap, Inc.; Alphabet, Inc.; Google, LLC; YouTube, LLC; Discord, Inc.; Reddit, Inc.; Twitch Interactive, Inc.; Amazon.com, Inc.; and 4chan Community Support, LLC (collectively, defendants)—platforms that, according to plaintiffs, were defectively designed. Plaintiffs allege that defendants intentionally designed their platforms to be addictive, failed to provide basic safeguards for those most susceptible to addiction—minors—and failed to warn the public of the risk of addiction. According to plaintiffs, defendants’ platforms did precisely what they were designed to do—they targeted and addicted minor users to maximize their engagement. Plaintiffs allege that the shooter became more isolated and reclusive as a result of his social media use and addiction, and that his addiction, combined with his age and gender, left him particularly susceptible to radicalization and violence—culminating in the tragedy in Buffalo. For the purposes of defendants’ CPLR 3211 (a) (7) motions to dismiss, we must “accept the facts as alleged in the [operative] complaint[s] as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Little assumption is required in this case, however. The shooter all but admitted those facts to be true.

Inasmuch as plaintiffs’ collective strict products liability causes of action predicate liability on the allegedly defective design of the platforms themselves—and the concomitant failure to warn of the risks of addiction in young people—plaintiffs do not seek to hold defendants liable for any third-party content; thus, we conclude that those causes of action do not implicate section 230 of the Communications Decency Act of 1934, enacted as part of the Communications Decency Act of 1996 (section 230) or the First Amendment. Even if section 230 were implicated, however, we conclude

that the use of an algorithm to push disparate content to individual end users constitutes the "creation or development of information," which could subject defendants to liability (47 USC § 230 [f] [3]), and is not the type of editorial or publishing decision that would fall within the ambit of section 230 (see *Shiamili v Real Estate Group of N.Y., Inc.*, 17 NY3d 281, 289 [2011]; *Anderson v TikTok, Inc.*, 116 F4th 180, 183-184 [3d Cir 2024]). Therefore, we respectfully dissent.

At the outset, we reject the foundation upon which the majority's opinion is built—that plaintiffs' causes of action necessarily seek to hold defendants responsible for radicalizing the shooter given their status "as the publisher[s] or speaker[s] of any information provided by another information content provider" (47 USC § 230 [c] [1]), i.e., that plaintiffs only seek to hold defendants liable for the third-party content the shooter viewed. If that were the only allegation raised by plaintiffs, we would agree with the majority. But it is not.

The operative complaints, when read as a whole, as they must be,³ also allege that defendants' platforms are "products" subject to strict products liability that are addictive—not based upon the third-party content they show but because of the inherent nature of their design. Specifically, plaintiffs allege that defendants' platforms: "prey upon young users' desire for validation and need for social comparison," "lack effective mechanisms . . . to restrict minors' usage of the product," have "inadequate parental controls" and age verification tools that facilitate unfettered usage of the products, and "intentionally place[] obstacles to discourage cessation" of the applications. Plaintiffs allege that the various platforms "send push notifications and messages throughout the night, prompting children to re-engage with the apps when they should be sleeping." They further allege that certain products "autoplay" video without requiring the user to affirmatively click on the next video, while others permit the user to "infinite[ly]" scroll, creating a constant stream of media that is difficult to close or leave.

Plaintiffs assert that defendants had a duty to warn the public at large and, in particular, minor users of their platforms and their parents, of the addictive nature of the platforms. They thus claim that defendants could have utilized reasonable alternate designs, including: eliminating "autoplay" features or creating a "beginning and end to a user's '[f]eed' " to prevent a user from being able to "infinite[ly]" scroll; providing options for users to self-limit time used on a platform; providing effective parental controls; utilizing

³ To the extent that any one operative complaint does not set forth the entirety of the factual allegations listed herein, that is not dispositive—it is axiomatic that, in the context of a CPLR 3211 (a) (7) motion to dismiss, "the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

session time notifications or otherwise removing push notifications that lure the user to re-engage with the application; and "[r]emoving barriers to the deactivation and deletion of accounts." These allegations do not seek to hold defendants liable for any third-party content (see 47 USC § 230 [c] [1]); rather, they seek to hold defendants liable for failing to provide basic safeguards to reasonably limit the addictive features of their social media platforms, particularly with respect to minor users. Indeed, other products liability actions similarly premised upon defective designs or failures to warn have been permitted to proceed past the motion to dismiss phase. To that end, the attorneys general of more than 30 states—including the New York Attorney General—are currently embroiled in ongoing, multi-district litigation against several of the same defendants here for virtually identical strict products liability claims under substantive New York law (see *In re Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, 702 F Supp 3d 809, 817, 836-854 [ND Cal 2023])—claims that the District Court concluded were not precluded by section 230 or the First Amendment.

For instance, in *Lemmon v Snap, Inc.* (995 F3d 1085 [9th Cir 2021]), the Ninth Circuit explained that "[t]he duty to design a reasonably safe product is fully independent of [the defendant's] role in monitoring or publishing third-party content" (*id.* at 1093). Contrary to the majority's conclusion, the design choices at issue in *Lemmon*—in particular, a "Speed Filter" (*id.* at 1088)—are no different from the design choices at issue here. Both seek to hold the product designer liable for choices that implicate the manner in which users engage with the platform, rather than the content contained thereon. A "Speed Filter," which encourages users to travel at high rates of speed while utilizing the application (*id.*), is no different from push notifications encouraging the user to re-engage with the platform at all hours of the night, or design features that "autoplay" video and permit the user to "infinite[ly]" scroll—both encourage users to engage with the application unsafely.

Similarly, in *A.M. v Omegle.com, LLC* (614 F Supp 3d 814 [D Or 2022]), the District Court held that section 230 did not preclude the plaintiff's products liability action alleging that the defendant's design choices were defective because they permitted minor users to match with adults, noting that the plaintiff was "not claiming that [the defendant] needed to review, edit, or withdraw any third-party content" to remediate its defective design (*id.* at 819). Just as the defendant in *A.M.* "could have satisfied its alleged obligation to [p]laintiff by designing its product differently" (*id.*), plaintiffs here allege that defendants could have designed their platforms to prevent addiction in any number of ways that do not implicate third-party content, such as: restricting minors' access to the platforms through age verification tools; instituting more robust parental controls; removing push notifications; utilizing session time notifications; and otherwise removing barriers to the deactivation and deletion of accounts.

In our view, the majority's reliance on *M.P. By & Through Pinckney v Meta Platforms, Inc.* (127 F4th 516 [4th Cir 2025] [*M.P.*])

is misplaced. There, a white supremacist shot and killed nine Black people at Mother Emanuel AME Church in Charleston, South Carolina, and the plaintiff—whose father was murdered inside the church—sued a number of social media platforms claiming that the shooter “was ‘radicalized online by white supremacist propaganda that was *directed to him* by the [d]efendants’ ” (*id.* at 521 [emphasis added]). The plaintiff alleged that the shooter’s “emotional desensitization” and radicalization were caused by “repeated” and “extended” exposure to “inflammatory[,] . . . extremist content,” and thus sought to hold the defendants responsible for the third-party content that the shooter viewed (*id.* [internal quotation marks omitted]). Unlike *M.P.*, plaintiffs here seek to hold defendants responsible for failing to provide reasonable safeguards to prevent addiction in minors using their platforms, and in failing to warn of the risks of such addiction. Those claims do not seek to hold defendants responsible for the content the shooter viewed, and indeed, plaintiffs are “not claiming that [defendants] needed to review, edit, or withdraw any third-party content” to remediate the platforms’ allegedly defective design (*A.M.*, 614 F Supp 3d at 819).

In short, we agree with the reasoning set forth in *Lemmon, A.M.*, and *In re Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.* and conclude that social media platforms are “products” subject to strict products liability in New York. “[W]hen considering whether strict products liability attaches, the question of whether something is a product is often assumed; none of our strict products liability case law provides a clear definition of a ‘product’ ” (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 494 [2019] [*Terwilliger*]). As the Court of Appeals noted, “ ‘[a]part from statutes that define “product” for purposes of determining products liability, in every instance it is for the court to determine as a matter of law whether something is, or is not, a product’ ” (*id.*, quoting Restatement [Third] of Torts: Products Liability § 19, Comment a).

In general, the Third Restatement defines a product as “tangible personal property distributed commercially for use or consumption” (Restatement [Third] of Torts: Products Liability § 19 [a]). Here, defendants largely urge that their social media platforms are not products because they are not tangible goods. We disagree. The Third Restatement explains that even intangible items “are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in th[e] Restatement” (*id.*).

That common-sense approach has been echoed by the Court of Appeals, which has recognized that the analysis of whether something is a product is inextricably “[i]ntertwined with . . . the more central question of whether the defendant manufacturer owes a duty to warn” (*Terwilliger*, 33 NY3d at 494). Indeed, the Court of Appeals has emphasized that in determining whether a duty should attach to a seller, the “governing factors [include] a defendant’s control over the design of the product, its standardization, and its superior ability to know—and warn about—the dangers inherent in the product’s

reasonably foreseeable uses or misuses" (*id.* at 496; see *Matter of New York City Asbestos Litig.*, 27 NY3d 765, 793, 800-801 [2016] [Dummitt]). The "overarching concern . . . is to 'settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the parties, the identity of the person or entity best positioned to avoid the harm in question, the public policy served by the presence or absence of a duty and the logical basis of a duty' " (*Terwilliger*, 33 NY3d at 495-496, quoting *Dummitt*, 27 NY3d at 788).

We recognize that tort liability is not open-ended (see generally *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139 [2002]), nor should it be. However, in this case, logic and the law compel the conclusion that the social media platforms in question are products, and that the manufacturers of those products can be held liable in products liability (see *Dummitt*, 27 NY3d at 793, 800-801). Defendants are multi-billion-dollar corporations that derive their revenue from maximizing user engagement on their platforms. They alone control the manufacture and distribution of their respective social media platforms. They are uniquely positioned to know of—and prevent—the harm posed by social media addiction generally and specifically in minors. Once injected into the stream of commerce, their platforms are uniform for all users. That users exchange their data as opposed to currency to use those platforms does not, in our view, vitiate their true nature as products. Thus, and as set forth above, we agree with the courts that have concluded that social media platforms (see *A.M.*, 614 F Supp 3d at 819; see also *Lemmon*, 995 F3d at 1093; *In re Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, 702 F Supp 3d at 854) and ride-sharing platforms (see *Brookes v Lyft Inc.*, 2022 WL 19799628 at *2-3 [Fla Cir Ct 2022]) are products subject to products liability law.

Though we conclude that plaintiffs' products liability allegations sounding in design defect and failure to warn generally do not implicate section 230, to the extent that plaintiffs claim that defendants' products were defectively designed because they do not create a beginning and end to a user's "feed" or "autoplay" videos, those allegations at least tangentially involve third-party content, and thus a discussion of section 230 is required.

As the majority notes, section 230 (c) (1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" (47 USC § 230 [c] [1]). An "information content provider" is defined by the statute to mean "any person or entity that is responsible, *in whole or in part*, for the *creation or development of information* provided through the Internet or any other interactive computer service" (§ 230 [f] [3] [emphasis added]).

As the Court of Appeals recognized in *Shiamili*, "[s]ervice providers are only entitled to . . . immunity . . . where the content at issue is provided by 'another information content provider' . . .

It follows that if a defendant service provider is itself the 'content provider,' it is not shielded from liability" (17 NY3d at 289). Inasmuch as "any party 'responsible . . . in part' for the 'creation or development of information' " is a content provider, "any piece of content can have multiple providers" (*id.*). While the Court of Appeals expressly declined to decide whether to interpret the term "development" broadly or narrowly in *Shiamili* (see *id.* at 290), we conclude that the use of design functions, such as algorithmic models that "autoplay" videos or create an "infinite feed," constitutes the "creation or development of information" that would render defendants first-party content providers and, thus, not immune from liability under section 230 (*Anderson*, 116 F4th at 183 n 8).

To that end, we conclude that, as Chief Judge Katzmann stated in his dissent in *Force v Facebook, Inc.* (934 F3d 53 [2d Cir 2019], *cert denied* – US –, 140 S Ct 2761 [2020]), "it strains the English language to say that in targeting and recommending [certain content] to users . . . [defendants here are merely] acting as 'the *publisher[s]* of . . . information provided by another information content provider' " (*id.* at 76-77 [Katzmann, Ch. J., concurring in part and dissenting in part], quoting 47 USC § 230 [c] [1]), and not developing first-party content in their own right. Relatedly, we conclude that the targeted dissemination of particular information to individual end users does not amount to a traditional editorial or publishing decision that would fall within the ambit of section 230. In that regard, the Court of Appeals' analysis in *Shiamili* addressed the publication of a publicly available blog post. Clearly, that is a traditional editorial or publication decision—no different than the New York Times choosing which editorials should appear within the most recent volume of their publication.

The conduct at issue in this case is far from any editorial or publishing decision; defendants utilize functions, such as machine learning algorithms, to push specific content on specific individuals based upon what is most apt to keep those specific users on the platform. Some receive cooking videos or videos of puppies, while others receive white nationalist vitriol, each group entirely ignorant of the content foisted upon the other. Such conduct does not "maintain the robust nature of Internet communication" or "preserve the vibrant and competitive free market that presently exists for the Internet" contemplated by the protections of immunity (*Force*, 934 F3d at 63 [internal quotation marks omitted]) but, rather, only serves to further silo, divide and isolate end users by force-feeding them specific, curated content designed to maximize engagement.

The majority concludes, based upon *Moody v NetChoice, LLC* (603 US 707 [2024]), that even if plaintiffs seek to hold defendants liable for their own first-party content, such conduct is protected by the First Amendment. We disagree. First and foremost, the language defendants rely upon is dicta and has no binding force or effect upon this Court. Second, *Moody* involved two different state laws that curtailed social media companies' ability to engage in content moderation (see *id.* at 720-721); in essence, the laws compelled the social media companies to "carry and promote user speech that they

would rather discard or downplay" (*id.* at 728). Government-imposed content moderation laws that specifically prohibit social media companies from exercising their right to engage in content moderation is a far cry from private citizens seeking to hold private actors responsible for their defective products in tort.

Such a vast expansion of First Amendment jurisprudence cannot be overstated. Taken to its furthest extent, the majority essentially concludes that every defendant would be immune from all state law tort claims involving speech or expressive activity. If the majority is correct, there could never be state tort liability for failing to warn of the potential risks associated with a product, for insisting upon a warning would be state-compelled speech in violation of the First Amendment. Nor could there ever be liability for failing to obtain a patient's informed consent in a medical malpractice action—for the defendant physician's explanation of the procedure, its alternatives, and the reasonably foreseeable risks and benefits of each proposed course of action—necessarily implicates the defendant physician's First Amendment rights. That simply cannot be the case.

Finally, inasmuch as proximate causation "is for the finder of fact to determine" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]), we conclude that plaintiffs have stated sufficient facts to withstand defendants' various CPLR 3211 (a) (7) motions. "[A]ccept[ing] the facts as alleged in the [operative] complaint[s] as true [and] accord[ing] plaintiffs the benefit of every possible favorable inference" (*Leon*, 84 NY2d at 87-88), as we must do, we conclude that it would be premature to dismiss the relevant causes of action at this juncture. We thus would affirm the orders in appeal Nos. 1, 3, 5, and 6, and we would dismiss the appeals in appeal Nos. 2 and 4 (see *Carcone v Noon* [appeal No. 1], 214 AD3d 1306, 1306 [4th Dept 2023]).

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

536

CA 24-00515

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, SMITH, AND NOWAK, JJ.

WAYNE JONES, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF CELESTINE CHANEY, DECEASED,
PLAINTIFF-RESPONDENT,

V

OPINION AND ORDER

MEAN LLC, ET AL., DEFENDANTS,
ALPHABET, INC., GOOGLE, LLC, YOUTUBE, LLC, AND
REDDIT, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

ORRICK, HERRINGTON & SUTCLIFFE LLP, WASHINGTON D.C. (ERIC A. SHUMSKY,
ADMITTED PRO HAC VICE, OF COUNSEL), WILSON SONSINI GOODRICH & ROSATI,
P.C., NEW YORK CITY, WEBSTER SZANYI LLP, BUFFALO, AND PERKINS COIE
LLP, NEW YORK CITY, FOR DEFENDANTS-APPELLANTS ALPHABET, INC., GOOGLE,
LLC, YOUTUBE, LLC, AND REDDIT, INC.

TYCKO & ZAVAREEI LLP, WASHINGTON, D.C. (GLENN E. CHAPPELL, ADMITTED
PRO HAC VICE, OF COUNSEL), EVERYTOWN LAW, NEW YORK CITY, AND LAW
OFFICES OF BONNER AND BONNER, SAN RAFAEL, CALIFORNIA, FOR
PLAINTIFF-RESPONDENT.

HOGAN LOVELLS US LLP, NEW YORK CITY (JASMEET K. AHUJA OF COUNSEL), FOR
CHAMBER OF PROGRESS, ENGINE ADVOCACY, AND WIKIMEDIA FOUNDATION, AMICUS
CURIAE.

HOLWELL SHUSTER & GOLDBERG LLP, NEW YORK CITY (DANIEL M. SULLIVAN OF
COUNSEL), FOR PRODUCTS LIABILITY ADVISORY COUNCIL, AMICUS CURIAE.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ISABELLA S. JANKOWSKI
OF COUNSEL), FOR CENTER FOR DEMOCRACY AND TECHNOLOGY, AMICUS CURIAE.

Appeals from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered March 18, 2024. The order denied the motions of defendants-appellants to dismiss the complaint against them.

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

Same opinion as in *Patterson v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

537

CA 24-00524

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, SMITH, AND NOWAK, JJ.

KIMBERLY J. SALTER, INDIVIDUALLY AND AS
EXECUTOR OF THE ESTATE OF AARON W. SALTER, JR.,
DECEASED, ET AL., PLAINTIFFS-RESPONDENTS,

V

OPINION AND ORDER

META PLATFORMS, INC., FORMERLY KNOWN AS FACEBOOK, INC.,
INSTAGRAM, LLC, AMAZON.COM, INC., TWITCH INTERACTIVE, INC.,
ALPHABET, INC., GOOGLE, LLC, YOUTUBE, LLC, 4CHAN
COMMUNITY SUPPORT, LLC, SNAP, INC.,
DISCORD, INC., REDDIT, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

ORRICK, HERRINGTON & SUTCLIFFE LLP, WASHINGTON D.C. (ERIC A. SHUMSKY,
ADMITTED PRO HAC VICE, OF COUNSEL), WILSON SONSINI GOODRICH & ROSATI,
P.C., NEW YORK CITY, WEBSTER SZANYI LLP, BUFFALO, AND PERKINS COIE
LLP, NEW YORK CITY, FOR DEFENDANTS-APPELLANTS META PLATFORMS, INC.,
FORMERLY KNOWN AS FACEBOOK, INC., INSTAGRAM LLC, ALPHABET, INC.,
GOOGLE, LLC, YOUTUBE, LLC, AND REDDIT, INC.

O'MELVENY & MEYERS LLP, NEW YORK CITY (JONATHAN P. SCHNELLER OF
COUNSEL), AND HAGERTY & BRADY, BUFFALO, FOR DEFENDANT-APPELLANT SNAP,
INC.

HUESTON HENNIGAN LLP, NEW YORK CITY (MOEZ M. KABA OF COUNSEL), AND
GIBSON, MCASKILL & CROSBY, LLP, BUFFALO, FOR DEFENDANTS-APPELLANTS
AMAZON.COM, INC. AND TWITCH INTERACTIVE, INC

MORRISON & FOERSTER LLP, NEW YORK CITY (JOSEPH R. PALMORE OF COUNSEL),
FOR DEFENDANT-APPELLANT DISCORD, INC

HARRIS BEACH MURTHA CULLINA PLLC, NEW YORK CITY (LISA ANNE LECOIRS OF
COUNSEL), FOR DEFENDANT-APPELLANT 4CHAN COMMUNITY SUPPORT, LLC.

DICELLO LEVITT LLP, CHICAGO, ILLINOIS (AMY E. KELLER, ADMITTED PRO HAC
VICE, OF COUNSEL), AND CONNORS LLP, BUFFALO, FOR
PLAINTIFFS-RESPONDENTS.

HOGAN LOVELLS US LLP, NEW YORK CITY (JASMEET K. AHUJA OF COUNSEL), FOR
CHAMBER OF PROGRESS, ENGINE ADVOCACY, AND WIKIMEDIA FOUNDATION, AMICUS
CURIAE.

HOLWELL SHUSTER & GOLDBERG LLP, NEW YORK CITY (DANIEL M. SULLIVAN OF
COUNSEL), FOR PRODUCTS LIABILITY ADVISORY COUNCIL, AMICUS CURIAE.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ISABELLA S. JANKOWSKI OF COUNSEL), FOR CENTER FOR DEMOCRACY AND TECHNOLOGY, AMICUS CURIAE.

Appeals from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered March 18, 2024. The order denied the motions of defendants-appellants to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motions are granted and the complaint is dismissed against defendants-appellants.

Same opinion as in *Patterson v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

All concur except BANNISTER and NOWAK, JJ., who dissent and vote to affirm in the same dissenting opinion as in *Patterson v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

538

CA 24-00527

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, SMITH, AND NOWAK, JJ.

FRAGRANCE HARRIS STANFIELD, ET AL.,
PLAINTIFFS-RESPONDENTS,

V

OPINION AND ORDER

MEAN LLC, ET AL., DEFENDANTS,
ALPHABET, INC., GOOGLE, LLC, YOUTUBE, LLC, AND
REDDIT, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 4.)

ORRICK, HERRINGTON & SUTCLIFFE LLP, WASHINGTON D.C. (ERIC A. SHUMSKY,
ADMITTED PRO HAC VICE, OF COUNSEL), WILSON SONSINI GOODRICH & ROSATI,
P.C., NEW YORK CITY, WEBSTER SZANYI LLP, BUFFALO, AND PERKINS COIE
LLP, NEW YORK CITY, FOR DEFENDANTS-APPELLANTS ALPHABET, INC., GOOGLE,
LLC, YOUTUBE, LLC, AND REDDIT, INC.

TYCKO & ZAVAREEI, LLP, WASHINGTON, D.C. (GLENN E. CHAPPELL, ADMITTED
PRO HAC VICE, OF COUNSEL), EVERYTOWN LAW, NEW YORK CITY, AND LAW
OFFICES OF BONNER AND BONNER, SAN RAFAEL, CALIFORNIA, FOR
PLAINTIFFS-RESPONDENTS.

HOGAN LOVELLS US LLP, NEW YORK CITY (JASMEET K. AHUJA OF COUNSEL), FOR
CHAMBER OF PROGRESS, ENGINE ADVOCACY, AND WIKIMEDIA FOUNDATION, AMICUS
CURIAE.

HOLWELL SHUSTER & GOLDBERG LLP, NEW YORK CITY (DANIEL M. SULLIVAN OF
COUNSEL), FOR PRODUCTS LIABILITY ADVISORY COUNCIL, AMICUS CURIAE.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ISABELLA S. JANKOWSKI
OF COUNSEL), FOR CENTER FOR DEMOCRACY AND TECHNOLOGY, AMICUS CURIAE.

Appeals from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered March 18, 2024. The order denied the motions of defendants-appellants to dismiss the amended complaint against them.

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

Same opinion as in *Patterson v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

539

CA 24-01447

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, SMITH, AND NOWAK, JJ.

WAYNE JONES, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF CELESTINE CHANEY, DECEASED,
PLAINTIFF-RESPONDENT,

V

OPINION AND ORDER

MEAN LLC, ET AL., DEFENDANTS,
ALPHABET INC., GOOGLE, LLC, YOUTUBE, LLC, AND
REDDIT, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 5.)

ORRICK, HERRINGTON & SUTCLIFFE LLP, WASHINGTON D.C. (ERIC A. SHUMSKY,
ADMITTED PRO HAC VICE, OF COUNSEL), WILSON SONSINI GOODRICH & ROSATI,
P.C., NEW YORK CITY, WEBSTER SZANYI LLP, BUFFALO, AND PERKINS COIE
LLP, NEW YORK CITY, FOR DEFENDANTS-APPELLANTS ALPHABET, INC., GOOGLE,
LLC, YOUTUBE, LLC, AND REDDIT, INC.

TYCKO & ZAVAREEI LLP, WASHINGTON, D.C. (GLENN E. CHAPPELL, ADMITTED
PRO HAC VICE, OF COUNSEL), EVERYTOWN LAW, NEW YORK CITY, AND LAW
OFFICES OF BONNER AND BONNER, SAN RAFAEL, CALIFORNIA, FOR
PLAINTIFF-RESPONDENT.

HOGAN LOVELLS US LLP, NEW YORK CITY (JASMEET K. AHUJA OF COUNSEL), FOR
CHAMBER OF PROGRESS, ENGINE ADVOCACY, AND WIKIMEDIA FOUNDATION, AMICUS
CURIAE.

HOLWELL SHUSTER & GOLDBERG LLP, NEW YORK CITY (DANIEL M. SULLIVAN OF
COUNSEL), FOR PRODUCTS LIABILITY ADVISORY COUNCIL, AMICUS CURIAE.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ISABELLA S. JANKOWSKI
OF COUNSEL), FOR CENTER FOR DEMOCRACY AND TECHNOLOGY, AMICUS CURIAE.

Appeals from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered August 29, 2024. The order denied the motion of defendants-appellants to dismiss the amended complaint against them.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted and the amended complaint is dismissed against defendants-appellants.

Same opinion as in *Patterson v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

All concur except BANNISTER and NOWAK, JJ., who dissent and vote to affirm in the same dissenting opinion as in *Patterson v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

540

CA 24-01448

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, SMITH, AND NOWAK, JJ.

FRAGRANCE HARRIS STANFIELD, ET AL.,
PLAINTIFFS-RESPONDENTS,

V

OPINION AND ORDER

MEAN LLC, ET AL., DEFENDANTS,
ALPHABET INC., GOOGLE, LLC, YOUTUBE, LLC, AND
REDDIT, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 6.)

ORRICK, HERRINGTON & SUTCLIFFE LLP, WASHINGTON D.C. (ERIC A. SHUMSKY,
ADMITTED PRO HAC VICE, OF COUNSEL), WILSON SONSINI GOODRICH & ROSATI,
P.C., NEW YORK CITY, WEBSTER SZANYI LLP, BUFFALO, AND PERKINS COIE
LLP, NEW YORK CITY, FOR DEFENDANTS-APPELLANTS ALPHABET, INC., GOOGLE,
LLC, YOUTUBE, LLC, AND REDDIT, INC.

TYCKO & ZAVAREEI LLP, WASHINGTON, D.C. (GLENN E. CHAPPELL, ADMITTED
PRO HAC VICE, OF COUNSEL), EVERYTOWN LAW, NEW YORK CITY, AND LAW
OFFICES OF BONNER AND BONNER, SAN RAFAEL, CALIFORNIA, FOR
PLAINTIFFS-RESPONDENTS.

HOGAN LOVELLS US LLP, NEW YORK CITY (JASMEET K. AHUJA OF COUNSEL), FOR
CHAMBER OF PROGRESS, ENGINE ADVOCACY, AND WIKIMEDIA FOUNDATION, AMICUS
CURIAE.

HOLWELL SHUSTER & GOLDBERG LLP, NEW YORK CITY (DANIEL M. SULLIVAN OF
COUNSEL), FOR PRODUCTS LIABILITY ADVISORY COUNCIL, AMICUS CURIAE.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ISABELLA S. JANKOWSKI
OF COUNSEL), FOR CENTER FOR DEMOCRACY AND TECHNOLOGY, AMICUS CURIAE.

Appeals from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered August 29, 2024. The order denied the motion of defendants-appellants to dismiss the second amended complaint against them.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted and the second amended complaint is dismissed against defendants-appellants.

Same opinion as in *Patterson v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

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

affirm in the same dissenting opinion as in *Patterson v Meta Platforms, Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

541

CA 24-00588

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

IN THE MATTER OF THE ESTATE OF FRANCIS J. MCGUIRE,
ALSO KNOWN AS FRANK J. MCGUIRE, DECEASED.

JORDAN A. TRIPI, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JEANNE MARIE MCGUIRE, KATHLEEN MCGUIRE,
F. JAMES MCGUIRE, KELLY MCGUIRE, JACQUELYN
MCGUIRE GURNEY, RESPONDENTS-APPELLANTS,
AND MICHAEL J. MCGUIRE, RESPONDENT.
(APPEAL NO. 1.)

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL),
FOR RESPONDENT-APPELLANT JEANNE MARIE MCGUIRE.

LIPPES MATHIA, LLP, BUFFALO (COURTNEY J. DONAHUE TASNER OF COUNSEL),
FOR RESPONDENT-APPELLANT KATHLEEN MCGUIRE.

COLE, SORRENTINO, HURLEY, HEWNER AND GAMBINO, P.C., BUFFALO (THOMAS F.
HEWNER OF COUNSEL), FOR RESPONDENTS-APPELLANTS F. JAMES MCGUIRE, KELLY
MCGUIRE AND JACQUELYN MCGUIRE GURNEY.

DAN CHIACCHIA ATTORNEYS, PLLC, HAMBURG (TIFFANY M. KOPACZ OF COUNSEL),
FOR PETITIONER-RESPONDENT.

Appeals from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered February 20, 2024. The order granted the application of petitioner to the extent it sought to compel nonconsensual DNA testing of a child of decedent.

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

Same memorandum as in *Matter of McGuire* ([appeal No. 2] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

542

CA 24-01515

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

IN THE MATTER OF THE ESTATE OF FRANCIS J. MCGUIRE,
ALSO KNOWN AS FRANK J. MCGUIRE, DECEASED.

JORDAN A. TRIPI, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JEANNE MARIE MCGUIRE, MICHAEL J. MCGUIRE,
KATHLEEN MCGUIRE, F. JAMES MCGUIRE, KELLY MCGUIRE
AND JACQUELYN MCGUIRE GURNEY, RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL),
FOR RESPONDENTS-APPELLANTS JEANNE MARIE MCGUIRE AND MICHAEL J.
MCGUIRE.

LIPPES MATHIAS, LLP, BUFFALO (COURTNEY J. DONAHUE TASNER OF COUNSEL),
FOR RESPONDENT-APPELLANT KATHLEEN MCGUIRE.

COLE, SORRENTINO, HURLEY, HEWNER AND GAMBINO, P.C., BUFFALO (THOMAS F.
HEWNER OF COUNSEL), FOR RESPONDENTS-APPELLANTS F. JAMES MCGUIRE, KELLY
MCGUIRE AND JACQUELYN MCGUIRE GURNEY.

DAN CHIACCHIA ATTORNEYS, PLLC, HAMBURG (TIFFANY M. KOPACZ OF COUNSEL),
FOR PETITIONER-RESPONDENT.

Appeals from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered July 30, 2024. The order, inter alia, granted the motions of respondents insofar as they sought leave to renew and reargue and, upon renewal and reargument, adhered to a prior determination granting petitioner's application to the extent it sought to compel nonconsensual DNA testing of a child of decedent.

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

Memorandum: Francis J. McGuire (decedent) died on July 7, 2020. He was survived by, inter alia, seven known children, six of whom—respondents in this proceeding pursuant to SCPA 1809—are biologically related to him. At the time of his death, decedent had a will. The will contained no specific bequests to his children. Instead of any specific bequests, decedent left respondents the family business, inter alia, which passed outside of the will. In March 2021, Surrogate's Court issued a decree granting probate of decedent's will, and issued letters testamentary to the executors of the estate. All respondents except for one waived process and consented to probate

of the will.

In January 2023, petitioner in this proceeding filed a notice of claim pursuant to SCPA 1803 with the Surrogate, alleging that she was one of decedent's biological children and, consequently, that she was a distributee and beneficiary of decedent's estate. As a result, she asserted a right, as a possible distributee and beneficiary, to participate in and object to the underlying probate proceeding and to request a construction hearing with respect to decedent's will. Petitioner alleged that she was decedent's biological child on the basis that her mother had an affair with decedent around the time petitioner was conceived. Petitioner first discovered that decedent might be her biological father when, in 2021, she submitted her own biological samples to an online ancestry company while researching her family background. Although petitioner's mother initially denied that decedent was petitioner's biological father, she eventually admitted her prior affair with decedent to petitioner, and suggested that it was possible that he could be her biological father.

When decedent's estate failed to acknowledge petitioner's notice of claim, petitioner sought, by order to show cause, to compel, pursuant to SCPA 1809, a known child of decedent's—i.e., one of respondents—to submit to DNA testing to confirm petitioner's parentage. All respondents, except respondent Kelly McGuire, opposed the relief requested by petitioner, arguing, among other things, that the Surrogate lacked the authority to issue the requested relief, that DNA testing was unnecessary where, as here, there was essentially no way for petitioner to inherit from decedent's estate, and that the requested relief was not appropriate inasmuch as respondents' privacy interests outweighed petitioner's interest in ascertaining her true parentage. In appeal No. 1, respondents—except for respondent Michael J. McGuire—appeal from an order granting petitioner's application to the extent it sought to compel nonconsensual DNA testing of one of respondents to confirm whether decedent is petitioner's biological father.

Subsequently, all respondents moved to preclude any of the DNA testing requested by petitioner, and for leave to reargue and renew the Surrogate's order granting petitioner's application for DNA testing. Petitioner opposed respondents' motions. In appeal No. 2, respondents appeal from an order that granted their motions insofar as they sought leave to renew and reargue petitioner's application for DNA testing and, upon renewal and reargument, adhered to the prior determination granting petitioner's request, and denied respondents' motions insofar as they sought to preclude any DNA testing of them.

Initially, inasmuch as the Surrogate granted those parts of respondents' motions seeking leave to renew and reargue petitioner's application, we conclude that the appeals from the order in appeal No. 1 should be dismissed inasmuch as the order in appeal No. 2, which was entered upon renewal and reargument, supersedes the order in appeal No. 1 (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

In appeal No. 2, respondents contend that the Surrogate erred in ordering the nonconsensual testing of their DNA on the basis that she lacked the statutory power to authorize such relief. We reject that contention. In granting petitioner relief, the Surrogate relied on EPTL former 4-1.2 (a) (2) (C)—i.e., the version of that section of the statute applicable at the time of decedent's death in 2020—to authorize the nonconsensual testing of respondents' DNA to confirm petitioner's parentage. That provision, governing inheritance by nonmarital children, provided, in relevant part, that "[a] non-marital child is the legitimate child of [their] father so that [they] and [their] issue inherit from [their] father and [their] paternal kindred if . . . paternity has been established by clear and convincing evidence, which may include, but is not limited to . . . evidence derived from a genetic marker test, or . . . evidence that the father openly and notoriously acknowledged the child as [their] own" (*id.* [emphasis added]). On its face, the plain language of that provision supports the assertion that petitioner here could seek to establish her parentage through resort to DNA testing. There is no dispute that decedent did not know that petitioner was his child, and therefore there can be no evidence of decedent openly and notoriously acknowledging her as one of his children. Thus, resort to DNA testing under EPTL former 4-1.2 (a) (2) (C) was effectively the only way petitioner could establish that she was a nonmarital child of decedent. If petitioner could establish that she was decedent's biological child and, consequently, that she had a right to inherit from him as a nonmarital child, then she would be a distributee and a necessary party to the probate proceeding, and would also have standing to challenge the will (see SCPA 1403 [1] [a]; see also *Matter of American Comm. for Weizmann Inst. of Science v Dunn*, 10 NY3d 82, 95 [2008]; see generally SCPA 1410).

Respondents contend, however, that the Surrogate erred in relying on EPTL former 4-1.2 (a) (2) (C) to grant the requested relief inasmuch as that provision applied only in cases involving intestate succession, and not where, as here, decedent died with a will. We reject that contention. Respondents' argument in that regard hinges on the fact that EPTL 4-1.2, in both its former and current forms, is found in the article of the EPTL that governs intestate succession. Thus, the argument goes, its application is limited to only those circumstances, and may not apply to other articles of the EPTL (see generally *Matter of Dwight*, 37 Misc 3d 580, 585 [Sur Ct, NY County 2012]). In rejecting that argument, however, we note that several other provisions of the EPTL, including many that operate outside of the context of intestate succession, expressly import the definition of a nonmarital child set forth in EPTL 4-1.2 to help ascertain parentage of a child. For instance, EPTL 2-1.3 (a) (3)—which involves rules governing testamentary dispositions to adopted children and posthumous children—provides, with respect to nonmarital children, that "[f]or the purposes of [that] paragraph, a nonmarital child . . . is the child of a father if the child is entitled to inherit from such father under section 4-1.2 of this chapter," and that "[t]he provisions of this paragraph shall apply to the wills of persons dying on and after" September 1, 1991 (emphasis added). Additional

provisions of the EPTL governing wills also incorporate by reference the definition of a nonmarital child set forth in EPTL 4-1.2 (see e.g. EPTL 3-3.3 [b]; 5-4.5). In other words, the very text of the EPTL itself presupposes that the definition of nonmarital children contained in section 4-1.2 applies in the context of decedents who die with a will. The relevant practice commentaries also express the understanding that EPTL 4-1.2, to the extent it permits a surrogate's court to compel a DNA test, applies without regard to whether a decedent died intestate or not (see generally Margaret Valentine Turano, *Prac Commentaries, McKinney's Cons Laws of NY, EPTL 2-1.3, 4-1.2*). In short, various EPTL provisions, and the manner in which they are structured and cross-referenced, support the conclusion that the EPTL's grant of power to permit a surrogate's court to compel a DNA test is not limited solely to cases involving intestate succession.

Although EPTL former 4-1.2 (a) (2) (C) did not expressly state that surrogates' courts have the power to compel a DNA test for the purpose of determining a person's parentage, we conclude that they do have the jurisdiction to grant such relief pursuant to that provision based on their unique placement in the constitutional structure of the judiciary of New York State. The New York State Constitution provides, among other things, that "[t]he surrogate's court shall have jurisdiction over all actions and proceedings relating to the . . . administration of estates and actions and proceedings arising thereunder or pertaining thereto" (NY Const art VI, § 12 [d]). It further provides that "[t]he surrogate's court shall exercise such equity jurisdiction as may be provided by law" (NY Const art VI, § 12 [e]). Indeed, echoing the constitutional structure, the SCPA reaffirms that surrogates' courts "shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents" (SCPA 201 [3]), and—to that end—are permitted to "make a full, equitable and complete disposition of the matter by such order or decree as justice requires" (*id.*). In other words, the grant of equity jurisdiction to surrogates' courts also extends to the shaping of relief by such a court (see *Matter of Abraham L.*, 53 AD2d 669, 670 [2d Dept 1976]; see generally *Matter of Raymond v Davis*, 248 NY 67, 71-72 [1928]; Deborah S. Kearns, *Prac Commentaries, McKinney's Cons Laws of NY, SCPA 201*). Consequently, consistent with the fact that EPTL former 4-1.2 (a) (2) (C) allowed for parentage to be established through a genetic marker test, it follows that, in shaping the relief available to petitioner, the Surrogate here has the authority, via her aforementioned equity jurisdiction, to compel the performance of such a test in a case such as this one. Regardless, we also note that "[t]he CPLR . . . appl[ies] in the surrogate's court except where other procedure is provided by this act" (SCPA 102), which extends to permitting a surrogate's court to allow "full disclosure of all matter material and necessary in the prosecution or defense of an action" or claim (CPLR 3101 [a]; see generally SCPA 1809 [1]). We conclude that CPLR 3101 (a), coupled with EPTL former 4-1.2 (a) (2) (C), also provides a surrogate's court with the power to compel a DNA test in the proper case.

Consistent with the above understanding of the ability of a

surrogate's court to shape the relief warranted in the proper case, we reject respondents' further contention that the Surrogate here lacked the power to compel a sibling to undergo a DNA test under the circumstances. Although there is no express statutory authority permitting a surrogate's court to compel DNA testing of a sibling, by the same token there is no statutory language expressly prohibiting such compulsory testing (see generally *Matter of Sandler*, 160 Misc 2d 955, 958 [Sur Ct, NY County 1994]). Indeed, changes made to the relevant statutory scheme support the proposition that, in enacting the applicable version of EPTL 4-1.2, the legislature intended to broaden the scope of permissible persons from whom DNA could be collected to establish parentage of a nonmarital child. Prior to amendments to the statute made in 2010, EPTL former 4-1.2 (a) (2) (D) provided that a nonmarital child could inherit from their father if "a blood genetic marker test had been administered to the father which together with other evidence establishes paternity by clear and convincing evidence." In other words, the statute's terms expressly authorized only DNA testing of blood procured from the putative father during his lifetime (see *Matter of Sekanic*, 229 AD2d 76, 77-78 [3d Dept 1997]; *Matter of Janis*, 210 AD2d 101, 101 [1st Dept 1994]). When it amended the statute in 2010, however, the legislature removed the language limiting DNA testing to material recovered from the putative father during his lifetime, and replaced it with unrestricted language allowing parentage to be established by any genetic marker test (see EPTL former 4-1.2 [a] [2] [C], as amended by L 2010, ch 64, §§ 1-2). In our view, that alteration demonstrated the legislature's intent to broaden the scope of permissible persons from whom DNA could be collected to establish the parentage of a nonmarital child. The legislative history confirms that point, noting that proof of parentage "may be in the form of a genetic marker test administered to the father (or close relative at any time)" (Assembly Mem in Support, Bill Jacket, L 2010, ch 64 at 8 [emphasis added]). Consequently, we conclude that the Surrogate properly determined that the DNA testing authorized by EPTL former 4-1.2 extends to DNA samples from purported siblings to establish the parentage of a nonmarital child, such as petitioner here. Indeed, we note that there have been several cases where courts have granted the application of a movant seeking genetic testing of siblings to ascertain parentage (see *Matter of Gaynor*, 13 Misc 3d 331, 332-334 [Sur Ct, Nassau County 2006]; see also *Matter of Abramaitis*, 2011 NY Slip Op 33234[U], *1-2 [Sur Ct, Nassau County 2011]; see generally *Sandler*, 160 Misc 2d at 956-958). To the extent respondents contend that the Surrogate lacks the power to compel them to undergo DNA testing on the basis that they are nonparties in the underlying probate proceeding and have not placed their genetic condition in issue, that contention is unpreserved for our review (see generally *Sky v Catholic Charities of Buffalo, NY*, 194 AD3d 1417, 1417-1418 [4th Dept 2021]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Having concluded that the Surrogate has the authority to compel DNA testing to establish parentage here, we must next consider respondents' additional contention that, under the facts of this case, the Surrogate abused her discretion in granting petitioner the

requested relief. We also reject that contention and conclude that, based on the record before us, the Surrogate did not abuse her discretion in granting the limited relief requested by petitioner—i.e., DNA testing of one of respondents for the sole purpose of establishing whether decedent is petitioner's biological father. In making such a determination, courts have considered whether a request for DNA testing in an inheritance case is "practicable and reasonable under the totality of the circumstances" (*Matter of Poldrugovaz*, 50 AD3d 117, 129 [2d Dept 2008]; see *Matter of Betz*, 74 AD3d 1459, 1463-1464 [3d Dept 2010]). Factors considered by the courts in making that determination include "(1) whether evidence presented demonstrates a reasonable possibility that the genetic testing will establish a match; (2) the practicability of obtaining the tissue sample for the purpose of conducting the genetic testing, including whether the sample is readily available; (3) whether there is a need to exhume the decedent's body or obtain the sample from a nonparty; (4) whether appropriate safeguards were, or will be, taken to insure the reliability of the genetic material to be tested; and (5) the privacy and religious concerns of the decedent and or [their] family members" (*Poldrugovaz*, 50 AD3d at 129).

Here, although the Surrogate did not expressly identify the factors on which she relied, we conclude that, in granting petitioner's application for DNA testing, she properly considered the aforementioned factors relevant to that determination. With respect to the first factor, we note that petitioner's submissions amply raised a reasonable possibility that genetic testing of respondents would establish that decedent was petitioner's biological father. Specifically, in addition to her own affidavit setting forth the basis for her allegation that she is decedent's biological daughter, petitioner submitted an affidavit from her mother, who was able to substantiate specific averred facts to establish the strong possibility that decedent is petitioner's biological father—i.e., by affirming that she had a sexual relationship with decedent around the time petitioner was conceived. Additionally, petitioner produced evidence from the online ancestry website to which she submitted her own DNA samples, which also supported her assertions that she is biologically related to decedent. In other words, in support of her application, petitioner did more than simply assert, without corroboration of her self-serving assertions, that decedent was her biological father. Indeed, this is not a case where evidentiary support for such an application is lacking. Here, the Surrogate was careful to grant the relief in question only after determining that, while petitioner's evidence did not, of course, conclusively establish parentage, there is at least a reasonable possibility based on the evidence presented that the requested DNA testing will in fact establish parentage.

With respect to several other of the *Poldrugovaz* factors—particularly, "the practicability of obtaining [a] sample" and whether there is a need to "obtain the sample from a nonparty" (50 AD3d at 129)—we conclude that there is nothing to suggest that petitioner could obtain a biological sample from decedent, rendering it necessary to obtain a sample from respondents, the putative

biological siblings. There is no evidence that any of decedent's tissue was preserved, and petitioner would not likely succeed in any attempt to exhume his remains for such testing (see generally *Matter of Currier [Woodlawn Cemetery]*, 300 NY 162, 164 [1949]; *Yome v Gorman*, 242 NY 395, 402-403 [1926]). Additionally, in granting petitioner's application, the Surrogate noted that obtaining a saliva sample from one of respondents would be a simple, noninvasive method of obtaining a DNA sample to establish petitioner's parentage.

We also conclude, contrary to respondents' contention, that the Surrogate properly considered "the privacy . . . concerns of . . . decedent and . . . his family members" when it granted petitioner the requested relief (*Poldrugovaz*, 50 AD3d at 129). The Surrogate specifically considered respondents' privacy rights, and balanced them against petitioner's interest in ascertaining her parentage. The Surrogate noted that petitioner's other submissions—i.e., the affidavits and results from the online ancestry website—had already lifted the veil of privacy on the subject of whether decedent had an affair with petitioner's mother, resulting in petitioner's birth. Moreover, with respect to respondents' privacy interests, we note that the Surrogate considered the privacy factors relevant to the specific relief sought by petitioner in her application—i.e., compelling a DNA test for the sole purpose of confirming whether decedent was petitioner's biological father.

Contrary to the assertion of respondents, petitioner does not seek broad, unspecified DNA testing of respondents. Rather, she sought the DNA testing of respondents for the sole purposes of identification. We note that there is a meaningful difference between "compell[ing] genetic testing in civil discovery disputes for identity related issues," and seeking "broad unspecified genetic testing" (*Rogers-Duell v Ying-Jen Chen*, 42 Misc 3d 291, 295, 297 [Sup Ct, Albany County 2013]). Genetic testing of identity only has been described as "ubiquitous," scientifically accepted, and reliable, and is not considered to be extreme or intrusive (*id.* at 297; see *Betz*, 74 AD3d at 1463; *Poldrugovaz*, 50 AD3d at 128-129). In contrast, unspecified genetic testing implicates different privacy concerns due to the risk that it could reveal a "vast amount of personal and private information" ranging from "familial relationships . . . to the potential discovery of genetic diseases, conditions, and predispositions" (*Rogers-Duell*, 42 Misc 3d at 296). Here, inasmuch as petitioner only requested DNA testing of respondents for purposes of establishing whether decedent was her biological father—i.e., for identity purposes—we conclude that many of respondents' asserted privacy concerns, which they contend were not considered by the Surrogate, simply do not obtain here.

Given that those stated concerns are not implicated by the relief requested by petitioner—and subsequently granted by the Surrogate—we conclude that the Surrogate did not abuse her discretion in determining that respondents' privacy concerns do not outweigh petitioner's interest in ascertaining her true parentage. Nonetheless, we remind the Surrogate that once petitioner has obtained

a DNA sample from one of respondents for purposes of determining whether decedent is her biological father, the Surrogate must take the necessary steps of ensuring that respondents' privacy concerns remain protected, and that any court-ordered genetic marker testing does not exceed the scope of relief granted to petitioner.

We reject respondents' further contention that their privacy rights under Civil Rights Law § 79-1 precluded the relief granted by the Surrogate here. It is true enough that, generally, "[n]o person shall perform a genetic test on a biological sample taken from an individual without the prior written informed consent of such individual" (Civil Rights Law § 79-1 [2] [a]). Nonetheless, such "genetic tests may be performed without the consent of the person who is the subject of the tests *pursuant to an order of a court of competent jurisdiction*" (§ 79-1 [4] [b] [emphasis added]). Inasmuch as we conclude that the Surrogate, in a court of competent jurisdiction, properly ordered respondents to comply with a DNA test to determine petitioner's parentage, we further conclude that the relief is not precluded by Civil Rights Law § 79-1 (2) (a). Similarly, although Civil Rights Law § 79-1 (3) (a) provides that the "results of any genetic test performed on any person shall be deemed confidential and shall not be disclosed without the written informed consent of the person to whom such genetic test relates," section 79-1 (4) (c) provides that, notwithstanding those provisions, test results may be disclosed by "an order of a court of competent jurisdiction." In other words, the protections of Civil Rights Law § 79-1 identified by respondents do not warrant reversal where, as here, we conclude that the Surrogate properly exercised her discretion in granting petitioner's application for DNA testing under EPTL former 4-1.2 (a) (2) (C).

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

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

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CA 24-00552

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

KATHERINE GENA, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CHRISTOPHER MU, PA, LOYOLA OUTPATIENT REHAB UNIT,
ST. JAMES MERCY HOSPITAL AND LOYOLA RECOVERY
FOUNDATION, INC., DEFENDANTS-RESPONDENTS.

SILBERSTEIN AWAD & MIKLOS, P.C., GARDEN CITY (JOHN T. RYAN OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN E. HULSLANDER OF
COUNSEL), FOR DEFENDANT-RESPONDENT CHRISTOPHER MU, PA.

CLAUSEN MILLER, P.C., NEW YORK CITY (JOSEPH J. FERRINI OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS LOYOLA OUTPATIENT REHAB UNIT AND LOYOLA
RECOVERY FOUNDATION, INC.

HODGSON RUSS LLP, ROCHESTER (CLAIRE E. WELLS OF COUNSEL), FOR
DEFENDANT-RESPONDENT ST. JAMES MERCY HOSPITAL.

Appeal from an order of the Supreme Court, Steuben County (Jason L. Cook, J.), entered March 11, 2024. The order, inter alia, granted the cross-motions of defendants Christopher Mu, PA, and St. James Mercy Hospital to dismiss the complaint pursuant to CPLR 3126 (3) and dismissed the complaint against all defendants.

It is hereby ORDERED that said appeal from the order insofar as it effectively dismissed the complaint against defendants Loyola Outpatient Rehab Unit and Loyola Recovery Foundation, Inc., is unanimously dismissed and the order is modified in the exercise of discretion by denying the cross-motions and reinstating the complaint against defendants Christopher Mu, PA, and St. James Mercy Hospital and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Steuben County, for further proceedings in accordance with the following memorandum: Plaintiff appeals from an order that granted both the noticed cross-motions to dismiss the complaint made by defendants Christopher Mu, PA, and St. James Mercy Hospital pursuant to CPLR 3126 (3) and the oral application to dismiss made by defendants Loyola Outpatient Rehab Unit and Loyola Recovery Foundation, Inc. (collectively, Loyola defendants) at oral argument. Insofar as the Loyola defendants did not file a formal cross-motion on notice but, rather, orally applied to dismiss plaintiff's complaint on the return date of the cross-motions, the part of the order

effectively dismissing the complaint against the Loyola defendants "is not appealable as of right under CPLR 5701 (a) (2) because such an application is not a proper cross[-]motion made on notice under CPLR 2215" (*Kavanaugh v Kavanaugh*, 200 AD3d 1568, 1572 [4th Dept 2021]; see *Matter of Henshaw v Hildebrand*, 191 AD3d 1237, 1238 [4th Dept 2021]). Plaintiff did not seek leave to appeal from that part of the order, and we decline to treat the notice of appeal as an application for leave to appeal (see CPLR 5701 [c]; *Mosley v Parnell*, 211 AD3d 1530, 1531 [4th Dept 2022]; *Milligan v Bifulco*, 153 AD3d 1624, 1626 [4th Dept 2017]). We therefore dismiss the appeal from the order insofar as it effectively dismissed the complaint against the Loyola defendants (see *Mosley*, 211 AD3d at 1531).

With respect to the appealable portions of the order, it is well established 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" (*Daniels v Rumsey*, 111 AD3d 1408, 1409 [4th Dept 2013]). Nevertheless, "where discretionary determinations concerning discovery and CPLR article 31 are at issue, [we are] vested with the same power and discretion as [Supreme Court, and thus we] may also substitute [our] own discretion even in the absence of abuse" (*Page v Niagara Falls Mem. Med. Ctr.*, 141 AD3d 1084, 1085 [4th Dept 2016] [internal quotation marks omitted]; see generally *Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]). Under the circumstances of this case, we substitute our own discretion for that of the motion court and conclude that dismissal of the complaint pursuant to CPLR 3126 (3) is not warranted (see generally *Windnagle v Tarnacki*, 184 AD3d 1178, 1179-1180 [4th Dept 2020]). We therefore modify the order, in the exercise of our discretion, by denying the cross-motions and reinstating the complaint against Mu and St. James Mercy Hospital and we remit the matter to Supreme Court.

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

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CA 24-00408

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

SHEILA HEMAMI, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

STEVEN JAMES LAUBER, HILDA LAUBER AND
BRENDAN A. LAUBER, DEFENDANTS-RESPONDENTS.

SHARON M. SULIMOWICZ, ITHACA, FOR PLAINTIFF-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (ROGER W. BRADLEY OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered January 9, 2024. The order, insofar as appealed from, denied that part of the motion of plaintiff for summary judgment on her trespass cause of action.

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

Memorandum: Plaintiff appeals, as limited by her notice of appeal, from that portion of an order denying her motion insofar as it sought summary judgment on her trespass cause of action. We affirm.

Plaintiff and defendants own adjacent lots abutting Skaneateles Lake, and, as relevant here, a stairway that encroaches on plaintiff's lot allows defendants access to the water. The former owners of plaintiff's and defendants' lots entered into an encroachment agreement, which permits defendants to use and maintain those stairs. The prior owners of defendants' lot used the stairs to access a seasonal, temporary dock, but in 2016 defendants had the temporary dock removed and a permanent dock erected in its place. Plaintiff commenced this action, alleging, as relevant on appeal, that defendants' dock was constructed on her property.

At the outset, we note that plaintiff limited the scope of her notice of appeal to the portion of Supreme Court's order that denied her motion insofar as it sought summary judgment on her cause of action for trespass. Limiting an appeal to one part of an order waives the right to appeal from other parts and deprives this Court of jurisdiction to review the unappealed portions of the order (*see* CPLR 5515 [1]; *Violet Realty, Inc. v Amigone, Sanchez & Mattrey, LLP*, 183 AD3d 1278, 1279 [4th Dept 2020]; *State Farm Mut. Auto. Ins. Cos. v Jaenecke*, 81 AD3d 1474, 1474-1475 [4th Dept 2011], *lv denied* 17 NY3d

701 [2011]; *City of Mount Vernon v Mount Vernon Hous. Auth.*, 235 AD2d 516, 517 [2d Dept 1997]).

With respect to the trespass cause of action, plaintiff has the initial burden of establishing her entitlement to judgment as a matter of law (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to meet that initial burden requires denial of the motion without regard to the sufficiency of defendants' opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad*, 64 NY2d at 853). To succeed on her cause of action sounding in trespass, plaintiff is required to prove that defendants intentionally entered onto her land without justification or permission (see *Pearl St. Parking Assoc. LLC v County of Erie*, 207 AD3d 1029, 1032 [4th Dept 2022]; *Ligo v Gerould*, 244 AD2d 852, 852 [4th Dept 1997]).

Insofar as the State is the presumptive owner of the land under a navigable body of water (see *Granger v City of Canandaigua*, 257 NY 126, 131 [1931]; *Stewart v Turney*, 237 NY 117, 124 [1923]) and plaintiff's private ownership interest in the land making up the lake bed extends only to the low water mark (see *Stewart*, 237 NY at 129-130), plaintiff's burden on her motion was to eliminate all triable issues of fact as to the location of the low water mark at the time of the dock's installation.

Plaintiff failed to meet that burden. In support of her motion, plaintiff submitted the deposition testimony of defendant Steven James Lauber, who testified that defendants' property ends in a cliff, that the water line always extended to the base of the cliff, and that the stairs extend from the base of the cliff out over the water. In addition, plaintiff submitted photographs depicting the water abutting the cliff's edge and the stairs protruding from the cliff over the water as the permanent dock was being built. Plaintiff's expert's affidavit, which purported to establish the low water mark as of 2022 (rather than 2016, when the dock was built) was insufficient to meet plaintiff's burden, particularly where the expert did not explain his methodology or discuss or comment upon the deposition testimony or photographs establishing that the stairs extend out over the water.

Thus, plaintiff's own motion papers raise triable issues of fact as to the location of the low water mark and, in particular, the location of the low water mark at the time the dock was built, and denial of the motion is required regardless of the sufficiency of defendants' opposing papers (see generally *Winegrad*, 64 NY2d at 853).

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

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CA 24-00870

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

PATRICK J. HOOVER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CLOUD 9 SMOKES & VAPORS, ET AL., DEFENDANTS,
LG CHEM LIMITED, AND LG CHEM AMERICA, INC.,
DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LEWIS BRISBOIS BISGAARD & SMITH LLP, NEW YORK CITY (WENDY S. DOWSE OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mario A. Giacobbe, A.J.), entered February 14, 2024 in an action for, inter alia, strict products liability. The order, insofar as appealed from, granted the motions of defendants LG Chem Limited and LG Chem America, Inc., to dismiss the complaint against them and denied the cross-motion of plaintiff insofar as it sought jurisdictional discovery.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motions of defendants LG Chem America, Inc. and LG Chem Limited are denied, the complaint is reinstated against those defendants, and plaintiff's cross-motion is granted insofar as it sought jurisdictional discovery.

Memorandum: In this action for, inter alia, strict products liability, plaintiff seeks damages for burn injuries he sustained when one or more allegedly "defective lithium-ion . . . batteries" spontaneously ignited while in his clothing. Plaintiff, as limited by his brief, appeals from an order insofar as it granted the motions of LG Chem America, Inc. (LGCAI) and LG Chem Limited (LG Chem) (collectively, defendants) seeking to dismiss against them the complaint pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction, and denied plaintiff's cross-motion insofar as it sought jurisdictional discovery. We reverse the order insofar as appealed from inasmuch as we agree with plaintiff that he is entitled to jurisdictional discovery before it can be determined whether dismissal for lack of personal jurisdiction is warranted (*see Williams v Beemiller, Inc.*, 100 AD3d 143, 152 [4th Dept 2012], amended on rearg 103 AD3d 1191 [4th Dept 2013]).

Here, LG Chem is a Korean company, and LGCAI is a subsidiary of LG Chem with its headquarters in Delaware and principal place of business in Georgia. "In determining whether the exercise of personal jurisdiction over a nondomiciliary defendant is proper, a court must assess whether the requirements of New York's long-arm statute have been met and, if so, whether a finding of personal jurisdiction comports with federal due process" (*Williams v Beemiller, Inc.*, 159 AD3d 148, 152 [4th Dept 2018], *affd* 33 NY3d 523 [2019]). "Although the ultimate burden of proof rests with the party asserting jurisdiction, in opposition to a motion to dismiss pursuant to CPLR 3211 (a) (8), the plaintiff need only make a prima facie showing that the defendant is subject to personal jurisdiction" (*Barone v Bausch & Lomb, Inc.*, 191 AD3d 1365, 1366 [4th Dept 2021]). Indeed, "[i]n order to defeat a motion to dismiss based upon lack of personal jurisdiction, a plaintiff need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant" (*Tucker v Sanders*, 75 AD3d 1096, 1096 [4th Dept 2010] [emphasis added & internal quotation marks omitted]; see *Best v Guthrie Med. Group, P.C.*, 175 AD3d 1048, 1050-1051 [4th Dept 2019]; *Williams*, 100 AD3d at 153). "The facts alleged in the complaint and affidavits in opposition to such a motion to dismiss are deemed true and construed in the light most favorable to the plaintiff, and all doubts are to be resolved in favor of the plaintiff" (*Fanelli v Latman*, 202 AD3d 758, 759 [2d Dept 2022] [internal quotation marks omitted]; see *Tucker*, 75 AD3d at 1097; see also *Zeidan v Scott's Dev. Co.*, 173 AD3d 1639, 1639-1640 [4th Dept 2019]).

We agree with plaintiff that he has set forth a " 'sufficient start' " (*Best*, 175 AD3d at 1050; see *Williams*, 100 AD3d at 154; see generally *Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]) to demonstrate that his position is not " 'frivolous' " (*Williams*, 100 AD3d at 153; cf. *Glazer v Socata, S.A.S.*, 170 AD3d 1685, 1687 [4th Dept 2019], *lv denied* 33 NY3d 911 [2019]), and thus that plaintiff "[is] entitled to conduct discovery on essential facts pertaining to [the issue of Supreme Court's] jurisdiction" over defendants (*Sovik v Healing Network*, 244 AD2d 985, 987 [4th Dept 1997], *amended on rearg* 679 NYS2d 858 [4th Dept 1998]; see *Williams*, 100 AD3d at 153-154; cf. *Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 487 [1st Dept 2017]). We therefore conclude that defendants' motions should be denied, that the complaint should be reinstated against them, and that plaintiff's cross-motion should be granted insofar as it sought jurisdictional discovery.

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

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KA 23-00329

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JENNIE CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered October 20, 2022. The judgment convicted defendant upon her plea of guilty of attempted murder in the second degree and vehicular manslaughter 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 plea of guilty of, *inter alia*, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [2]), defendant contends that the waiver of the right to appeal is invalid and that the sentence is unduly harsh and severe. We agree with defendant that the purported waiver of her right to appeal is invalid and thus does not foreclose her challenge to the severity of the sentence (*see People v Williams*, 228 AD3d 1314, 1314 [4th Dept 2024]; *People v Rumph*, 207 AD3d 1209, 1210 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Although defendant's further contention that her plea was not knowingly, intelligently, and voluntarily entered would survive even a valid waiver of the right to appeal, she "failed to preserve [that contention] for our review by way of a motion to withdraw [her] plea or to vacate the judgment of conviction on that ground" (*People v Williams*, 228 AD3d 1316, 1317 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024], *reconsideration denied* 42 NY3d 1055 [2024] [internal quotation marks omitted]; *see People v Morseman*, 199 AD3d 1475, 1475 [4th Dept

2021])). 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]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 24-00096

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MALIK M. WEEMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered September 13, 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 [7]). Defendant's contentions concerning alleged discovery violations are forfeited by his guilty plea (*see People v Robinson*, 225 AD3d 1266, 1268 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]; *People v Smith*, 217 AD3d 1578, 1578 [4th Dept 2023]; *cf.* CPL 30.30 [6]). Moreover, we conclude that "[d]efendant's contention that defense counsel was ineffective does not survive his plea . . . inasmuch as defendant did not assert that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Trisvan*, 237 AD3d 1556, 1557 [4th Dept 2025] [internal quotation marks omitted]).

We further conclude that Supreme Court did not abuse its discretion in declining to adjudicate defendant a youthful offender (*see generally People v McCall*, 187 AD3d 1682, 1683 [4th Dept 2020], *lv denied* 36 NY3d 930 [2020]), and having reviewed the applicable factors pertinent to a youthful offender determination (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to grant him that status

(see *People v Hall*, 221 AD3d 1600, 1601 [4th Dept 2023], *lv denied* 40 NY3d 1092 [2024]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

549

KA 22-01391

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL LANGDON, JR., DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered April 4, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]). We affirm. Defendant contends that his waiver of the right to appeal is invalid and that County Court erred in denying that part of his omnibus motion seeking suppression of statements that he made to law enforcement officers. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the court's suppression ruling (*see People v Williams*, 225 AD3d 1130, 1130 [4th Dept 2024], *lv denied* 42 NY3d 973 [2024]), we conclude that the court properly refused to suppress his pre-Miranda statements. Defendant's initial statements to the state troopers arriving on the scene, which described who had shot the victim and where the victim was located, "were responses to threshold inquiries by the [troopers] that were intended to ascertain the nature of the situation during initial investigation of a crime, rather than to elicit evidence of a crime, and those statements thus were not subject to suppression" (*People v Pruitt*, 158 AD3d 1138, 1140 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018] [internal quotation marks omitted]; *see People v Mitchell*, 132 AD3d 1413, 1414 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016]). Similarly, we conclude that defendant's subsequent statement that the shooting was an act of self-defense "was spontaneous, inasmuch as it was 'in no way the product of an interrogation environment [or] the result of express questioning or its functional equivalent,' " and thus not subject to suppression (*People v Dawson*, 149 AD3d 1569, 1570-1571 [4th Dept 2017], *lv denied*

29 NY3d 1125 [2017]; *see People v Harris*, 57 NY2d 335, 342 [1982],
cert denied 460 US 1047 [1983]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

550

KA 24-00067

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER J. SCHLEDORN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ADAM AMIRAULT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Chauncey J. Watches, J.), rendered November 15, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals 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 [1]). Defendant contends that the search warrant application did not supply the requisite probable cause for the issuance of the search warrant. We affirm in appeal No. 1.

In appeal No. 2, defendant appeals from a resentence. We dismiss the appeal from the resentence in appeal No. 2 inasmuch as defendant raises no contentions with respect thereto (*see People v Swem*, 182 AD3d 1050, 1051 [4th Dept 2020]).

With respect to appeal No. 1, it is well settled that a search warrant may be properly issued "only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur" (*People v Moxley*, 137 AD3d 1655, 1656 [4th Dept 2016]; *see generally People v Mercado*, 68 NY2d 874, 875-876 [1986], *cert denied* 479 US 1095 [1987]) and "where there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched" (*Moxley*, 137 AD3d at 1656; *see People v Bigelow*, 66 NY2d 417, 423 [1985]; *People v Pitcher*, 199 AD3d 1493, 1493 [4th Dept 2021]). We note that the sworn statement in the search warrant application was provided by an identified citizen, i.e., a resident of the home to which police and emergency personnel

were responding to a report of a drug overdose. "An identified citizen informant is presumed to be personally reliable" (*People v Parris*, 83 NY2d 342, 350 [1994]), and the application established that the citizen possessed the requisite basis of knowledge for the information she provided (see *Bigelow*, 66 NY2d at 423; *People v Holmes*, 115 AD3d 1179, 1180-1181 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

551

KA 24-00310

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER J. SCHLEDORN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ADAM AMIRAULT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Steuben County Court (Chauncey J. Watches, J.), rendered January 3, 2024. Defendant was resented upon his conviction of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Schledorn* ([appeal No. 1] - AD3d - [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

554

CAF 24-00520

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF ANDREINA CASTRO,
PETITIONER-RESPONDENT-RESPONDENT,

V

MEMORANDUM AND ORDER

GIOVANNI RIOS-OSORIO,
RESPONDENT-PETITIONER-APPELLANT.

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

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

ELIZABETH SCHENCK, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered March 11, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner-respondent sole legal and physical custody of the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent-petitioner challenges the denial of his request for an adjournment, the order is reversed on the law without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner father appeals from an order that, among other things, effectively granted the petition of petitioner-respondent mother by awarding her sole legal and physical custody of the subject child and effectively denied the father's cross-petition seeking custody of the child. Contrary to the father's contention, we conclude that the order was properly entered on his default (*see Sarlo-Pinzur v Pinzur*, 59 AD3d 607, 607 [2d Dept 2009]; *see generally Matter of Reardon v Krause*, 219 AD3d 1710, 1711-1712 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]).

"[N]otwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal from [such an] order [or judgment] brings up for review those 'matters which were the subject of contest' before the [trial court]" (*Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004], quoting *James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]; *see Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080 [4th

Dept 2019])). Thus, in this appeal, review is limited to the father's contention that Family Court abused its discretion in denying his request for an adjournment (see *Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386-1387 [4th Dept 2019], lv denied 35 NY3d 904 [2020]; *Matter of Martin v Martin*, 121 AD3d 693, 693-694 [2d Dept 2014], lv denied 26 NY3d 911 [2015])).

We agree with the father that "the court abused its discretion in denying [his] request for an adjournment" (*Matter of Jiryan S. [Tammy D.]*, 207 AD3d 1247, 1248-1249 [4th Dept 2022], lv denied 39 NY3d 903 [2022]). The father "personally appeared at all prior proceedings, and . . . the request for an adjournment was the [father's] first" (*Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th Dept 2017]; see *Matter of Nicole J.*, 71 AD3d 1581, 1582 [4th Dept 2010]). Moreover, the father's request was not a delay tactic and did not result from his lack of diligence (see *Matter of Dupont v Armstrong*, 207 AD3d 1242, 1243 [4th Dept 2022]; *Daming Zhu v Ye Cheng*, 142 AD3d 1365, 1365 [4th Dept 2016]). Indeed, the father was incarcerated at the time that he made the adjournment request and, as a result of his incarceration, he had not been in recent contact with his attorney or been able to recover important evidence from a cell phone. We therefore reverse the order and remit the matter to Family Court for a new hearing on the mother's petition and the father's cross-petition.

The remaining contentions raised by the father are not reviewable on appeal from the order entered upon his default because they were not the subject of contest before the court (see *Reardon*, 219 AD3d at 1713; *Matter of Larae L. [Heather L.]*, 202 AD3d 1454, 1455 [4th Dept 2022], lv denied 38 NY3d 907 [2022]; but see *Matter of Sims v Boykin*, 130 AD3d 835, 835-836 [2d Dept 2015]).

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

566

CA 24-01020

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF CELESTIA KAYLENE C.,
AS PARENT FOR LEAVE TO CHANGE THE NAME
OF MARLEY LOUISE G. TO MARLEY LOUISE C.,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

GATOR J.G., RESPONDENT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR RESPONDENT-APPELLANT.

CELESTIA KAYLENE C., RESPONDENT-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Genesee County (Diane Y. Devlin, J.), dated June 4, 2024 in a proceeding to change the name of a child. The order denied the motion of respondent seeking, inter alia, to vacate an order authorizing a name change of the parties' child.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in part, the order entered January 24, 2023, is vacated upon condition that until further order of Supreme Court, Genesee County, the provisions of that order shall remain in effect, and the matter is remitted to Supreme Court, Genesee County, for further proceedings in accordance with the following memorandum: Petitioner mother commenced this proceeding seeking an order authorizing a name change of the parties' child from respondent father's surname to the mother's surname. At the time of the child's birth, the father acknowledged paternity, and the child was given his surname. Supreme Court granted the mother's application and sealed the record. The father subsequently learned of the name change application and moved to, inter alia, vacate the order (name change order) pursuant to CPLR 5015 (a) (1) contending that he had a reasonable excuse for the default and a meritorious defense. The court denied the motion and, as limited by his brief, the father appeals from the order to the extent that it denied that part of his motion seeking to vacate the name change order. We reverse the order insofar as appealed from.

We agree with the father that he has demonstrated a reasonable excuse for the default inasmuch as he was not served with the statutory notice of the name change application. Civil Rights Law § 60 permits a petition for a name change to be brought by, among others, either of the infant's parents (*see* § 60 [1]). As relevant

here, section 62 (1) of the Civil Rights Law requires that the petitioning parent must serve "in like manner as a notice of a motion upon an attorney in an action" notice upon the other parent. The only statutory exemptions from that notice requirement are when the person required to be given notice is deceased or "cannot be located with due diligence within the state, and . . . such person has no known address outside the state" (*id.*), and neither of those exemptions applies here.

We further agree with the father that he has a meritorious defense on the basis that he raised reasonable objections to the petition. "While 'neither parent has a superior right to determine the surname of the child,' we have stated that 'a father has a recognized interest in having his child bear his surname' " (*Matter of Niethé [McCarthy-DePerno]*, 151 AD3d 1952, 1953 [4th Dept 2017]). The father also contends that an order granting the petition will have a deleterious effect on his relationship with his child (*see id.*; *see generally Matter of Eberhardt*, 83 AD3d 116, 121 [2d Dept 2011]).

We therefore reverse the order insofar as appealed from, grant the motion in part, vacate the name change order upon condition that, until further order of the court, the provisions of the name change order shall remain in effect, and remit the matter to Supreme Court for a hearing on the petition. In light of our determination, we need not consider the father's remaining contentions.

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

567

CA 24-01389

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

MITCHELL J. NEWVINE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JEFFREY J. BARZEE, DEFENDANT-RESPONDENT.

WEGERSKI LAW FIRM, NEW YORK CITY (JOHN P. WEGERSKI, III, OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Danielle M. Fogel, J.), entered February 1, 2024 in a personal injury action arising from a collision between a motor vehicle and a bicycle. The judgment dismissed the complaint upon a jury verdict.

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

Memorandum: On appeal from a judgment dismissing the complaint upon a jury verdict finding that defendant was not negligent with regard to a collision between defendant's vehicle and plaintiff's bicycle, plaintiff contends that Supreme Court erred in instructing the jury regarding the emergency doctrine (*see* PJI 2:14). We reject that contention. The evidence established that plaintiff, an intoxicated bicyclist, veered into defendant's lane of travel and then inexplicably swerved into the side of defendant's vehicle when defendant attempted to turn into a parking lot to avoid colliding with plaintiff. Evaluating the evidence in the light most favorable to defendant, we conclude that there is a reasonable view of the evidence supporting the conclusion that defendant was confronted by a qualifying emergency (*see generally Stefanski v Huntress*, 224 AD3d 1362, 1363-1364 [4th Dept 2024]; *Selig v Diez*, 180 AD3d 832, 833-834 [2d Dept 2020]; *Kenney v County of Nassau*, 93 AD3d 694, 695-696 [2d Dept 2012]; *Goff v Goudreau*, 222 AD2d 650, 650 [2d Dept 1995]), and we therefore agree with defendant that the court properly gave the charge (*see Barnes v Dellapenta*, 111 AD3d 1287, 1288 [4th Dept 2013]; *cf. Fusco v Hobbes*, 16 AD3d 1031, 1032 [4th Dept 2005]).

We likewise reject plaintiff's contention that the jury verdict is against the weight of the evidence. "[A] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the

plaintiff that it could not have been reached on any fair interpretation of the evidence" (*McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016] [internal quotation marks omitted]). Affording "great deference . . . to the jury given its opportunity to see and hear the witnesses" (*Kendrick v Rochester Gen. Hosp.*, 228 AD3d 1281, 1283 [4th Dept 2024] [internal quotation marks omitted]), we conclude that the court properly denied plaintiff's posttrial motion to set aside the verdict as against the weight of the evidence.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

568

CA 24-01524

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

RONALD PACE, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF GERALDINE M. PACE, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

CROUSE HEALTH HOSPITAL, INC., ET AL., DEFENDANTS,
AND SCOTT BRADLEY, M.D., DEFENDANT-APPELLANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT.

FISCHER & REDAVID, PLLC, PORT JEFFERSON (JORDAN S. REDAVID OF
COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), dated August 16, 2024 in a medical malpractice action. The order, among other things, denied in part the motion of defendant Scott Bradley, M.D. to set aside the jury's verdict.

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

Memorandum: Plaintiff, individually and as administrator of the estate of Geraldine M. Pace, his wife (decedent), commenced this medical malpractice action seeking damages for injuries allegedly sustained by decedent as a result of defendants' negligence in the care and treatment of decedent while she was a patient of a rehabilitation facility after having undergone orthopedic surgery. After a trial, the jury determined that defendant Scott Bradley, M.D., was negligent in the care and treatment of decedent and that his negligence was a substantial factor in causing injury to decedent and awarded \$5,000,000 for decedent's pain and suffering and \$2,000,000 for plaintiff's derivative cause of action. Defendant made a posttrial motion seeking an order setting aside the verdict and either directing that judgment be entered in his favor as a matter of law and dismissing the complaint or ordering a new trial "on the ground that the verdict against [him] was against the weight of the evidence and/or in the interest of justice." As a further alternative, defendant sought an order granting "a new trial . . . at the very least on the issue of damages," unless plaintiff stipulated to a reduced amount of damages. Supreme Court granted the motion in part by ordering a new trial on the issue of damages unless within 30 days

of entry of the order, plaintiff consented to specific reductions of the jury's damages awards for decedent's pain and suffering and plaintiff's derivative cause of action and otherwise denied the motion. After plaintiff refused to stipulate to a reduction in the damage awards, a second trial was held on the issue of damages only. The jury awarded \$1,200,000 for decedent's pain and suffering and \$350,000 for plaintiff's derivative cause of action. As limited by his brief, defendant appeals from so much of the order as denied his motion to set aside the verdict and plaintiff cross-appeals from so much of the order as directed a new trial on damages unless he stipulated to the specified reductions of the verdict. We affirm.

Contrary to defendant's contention on his appeal, we conclude that the jury verdict with respect to liability is not against the weight of the evidence inasmuch as it cannot be said that "the evidence at trial so preponderated in favor of [defendant] that the verdict could not have been reached on any fair interpretation of the evidence" (*Revere v Burke*, 229 AD3d 1212, 1213 [4th Dept 2024], lv dismissed 42 NY3d 1047 [2024] [internal quotation marks omitted]; see generally *Monzon v Porter*, 173 AD3d 1779, 1780 [4th Dept 2019]). Plaintiff presented expert testimony that defendant deviated from the applicable standard of care by continuing certain rehabilitation activities that resulted in the worsening of decedent's condition and the ultimate need for a second surgery. Contrary to defendant's further contention, we conclude that plaintiff's expert, a board-certified orthopedic surgeon, was qualified to offer an opinion about defendant's performance as a physiatrist, in care and treatment of decedent, inasmuch as the expert possessed the requisite skill, training, knowledge, and experience to render a reliable opinion with respect to the standard of care applicable in this case (see *Fay v Satterly*, 158 AD3d 1220, 1221 [4th Dept 2018]; *Diel v Bryan*, 71 AD3d 1439, 1440 [4th Dept 2010]).

Defendant further contends on his appeal that a new trial is warranted in the circumstances of this case because the court gave the jury a general verdict sheet. We reject that contention. Generally, reversal is required when a general verdict sheet has been used and there is an error affecting only one theory of liability (see *Wild v Catholic Health Sys.*, 85 AD3d 1715, 1718 [4th Dept 2011], *affd* 21 NY3d 951 [2013]; *Wright-Perkins v Lyon*, 188 AD3d 1604, 1606 [4th Dept 2020]). Here, however, reversal is not required because defendant, as the party asserting an error resulting from the use of the general verdict sheet, failed to request or offer a special verdict sheet with multiple liability questions or to sufficiently object to the use of a general verdict sheet by the court (see *Wild*, 85 AD3d at 1718; *Wright-Perkins*, 188 AD3d at 1606). Thus, defendant may not now rely on the use of the court's general verdict sheet as a basis for reversal (see *Wild*, 85 AD3d at 1718; *Wright-Perkins*, 188 AD3d at 1606).

Plaintiff contends on his cross-appeal that the court erred in directing a new trial on damages unless plaintiff stipulated to the specified reductions of the verdict. We conclude that plaintiff waived review of that contention because plaintiff did not obtain appellate review of the court's remittitur before the second damages

trial was held (*see Oakes v Patel*, 20 NY3d 633, 643 [2013]). Here, plaintiff could have consented to defendant's multiple requests to stay the second damages trial pending this appeal. Plaintiff, however, refused to do so, and instead insisted on proceeding to the second trial, which was completed before his cross-appeal was argued before this Court. Plaintiff elected his remedy in the second damages trial, which results in his waiver of the pursuit of the cross-appeal (*see id.*).

Finally, we have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the order.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

570

CA 24-01401

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF FRUEHAUF AND CHATEAU
HOMEOWNERS FOR A CLEAN ENVIRONMENT, INC.,
SAMANTHA SMITH AND MICHAEL KOZELSKY,
INDIVIDUALLY AND AS CO-PRESIDENTS OF
FRUEHAUF AND CHATEAU HOMEOWNERS FOR A
CLEAN ENVIRONMENT, INC., JESSICA BLACK AND
DIANE GORDON, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN OF AMHERST, TOWN OF AMHERST PLANNING
BOARD AND BENDERSON DEVELOPMENT COMPANY, LLC,
RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (JOSHUA R. LIPPES OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (ERICA L. MASLER OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS TOWN OF AMHERST AND TOWN OF AMHERST PLANNING
BOARD.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR
RESPONDENT-RESPONDENT BENDERSON DEVELOPMENT COMPANY, LLC.

Appeal from a judgment (denominated order and judgment) of the
Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January
16, 2024, in a proceeding pursuant to CPLR article 78. The judgment
dismissed the amended verified petition.

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

Memorandum: Petitioners commenced this CPLR article 78
proceeding seeking, inter alia, to annul the negative declaration
issued by respondent Town of Amherst Planning Board (Planning Board)
in May 2023, under the State Environmental Quality Review Act ([SEQRA]
ECL art 8) with respect to the proposed redevelopment of two
properties owned by respondent Benderson Development Company, LLC
(Benderson) and located in respondent Town of Amherst, which included
a house, garage, and driveway at 22 Chateau Terrace and a building
known as the Squire Shop at 4548-4564 Main Street. The garage at 22
Chateau Terrace and the Squire Shop building were demolished in 2024.
Respondents filed answers seeking dismissal of the amended petition.
Following additional written submissions and oral argument, Supreme

Court dismissed the amended petition. Petitioners appeal. We affirm.

Initially, we conclude that petitioners have standing as adjacent property owners concerned over increased traffic and noise, the safety of the neighborhood residents, and whether the new development is compatible with a residential neighborhood, and that their concerns fall squarely within the zone of interests to be protected by the SEQRA statute (*see* ECL 8-0105 [6]; *Matter of Turner v County of Erie*, 136 AD3d 1297, 1298 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016]). We agree with petitioners that the demolition of the garage and the Squire Shop building does not render moot the parts of the amended petition concerning traffic, noise, safety, and design disparities. However, we agree with respondents that the demolition of those buildings "constitutes a change in circumstances that would prevent" this Court from "effectively determin[ing] an actual controversy" concerning whether those buildings should be preserved (*Matter of League of Women Voters of Buffalo/Niagara, Inc. v Erie Canal Harbor Dev. Corp.*, 217 AD3d 1490, 1491 [4th Dept 2023] [internal quotation marks omitted], quoting *Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 728-729 [2004]; *see Matter of Sierra Club v New York State Dept. of Env'tl. Conservation*, 169 AD3d 1485, 1486 [4th Dept 2019]). We therefore conclude that the contentions in the amended petition regarding preservation of those buildings are moot (*see League of Women Voters of Buffalo/Niagara, Inc.*, 217 AD3d at 1491-1492).

Contrary to petitioners' contention, we conclude that the Planning Board did not violate the substantive and procedural aspects of SEQRA in issuing the negative declaration. Based on the evidence in the record before us, which establishes that the Planning Board reviewed, *inter alia*, the issues of historic preservation, traffic impacts, and neighborhood character, we agree with respondents that the Planning Board "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]).

Contrary to petitioners' further contention that the Planning Board violated General Municipal Law § 239-m by failing to re-refer the project to the Erie County Planning Department after changes were made to the project, we conclude that a new referral was not required here inasmuch as "the particulars of the amendment were embraced within the original referral" (*Matter of Benson Point Realty Corp. v Town of E. Hampton*, 62 AD3d 989, 992 [2d Dept 2009], *lv dismissed* 13 NY3d 788 [2009]).

Petitioners' contention concerning the alleged violation of the Historic Preservation Law of the Town of Amherst is not properly before us inasmuch as that contention is not contained in the amended petition and is now improperly raised for the first time on appeal (*see Matter of Mixon v Wickett*, 196 AD3d 1094, 1096 [4th Dept 2021]). Moreover, this Court has no discretionary power to reach that contention because petitioners failed to raise it at the administrative level and thus failed to exhaust their administrative

remedies with respect to it (*see generally Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]).

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

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

571.1

CA 24-01828

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CONTOUR STEEL INC., CONTOUR ERECTION & SIDING
SYSTEMS, INC., EDEN VALLEY PROPERTIES, INC.,
EDEN VALLEY STEEL, INC., AND EDEN VALLEY
EQUIPMENT, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

COUCH WHITE, LLP, ALBANY (CLEMENTE J. PARENTE OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

L'ABBATE, BALKAN, COLAVITA & CONTINI, LLP, MELVILLE (MAUREEN E.
O'CONNOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered October 7, 2024 in a breach of contract action. The order, among other things, granted plaintiff's motion for summary judgment and denied defendants' cross-motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion to the extent that it seeks declaratory relief, and as modified the order is affirmed without costs.

Memorandum: Plaintiff insurance company commenced this action seeking a determination and declaration that defendants are required pursuant to the terms of their insurance policies to provide plaintiff with their bank statements so that plaintiff could complete premium audits. Defendants had refused to provide plaintiff with the bank statements on the ground that the language of the insurance policies did not require defendants to turn them over. Plaintiff moved for summary judgment on the complaint and defendants cross-moved for summary judgment dismissing the complaint "and/or for an [o]rder declaring that [d]efendants are not required to provide [p]laintiff and its auditors their bank statements." In appeal No. 1, defendants appeal from an order that, inter alia, granted plaintiff's motion, directed defendants to provide certain bank statements and that the bank statements were to be kept confidential and used solely to complete the audits, and denied defendants' cross-motion. In appeal No. 2, defendants appeal from an order that again, inter alia, granted

plaintiff's summary judgment motion and ordered defendants to turn over the bank statements.

Initially, we dismiss the appeal from the order in appeal No. 2 inasmuch as the order in that appeal is duplicative of the order in appeal No. 1 (*see generally Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Contrary to defendants' contention, Supreme Court did not err in ruling that defendants were required to supply plaintiff with the relevant bank statements. Where, as here, the provisions of an insurance contract are clear and unambiguous, they must be enforced as written (*see Lattimore Rd. Surgicenter, Inc. v Merchants Group, Inc.*, 71 AD3d 1379, 1380 [4th Dept 2010]; *Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 66 [4th Dept 1998]). Affording the unambiguous terms in the instant insurance contract their plain and ordinary meaning (*see White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]), we conclude that plaintiff met its initial burden on its motion for summary judgment. Plaintiff submitted the relevant portion of the parties' insurance policies, which provide that plaintiff was entitled to conduct audits at the conclusions of the coverage periods to determine whether there were differences between the advance premiums and the earned premiums. Pursuant to the policies' terms, defendants were required to "keep records of the information that [plaintiff] need[ed] for the earned premium computation, and send [plaintiff] copies of those records at such times as [plaintiff] may request." Plaintiff further submitted the affidavit of its auditor who averred that the relevant bank statements were necessary for completion of the earned premium computations for the audits.

In opposition to plaintiff's motion, defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We reject defendants' contention that plaintiff's interpretation of the insurance provision is inconsistent with "common speech and . . . the reasonable expectation of the average insured at the time of contracting" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 37 NY3d 552, 561 [2021], *rearg denied* 37 NY3d 1228 [2022] [internal quotation marks omitted]; *see generally John Mezzalingua Assoc., LLC v Travelers Indem. Co.*, 211 AD3d 1553, 1557 [4th Dept 2022]).

We further conclude, however, that under the circumstances of this case declaratory relief is unnecessary (*see Applied Healthcare Research Mgt. v Ibrahim*, 232 AD3d 1312, 1315 [4th Dept 2024]; *see generally Harris v Town of Mendon*, 284 AD2d 988, 988-989 [4th Dept 2001]). We therefore modify the order accordingly.

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

571.2

CA 24-01829

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CONTOUR STEEL INC., CONTOUR ERECTION & SIDING
SYSTEMS, INC., EDEN VALLEY PROPERTIES, INC.,
EDEN VALLEY STEEL, INC., AND EDEN VALLEY
EQUIPMENT, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

COUCH WHITE, LLP, ALBANY (CLEMENTE J. PARENTE OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

L'ABBATE, BALKAN, COLAVITA & CONTINI, LLP, MELVILLE (MAUREEN E.
O'CONNOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered October 10, 2024 in a breach of contract action. The order, among other things, granted plaintiff's motion for summary judgment and denied defendants' cross-motion for summary judgment.

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

Same memorandum as in *American Empire Surplus Lines Ins. Co. v Contour Steel Inc.* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

572

KA 20-01032

PRESENT: BANNISTER, J.P., SMITH, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY C. KEANE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 19, 2019. The appeal was held by this Court by order entered November 17, 2023, decision was reserved and the matter was remitted to Jefferson County Court for further proceedings (221 AD3d 1586 [4th Dept 2023]). The proceedings were held and completed.

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

Memorandum: In appeal No. 1, defendant was convicted following a jury trial of unlawful manufacture of methamphetamine in the third degree (Penal Law § 220.73 [1]) and, in appeal No. 2, he was convicted following the same jury trial of sexual abuse in the first degree (§ 130.65 [4]), attempted use of a child in a sexual performance (§§ 110.00, 263.05), forcible touching (§ 130.52 [1]), and endangering the welfare of a child (§ 260.10 [1]). We previously held this case, reserved decision, and remitted the matter to County Court for a ruling on defendant's motion for a trial order of dismissal, on which the court had failed to rule (*People v Keane*, 221 AD3d 1586, 1590 [4th Dept 2023]). Upon remittal, the court (Renzi, J.) denied the motion. We affirm.

In appeal No. 1, defendant contends in his pro se supplemental brief and his main brief on resubmission that the evidence is legally insufficient to support the conviction of unlawful manufacture of methamphetamine in the third degree, inasmuch as the People did not establish that he had constructive possession of the contraband in question. We reject that contention. "Where, as here, there is no evidence that [the] defendant actually possessed the [contraband in question], the People must establish that 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 Pichardo*, 34 AD3d 1223, 1224 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007] [internal quotation marks omitted]; see *People v Manini*, 79 NY2d 561, 573-574 [1992]; *People v Mattison*, 41 AD3d 1224, 1225 [4th Dept 2007], *lv denied* 9 NY3d 924 [2007]). We conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant had constructive possession of the laboratory equipment, and precursors, chemical reagents, or solvents, used for manufacturing methamphetamine, found in his former residence (see *People v Nevins*, 196 AD3d 1110, 1111 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant had resided in the house where the chemicals and materials for manufacturing methamphetamine were found, and while he lived there he came under investigation by the police for repeatedly purchasing pseudoephedrine and neighbors complained about strange odors and many people going in and out of the premises. Although defendant was evicted from the property approximately two weeks before the search warrant was executed, the chemicals and materials were scattered throughout the home in plain view and the investigators were able to determine that they had been in the house for months (see *Nevins*, 196 AD3d at 1111-1112; *People v Maricle*, 158 AD3d 984, 986 [3d Dept 2018]; see generally *People v Torres*, 68 NY2d 677, 678-679 [1986]).

In appeal No. 2, defendant contends in his pro se supplemental brief that the evidence is legally insufficient to support the conviction of attempted use of a child in a sexual performance. We reject that contention. In order to be legally sufficient to support a conviction of an attempt to commit a charged crime, "the evidence must establish that defendant engaged in conduct that 'tends to effect the commission of such crime' " (*People v Lendof-Gonzalez*, 170 AD3d 1508, 1509 [4th Dept 2019], *affd* 36 NY3d 87 [2020], quoting Penal Law § 110.00). We conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant engaged in conduct that tended to effect the use of a child in a sexual performance. The minor victim testified that defendant asked her to engage in sexual performances on camera, and defendant admitted during his recorded interview that he "may have" told the minor victim to film herself while engaging in a sexual performance. "It is the 'province of the jury' to assess witness credibility . . . , and we therefore assume on a legal sufficiency review that the jury credited the People's witnesses" (*People v Freeland*, 213 AD3d 1240, 1242 [4th Dept 2023], quoting *People v Li*, 34 NY3d 357, 364 [2019]).

Finally, in appeal Nos. 1 and 2, after viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in his main and pro se supplemental briefs that the verdict is against the weight of the evidence (see *Bleakley*, 69 NY2d at 495).

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

573

KA 20-01033

PRESENT: BANNISTER, J.P., SMITH, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY C. KEANE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 19, 2019. The appeal was held by this Court by order entered November 17, 2023, decision was reserved and the matter was remitted to Jefferson County Court for further proceedings (221 AD3d 1590 [4th Dept 2023]). The proceedings were held and completed.

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

Same memorandum as in *People v Keane* ([appeal No. 1] - AD3d - [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

574

KA 23-00862

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAHMIERE WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard M. Healy, A.J.), rendered March 24, 2023. 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]). Contrary to defendant's contention, the record establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). We reject defendant's contention that the waiver of the right to appeal was invalid because "some of defendant's responses to the court's inquiries were monosyllabic" (*People v Brown*, 41 AD3d 1234, 1234 [4th Dept 2007], *lv denied* 9 NY3d 873 [2007] [internal quotation marks omitted]; *see People v Hoose*, 236 AD3d 1294, 1295 [4th Dept 2025]). "No 'particular litany' is required for a waiver of the right to appeal to be valid" (*People v Wood*, 217 AD3d 1407, 1408 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]; *see also People v Parker*, 151 AD3d 1876, 1876 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]).

Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of the sentence (*see Lopez*, 6

NY3d at 255-256; *People v Foumakoye*, 229 AD3d 1380, 1380 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

575

KA 21-01392

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SHANE R. ESHBACH, DEFENDANT-APPELLANT.

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

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (ANDREW W. HALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered September 27, 2021. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree (two counts).

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

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

576

KA 22-00872

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY A. COON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (John James Ottaviano, J.), rendered May 9, 2022. The judgment convicted defendant, upon his plea of guilty, of attempted course of sexual conduct against a child in the first degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from separate judgments convicting him, upon his guilty pleas, of attempted course of sexual conduct against a child in the first degree (Penal Law §§ 110.00, former 130.75 [1] [a]). The two pleas were entered in a single plea proceeding.

Contrary to defendant's contention with respect to both appeals, the record establishes that the oral colloquy was adequate to ensure that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Giles*, 219 AD3d 1706, 1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]; *People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). We note that County Court used the appropriate model colloquy with respect to the waiver of the right to appeal (*see generally Thomas*, 34 NY3d at 567; *People v Osgood*, 210 AD3d 1426, 1427 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]). The valid waiver forecloses defendant's challenge in each appeal to the severity of the sentence (*see People v Lopez*, 6

NY3d 248, 255-256 [2006]; *People v Malcolm*, 231 AD3d 1503, 1504 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

577

KA 22-00873

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY A. COON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (John James Ottaviano, J.), rendered May 9, 2022. The judgment convicted defendant, upon his plea of guilty, of attempted course of sexual conduct against a child in the first degree.

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

Same memorandum as in *People v Coon* ([appeal No. 1] – AD3d – [July 25, 2025] [4th Dept 2025]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

578

KA 22-00352

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRELL HINKLE, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 7, 2022. The judgment convicted defendant, upon his plea of guilty, of attempted 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 guilty plea, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]). We affirm. Defendant contends that his guilty plea was involuntary because, during the plea colloquy, Supreme Court referred to his right to a trial, not his right to a jury trial, and to his right to remain silent, not his right against self-incrimination (*see generally Boykin v Alabama*, 395 US 238, 243 [1969]). Defendant 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 Barnes*, 206 AD3d 1713, 1714-1715 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]). In any event, defendant's contention is without merit, inasmuch as the record affirmatively demonstrates that defendant knowingly, intelligently, and voluntarily waived his *Boykin* rights (*see People v Conceicao*, 26 NY3d 375, 382-383, 383-384 [2015]; *Barnes*, 206 AD3d at 1714-1715).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

582

KA 24-00913

PRESENT: LINDLEY, J.P., SMITH, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ADAM W. SULLIVAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Steuben County (Jason L. Cook, J.), rendered April 4, 2024. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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 driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), defendant contends that his sentence is unduly harsh and severe. Defendant's contention "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: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

583

KA 24-01097

PRESENT: LINDLEY, J.P., SMITH, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALLEN J. WARNER, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Richard M. Healy, J.), dated April 24, 2024. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk and a sexually violent offender pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We affirm.

Contrary to defendant's contention, County Court properly assessed 20 points under risk factor 4, for engaging in a continuing course of sexual misconduct. "At a SORA hearing, the People must prove the facts to support a SORA risk-level classification by clear and convincing evidence" (*People v Howard*, 27 NY3d 337, 341 [2016]; see Correction Law § 168-n [3]). A sex offender is properly assessed 20 points under risk factor 4 if the offender "engaged in a continuing course of sexual misconduct with at least one victim" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, risk factor 4 [2006] [Guidelines]). An offender has engaged in a continuing course of sexual misconduct when the offender has "engage[d] in either (i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks" (Guidelines at 10; see *People v Haresign*, 149 AD3d 1578, 1579 [4th Dept 2017]). Here, we conclude that the evidence, including the victim's statements and defendant's admissions contained in the presentence investigation report and case summary, establishes that defendant engaged in three

or more acts of sexual contact with the victim over a period of at least two weeks (see *People v Lang*, 181 AD3d 1169, 1170 [4th Dept 2020], lv denied 35 NY3d 912 [2020]; *Haresign*, 149 AD3d at 1579; *People v Leeson*, 148 AD3d 1677, 1678 [4th Dept 2017], lv denied 29 NY3d 912 [2017]).

We reject defendant's further contention that he is entitled to a downward departure from his presumptive risk level. Contrary to defendant's assertion, the fact that the risk assessment instrument yielded the minimum number of points needed to qualify as a presumptive level two risk does not constitute an appropriate mitigating factor (see *People v Clark*, 126 AD3d 1540, 1540 [4th Dept 2015], lv denied 25 NY3d 910 [2015]). Although an offender's response to sex offender treatment, if exceptional, may provide a basis for a downward departure (see Guidelines at 17), we conclude that, here, defendant failed to prove by the requisite preponderance of the evidence (see *People v Gillotti*, 23 NY3d 841, 861 [2014]) that his response to treatment was exceptional (see *People v June*, 150 AD3d 1701, 1702 [4th Dept 2017]; see also *People v Ojeda*, 216 AD3d 819, 820 [2d Dept 2023], lv denied 40 NY3d 906 [2023]; *People v Santiago*, 137 AD3d 762, 764 [2d Dept 2016], lv denied 27 NY3d 907 [2016]).

Finally, even assuming, arguendo, that defendant satisfied his burden with respect to the first two steps of the downward departure analysis (see generally *Gillotti*, 23 NY3d at 861), we conclude on this record, after applying the third step of weighing the aggravating and mitigating factors, that the totality of the circumstances does not warrant a downward departure inasmuch as defendant's presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism (see *People v Wolcott*, 232 AD3d 1321, 1322-1323 [4th Dept 2024]; *People v Pope*, 229 AD3d 1379, 1379-1380 [4th Dept 2024], lv denied 42 NY3d 910 [2024]; see generally *People v Sincerbeaux*, 27 NY3d 683, 689-691 [2016]).

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

585

KA 22-01819

PRESENT: LINDLEY, J.P., SMITH, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROGER K. BRINKMAN, DEFENDANT-APPELLANT.

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

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Melissa Lightcap Cianfrini, J.), rendered November 1, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law former § 130.50 [1]), defendant contends that his waiver of the right to appeal is unenforceable and that the sentence is unduly harsh and severe. We affirm.

Contrary to defendant's contentions, a waiver of the right to appeal is not unconscionable per se (see *People v Barr*, 192 AD3d 1571, 1571 [4th Dept 2021], lv denied 37 NY3d 954 [2021]; see generally *People v Thomas*, 34 NY3d 545, 557 [2019], cert denied – US –, 140 S Ct 2634 [2020]), and it is not improper for the People to demand a waiver of the right to appeal as a condition of a plea bargain (see e.g. *People v Thomas*, 237 AD3d 1557, 1557-1558 [4th Dept 2025]; *People v Giles*, 219 AD3d 1706, 1706 [4th Dept 2023], lv denied 40 NY3d 1039 [2023]). Inasmuch as the record here establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (see *Giles*, 219 AD3d at 1706; *People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], lv denied 39 NY3d 1110 [2023]), the waiver is valid and precludes our review of defendant's challenge to the severity of his sentence (see *People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Bailey*, 230 AD3d 1543, 1544 [4th Dept 2024], lv denied 42 NY3d 1034

[2024]; *People v Foumakoye*, 229 AD3d 1380, 1380 [4th Dept 2024], lv denied 42 NY3d 970 [2024]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

586

KA 19-01727

PRESENT: LINDLEY, J.P., SMITH, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL RIOS, DEFENDANT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered May 10, 2019. The judgment convicted defendant upon his plea of guilty of course of sexual conduct against a child 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 a plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [former (b)]), defendant contends that his plea was not knowingly, intelligently, and voluntarily entered and that County Court thus erred in denying his motion to withdraw his plea. We reject that contention. "Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Robertson*, 255 AD2d 968, 968 [4th Dept 1998], *lv denied* 92 NY2d 1053 [1999]; *see People v Zimmerman*, 100 AD3d 1360, 1361 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). Here, we perceive no abuse of discretion.

Defendant contends that his guilty plea was not knowing, intelligent and voluntary because, when asked by the court whether he understood the offer, he answered "for the most part" and the court did not make further inquiry as to which parts he did not understand. The record demonstrates, however, that, following that answer, the court repeated each term of the offer and defendant repeatedly informed the court that he understood the terms of the plea offer and had no questions (*see People v Merritt*, 115 AD3d 1250, 1251 [4th Dept 2014], *lv denied* 30 NY3d 1021 [2017], *reconsideration denied* 35 NY3d 1068 [2020]; *see also People v Torres*, 117 AD3d 1497, 1498 [4th Dept 2014], *lv denied* 24 NY3d 965 [2014]). Defendant's contention that his

plea was not knowing, intelligent, and voluntary because he misunderstood the terms of the plea offer with respect to the duration of postrelease supervision, believing that the period would be only 10 years, is similarly unsupported by the record. When explaining the terms of the plea offer to defendant before accepting the plea, the court advised defendant clearly and consistently three separate times that the plea offer included 20 years of postrelease supervision.

We conclude that "[d]efendant's contention that he was pressured into accepting the plea is belied by his statements during the plea proceedings" (*People v Garner*, 86 AD3d 955, 955 [4th Dept 2011]; see generally *Zimmerman*, 100 AD3d at 1361-1362).

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

587

CAF 24-01521

PRESENT: LINDLEY, J.P., SMITH, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF DERICA E. WILSON,
PETITIONER-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

JERRY L. CHEVES, JR.,
RESPONDENT-PETITIONER-RESPONDENT.

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

JEFFREY L. TURNER, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (John I. Menard, R.), entered August 30, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary residency of the subject child to respondent-petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent mother appeals from an order that, inter alia, denied the mother's petition for modification of the parties' prior custody order and granted respondent-petitioner father's amended petition for modification of that order by awarding him sole legal custody and primary residency of the subject child. We affirm.

Initially, we note that the parties do not dispute that there is a sufficient change in circumstances to warrant an inquiry into whether modification of the existing custody arrangement would be in the child's best interests inasmuch as the child has attained the age to attend school (*see Matter of Biagini v Parent*, 124 AD3d 1368, 1368-1369 [4th Dept 2015]; *see also Matter of Verne v Hamilton*, 191 AD3d 1433, 1433-1434 [4th Dept 2021]). As a result, the only issue before this Court is whether Family Court properly "determined that the best interests of the child would be served by a change in the custody and visitation arrangement" (*Matter of Castle v Barnes*, 221 AD3d 1562, 1562 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]; *see Matter of Ridall v Jones*, 230 AD3d 1548, 1549 [4th Dept 2024]).

The mother contends that the court's determination is not in the child's best interests and that she should be awarded sole custody and

primary residency of the child. We reject that contention. "[A] court's determination regarding custody . . . , based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Ridall*, 230 AD3d at 1549 [internal quotation marks omitted]; see *Matter of Bonner v Bonner* [appeal No. 2], 225 AD3d 1301, 1302 [4th Dept 2024], lv denied 42 NY3d 901 [2024]). Here, the record establishes that the mother interfered with the child's kindergarten registration by withdrawing the child from the father's school district and registering the child in her school district, despite the parties' prior agreement that the child would attend school in the father's district (see *Matter of Warren v Miller*, 132 AD3d 1352, 1354 [4th Dept 2015]; see also *Matter of Graffagnino v Esposito*, 223 AD3d 805, 807-808 [2d Dept 2024]; *Matter of Cadet v Lamour*, 86 AD3d 538, 539 [2d Dept 2011]). The record also reflects that at the time of the hearing, the mother had been without an operational vehicle for almost one year, causing the father to bear the burden of all of the child's transportation for a significant period of time.

Based on our review of the record, we conclude that there is a sound and substantial basis in the record for the court's determination to award sole custody and primary physical residency to the father, with extensive visitation to the mother (see *Matter of Williams v Grau*, 230 AD3d 1539, 1540 [4th Dept 2024]; *Matter of Vega v Delgado*, 195 AD3d 1555, 1556 [4th Dept 2021]).

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

588

KA 23-00064

PRESENT: CURRAN, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON NIEVES, DEFENDANT-APPELLANT.

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

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (ROBERT ROSE OF COUNSEL),
FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered June 26, 2018. The judgment convicted defendant upon a guilty plea 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 [4]). As defendant contends and the People correctly concede, defendant's purported waiver of the right to appeal is invalid inasmuch as both the signed written waiver and the oral waiver colloquy mischaracterized the nature of the right to appeal, and therefore we are not precluded from reviewing his challenge to the severity of the sentence (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *People v Irwin*, 232 AD3d 1251, 1251 [4th Dept 2024]; *People v Cossette*, 199 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]). Nonetheless, we conclude that the sentence is not unduly harsh or severe. We have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

589

KA 19-01173

PRESENT: CURRAN, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FREDRICK T. WELCH, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.), rendered January 16, 2019. The judgment convicted defendant upon his plea of guilty of burglary in the third 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 burglary in the third degree (Penal Law § 140.20). As defendant correctly concedes, by failing to object to the sentence on the ground that restitution was not part of the plea agreement or to move to withdraw the plea, he failed to preserve his contention that County Court improperly imposed restitution that was not discussed at the time that he pleaded guilty (*see People v Motell*, 229 AD3d 1330, 1331 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *People v Predmore*, 68 AD3d 1755, 1756 [4th Dept 2009], *lv denied* 14 NY3d 804 [2010]). We decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

590

KA 24-00683

PRESENT: CURRAN, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TYRELL A. REEDER, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Jon E. Budelmann, A.J.), rendered November 8, 2023. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Cayuga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Defendant contends, *inter alia*, that his sentence is illegal because it includes a period of postrelease supervision of 3½ years when the maximum legal period is 3 years.

Although defendant is correct that the maximum legal period of postrelease supervision that may be imposed for a class C felony drug offense committed by a second felony drug offender is 3 years (see Penal Law §§ 70.45 [2] [d]; 70.70 [3] [b] [ii]), the People assert that defendant's contention is moot inasmuch as he was resentenced to a three-year period of postrelease supervision shortly after County Court received a letter from the New York State Department of Corrections and Community Supervision (DOCCS) alerting the court to the illegal sentence pursuant to Correction Law § 601-a. A copy of DOCCS's letter is included in the record, along with an amended uniform sentence and commitment form reflecting that the period of postrelease supervision had subsequently been changed to three years.

Correction Law § 601-a imposes on DOCCS a "duty . . . to communicate with the sentencing court" when it appears that a defendant "has been erroneously sentenced." If the court "believes that the [defendant] has been so erroneously sentenced, the sentencing court . . . shall notify [DOCCS] and arrange for the [defendant] to be

heard and properly resentenced" (*id.*). It is well established that "resentencing to correct an error in a sentence must be done in the defendant's presence" (*People v Perkins*, 162 AD3d 1641, 1642 [4th Dept 2018] [internal quotation marks omitted]; see CPL 380.40 [1]; see generally *People v Estremera*, 30 NY3d 268, 272-273 [2017]), unless the court "secur[es] defendant's waiver of the right to be present at such a proceeding" (*People v Abergut*, 202 AD3d 1497, 1499 [4th Dept 2022], *lv denied* 38 NY3d 1068 [2022]; see generally *Estremera*, 30 NY3d at 272-273).

Here, the inclusion in the record of an amended uniform sentence and commitment form does not establish that defendant was properly resentenced inasmuch as it does not establish that the court resentenced defendant while he was present or that the court resentenced defendant only after he waived the right to be present (see generally *People v Johnson*, 19 AD3d 1163, 1164 [4th Dept 2005], *lv denied* 5 NY3d 829 [2005]). Thus, the record before us is insufficient to determine whether defendant was properly resentenced.

If defendant was properly resentenced, his appeal insofar as it challenges the original sentence would be dismissed (see *People v Saeli* [appeal No. 1], 219 AD3d 1122, 1123 [4th Dept 2023]; see also *People Bell*, 229 AD3d 1178, 1180 [4th Dept 2024], *lv denied* 42 NY3d 1018 [2024]; *People v Linder*, 170 AD3d 1555, 1560 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]). Therefore, we hold the case, reserve decision, and remit the matter to County Court for clarification of whether defendant was properly resentenced to a three-year term of postrelease supervision.

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

591

KA 24-01194

PRESENT: CURRAN, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FREDDIE PAGAN, ALSO KNOWN AS FREDDIE MARTINEZ,
DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered May 8, 2024. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*).

We conclude that County Court did not abuse its discretion in granting the People's request for an upward departure (*see generally People v DeCapua*, 179 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 906 [2020]). 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 or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines' " (*People v Morin*, 232 AD3d 1241, 1241 [4th Dept 2024], *lv denied* 43 NY3d 903 [2025]; *see People v Vaillancourt*, 112 AD3d 1375, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Here, the People met their burden of establishing by clear and convincing evidence the existence of aggravating factors not adequately accounted for in the risk assessment instrument, including that the victim's 4-year-old child was awake in the next room while defendant raped the victim, and that defendant had previously followed and threatened the victim with a firearm (*see People v Rodriguez*, 196 AD3d 43, 54 [2d Dept 2021], *lv denied* 37 NY3d 913 [2021]; *see*

generally Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 7-8 [2006]). Contrary to defendant's contention, the court did not fail to properly weigh the aggravating and mitigating factors in determining that the totality of the circumstances warranted a discretionary upward departure (*see Morin*, 232 AD3d at 1241; *People v Tidd*, 128 AD3d 1537, 1537 [4th Dept 2015], *lv denied* 25 NY3d 913 [2015]; *see generally Gillotti*, 23 NY3d at 861). To the extent that defendant's contention may be construed as an invitation to determine that an upward departure is precluded by the fact that he received a low-risk score on an alternate risk assessment instrument, we decline that invitation (*see generally People v Rolon*, 210 AD3d 708, 708-709 [2d Dept 2022], *lv denied* 39 NY3d 907 [2023]; *People v Curry*, 158 AD3d 52, 60 [2d Dept 2017], *lv denied* 31 NY3d 905 [2018]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

592

KA 24-01415

PRESENT: CURRAN, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JUSTIN C. MICCICHE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), dated August 8, 2024. The order denied the petition of defendant for a downward modification of his risk level pursuant to the Sex Offender Registration Act.

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

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

593

CAF 24-00694

PRESENT: CURRAN, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF NAOUAL EDDAOUDI,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

SHMU'EL OBTENU, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Lourdes P. Rosario, R.), entered April 11, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and physical custody of the subject child with leave to relocate to Massachusetts.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order granting petitioner mother's petition seeking permission to relocate with the subject child to Massachusetts and modification of the prior stipulated order of custody (stipulated order) by awarding her sole legal and physical custody of the child. We agree with the father that Family Court's determination is deficient and, as set forth on the record, does not have a sound and substantial basis in the record.

The parties were married in Morocco in 2018. The father is a naturalized citizen of the United States, and the mother had a green card due to her marriage to the father. Although he was born in Morocco, the child is a United States citizen through the father. The family moved to the United States in 2021, initially residing in Connecticut. The mother's family lives in Massachusetts, and the father worked at Logan International Airport. By the end of 2021, the father decided to move the family to Onondaga County. He continued to commute to work in Massachusetts until he left his job in 2023. The parties separated in 2022, but are not yet divorced. In March 2023, the parties stipulated to joint legal and shared physical custody of the child. Subsequently, the mother filed the present petition.

Generally, when one parent petitions to relocate out of state, "the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child" (*Matter of Tropea v Tropea*, 87 NY2d 727, 736 [1996]). Thus, factors to consider in assessing a parent's request to relocate include "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and [the] child through suitable visitation arrangements" (*id.* at 740-741; see *Mason v Mason*, 218 AD3d 1226, 1227 [4th Dept 2023]; *Matter of Holtz v Weaver*, 94 AD3d 1557, 1557 [4th Dept 2012]).

Here, we conclude that the court failed "to consider and give appropriate weight to all of the factors that may be relevant to the determination" (*Tropea*, 87 NY2d at 740). Although the court properly considered facts supporting the conclusion that the child would be better off economically and emotionally in Massachusetts given, among other things, the mother's family support system there, it failed to consider or evaluate the father's reasons for opposing the relocation. Specifically, the court did not consider the mother's immigration status and the father's concerns that the mother might try to remove the child from the country (see generally *Matter of Rory H. v Mary M.*, 13 AD3d 373, 374 [2d Dept 2004]). Indeed, the father testified that the mother still had connections to Morocco and had previously expressed a desire to move back there with the child. He also testified about an incident where the mother took the child's passport from the father without his consent and in violation of the stipulated order. In short, the court failed to consider whether the father had "a good faith basis for opposing a requested move," which "is a factor bearing on a relocation determination" (*Mason*, 218 AD3d at 1228; see *Tropea*, 87 NY2d at 740-471). Consequently, we conclude that, in ruling on the mother's petition with respect to relocation without considering the father's concerns, the court failed to consider the relocation request "with due consideration of all the relevant facts and circumstances," including the "central concern" of "the impact of the move on the relationship between the child and the [father]" (*Tropea*, 87 NY2d at 739; see *Mason*, 218 AD3d at 1228).

We further agree with the father that the court's determination awarding the mother sole custody of the child does not have a sound and substantial basis in the record. With respect to that determination, the court failed to make any factual findings to support the award of sole custody—both legal and physical—to the mother (see *Matter of Ianello v Colonomos*, 213 AD3d 1301, 1302 [4th Dept 2023]). Effectively, the court awarded the mother sole custody of the child on the basis of its determination on the petition insofar as it sought permission to relocate the child. However, it is "well established that the court is obligated 'to set forth those facts essential to its decision' " (*Matter of Rocco v Rocco*, 78 AD3d 1670,

1671 [4th Dept 2010]; see CPLR 4213 [b]; Family Ct Act § 165 [a]; *Matter of Brown v Orr*, 166 AD3d 1583, 1583 [4th Dept 2018]). Here, the court did not make any findings with respect to the relevant factors that it considered in making a determination regarding the best interests of the child (see *Matter of Avdic v Avdic*, 125 AD3d 1534, 1536 [4th Dept 2015]; see generally *Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]; *Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]). Crucially, as with its analysis on the issue of relocation, the court, in awarding the mother sole custody, did not consider the father's stated concerns about the mother's immigration status and whether she intended to remove the child from the country. "Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses" (*Matter of Jose L. I.*, 46 NY2d 1024, 1026 [1979]). We therefore reverse the order and remit the matter to Family Court to make a determination on the petition, including specific findings as to the best interests of the child, following an additional hearing if necessary to consider the factors that the court previously failed to evaluate (see *Brown*, 166 AD3d at 1584; *Avdic*, 125 AD3d at 1536). Pending the court's determination upon remittal, the relocation, custody and visitation provisions in the order appealed from shall remain in effect (see *Ianello*, 213 AD3d at 1302).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

594

CAF 24-00695

PRESENT: CURRAN, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF SHMU'EL OBTENU,
PETITIONER-APPELLANT,

V

ORDER

NAOUAL EDDAOUDI, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Lourdes P. Rosario, R.), entered April 11, 2024, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking modification of an order of custody and visitation.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see CPLR 5511; *Matter of Roache v Hughes-Roache*, 153 AD3d 1653, 1653 [4th Dept 2017]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

595

KA 23-00316

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL HORNING, DEFENDANT-APPELLANT.

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.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 3, 2021. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted rape in the first degree (Penal Law §§ 110.00, former 130.35 [2]). We agree with defendant that his 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 Durie*, 216 AD3d 1449, 1449 [4th Dept 2023] [internal quotation marks omitted]; see *People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

596

KA 23-00096

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHELLE E. CORREIA, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered October 20, 2022. The judgment convicted defendant, upon a plea of guilty, of manslaughter in the second degree and leaving the scene of an incident resulting in death without reporting.

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 manslaughter in the second degree (Penal Law § 125.15 [1]) and leaving the scene of an incident resulting in death without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [ii]). Contrary to defendant's contention, the record establishes that she knowingly, voluntarily, and intelligently waived her right to appeal (see *People v Alfonso*, 237 AD3d 1572, 1572-1573 [4th Dept 2025]; see generally *People v Thomas*, 34 NY3d 545, 559-564 [2019], cert denied – US –, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]). Supreme Court, relying on the appropriate model colloquy (see NY Model Colloquies, Waiver of Right to Appeal; see generally *Thomas*, 34 NY3d at 567), orally explained that a criminal defendant normally retains the right to appeal even after pleading guilty, that the right to appeal was separate and distinct from those rights automatically forfeited upon a plea of guilty, and that defendant was waiving "the right to have an appellate court review most potential claims of error," including claims regarding the severity of the sentence, while also retaining "the right to appeal a limited number of issues," including the voluntariness of the plea and of the waiver (see *People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024], lv denied 42 NY3d 1079 [2025]; *People v Edmonds*, 229 AD3d 1275, 1277 [4th Dept 2024], lv denied 43 NY3d 930 [2025]). Defendant's assertion that the oral colloquy was defective because it omitted certain information

contained in the model colloquy regarding the appellate process is without merit inasmuch as "there is no mandatory litany that must be used in order to obtain a valid waiver of appellate rights" (*People v Johnson*, 14 NY3d 483, 486 [2010]; see *Thomas*, 34 NY3d at 563; *Alfonso*, 237 AD3d at 1573) and, in any event, the written waiver form executed by defendant—which followed the model colloquy and contained the information omitted from the oral colloquy—cured that alleged defect (see *People v Hoose*, 236 AD3d 1294, 1295 [4th Dept 2025]; see generally *Thomas*, 34 NY3d at 563 and n 5). Contrary to defendant's related assertion, the record establishes that the court ascertained that defendant, before signing the written waiver form, had reviewed the contents thereof with her attorney and understood the appellate rights she was giving up as a result of the waiver (see *Edmonds*, 229 AD3d at 1278; cf. *People v Bradshaw*, 18 NY3d 257, 262 [2011]; *People v Callahan*, 80 NY2d 273, 283 [1992]). We conclude that "all the relevant circumstances," including both the oral colloquy and the written waiver form, "reveal a knowing and voluntary waiver" (*Thomas*, 34 NY3d at 563; see *Alfonso*, 237 AD3d at 1573). Defendant's valid waiver of the right to appeal forecloses our review of her challenge to the severity of the sentence (see *Lopez*, 6 NY3d at 255-256; *People v Pluiose*, — AD3d —, —, 2025 NY Slip Op 03449, *1 [4th Dept 2025]).

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

597

KA 24-01045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

COREY KUHN, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Steuben County Court (Chauncey J. Watches, J.), entered May 2, 2024. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 et seq.). Preliminarily, although defendant's notice of appeal is premature inasmuch as it predates the entry of the order from which he purports to appeal, we exercise our discretion in the interest of justice to treat the notice of appeal as valid and deem the appeal as properly taken from the order (see CPLR 5520 [c]; *People v Pichcuskie*, 111 AD3d 1344, 1344 [4th Dept 2013], lv denied 22 NY3d 861 [2014]; *People v Cantrell*, 37 AD3d 1183, 1184 [4th Dept 2007], lv denied 8 NY3d 812 [2007]).

Contrary to defendant's contention, we conclude that County Court properly assessed 20 points under risk factor seven. The People established by clear and convincing evidence that defendant's relationship with the victim had been established for the primary purpose of victimization (see *People v Kent*, 175 AD3d 561, 563 [2d Dept 2019], lv denied 34 NY3d 910 [2020]; *People v Buculei*, 161 AD3d 903, 904 [2d Dept 2018]; *People v Gifford*, 144 AD3d 1678, 1679 [4th Dept 2016], lv denied 28 NY3d 915 [2017]). Defendant met the victim online and communicated with her using an alias. Defendant was aware that the victim was 15 years old and had sexual intercourse with her two months after meeting her in person.

Defendant further contends that the court abused its discretion

in not granting a downward departure based on certain mitigating factors. At the SORA hearing, the People requested that defendant be designated a level one sex offender, but at the conclusion of the hearing, the court assessed additional points, rendering defendant a level two sex offender. Although defendant does not contend on appeal that the court violated his right to due process by sua sponte assessing additional points (*cf. People v Acosta*, 225 AD3d 1257, 1257 [4th Dept 2024]; *People v Lostumbo*, 225 AD3d 1277, 1277 [4th Dept 2024]; *People v Chrisley*, 172 AD3d 1914, 1914-1915 [4th Dept 2019]), the court's ruling did not afford defendant a meaningful opportunity to request a downward departure (*see People v Ritchie*, 203 AD3d 1562, 1564 [4th Dept 2022]). We therefore reverse the order, vacate defendant's risk level determination, and remit the matter to County Court for a new hearing and risk level determination (*see generally Lostumbo*, 225 AD3d at 1279; *People v Tutty*, 156 AD3d 1444, 1445 [4th Dept 2017]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

598

KA 24-01090

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ADAM C. CLARK, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Chauncey J. Watches, J.), rendered May 23, 2024. 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.

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

599

KA 24-00060

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHANN A. BASS, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 27, 2023. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the third degree (Penal Law § 160.05), arising from a bank robbery. By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that he did not knowingly, voluntarily, and intelligently enter the plea (see *People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *People v Thompson*, 206 AD3d 1628, 1629 [4th Dept 2022], *lv denied* 38 NY3d 1153 [2022]; *People v Brown*, 204 AD3d 1519, 1519 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]). Furthermore, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). To the extent that defendant negated an essential element of the crime to which he pleaded guilty by initially denying that the note he handed to the bank teller included a threat of force, we note that County Court immediately conducted the requisite further inquiry to ensure that defendant's guilty plea was knowing, intelligent, and voluntary (see *id.* at 666-668; *People v Briggs*, 115 AD3d 1245, 1246 [4th Dept 2014], *lv denied* 23 NY3d 1018 [2014]; *People v Pratt*, 176 AD2d 1231, 1231 [4th Dept 1991], *lv denied* 79 NY2d 830 [1991]), and we conclude that "defendant's responses to the court's subsequent questions removed [any] doubt about [his] guilt" (*People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017] [internal quotation marks omitted]; see *People v*

Bonacci, 119 AD3d 1348, 1349 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014]).

Entered: July 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

600

CAF 24-00747

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

IN THE MATTER OF MAYHON P.I.

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

MEMORANDUM AND ORDER

CLAUDETTE P., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL),
FOR PETITIONER-RESPONDENT.

ARLENE BRADSHAW, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered March 29, 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.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order of disposition that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect, committed the custody and guardianship of the child to petitioner, and freed the child for adoption. We affirm.

The mother failed to preserve for our review her contention that Family Court abused its discretion in permitting petitioner to proceed at the fact-finding hearing based on a time period of alleged permanent neglect that is not statutorily prescribed. In any event, the mother's contention is without merit. With respect to the time period for establishing permanent neglect, Social Services Law § 384-b (7) (a) defines a "permanently neglected child," as relevant here, as a child "who is in the care of an authorized agency and whose parent . . . has failed for a period of either *at least one year* or fifteen out of the most recent twenty-two months following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and

strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child" (emphasis added). Here, the subject child was removed from the mother's care in January 2020 and placed in foster care. The petition, filed in October 2022, alleged that the mother had failed to meet her responsibilities under section 384-b (7) (a) for the period between September 1, 2020, and November 15, 2021. Thus, the petition properly alleged a statutory time period of at least one year while the child was in the care of petitioner, and the court did not abuse its discretion in permitting petitioner to seek to establish permanent neglect based on the identified time period.

Contrary to the mother's further contention, petitioner established by clear and convincing evidence that for the duration of the identified period she failed to plan appropriately for the child's future (see *Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]). "It is well settled that, to plan substantially for a child's future, the parent must take meaningful steps to correct the conditions that led to the child's removal within a reasonable period of time" (*Matter of Patience E. [Victoria E.]*, 225 AD3d 1181, 1182 [4th Dept 2024], *lv denied* 42 NY3d 904 [2024] [internal quotation marks omitted]). Here, the mother "did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent [his] safe return" (*Matter of Aubrey M.T. [Scott W.T.]*, 237 AD3d 1506, 1507 [4th Dept 2025]; see *Matter of Tyasia T.S. [Ruthanne J.]*, 214 AD3d 1342, 1342-1343 [4th Dept 2023], *lv denied* 40 NY3d 910 [2024]).

We reject the mother's contention that the court erred in terminating her parental rights following the dispositional hearing. "Unlike a fact-finding hearing [that] resolves the issue of permanent neglect and in which the best interests of the child[] play no part in the court's determination, the court in the dispositional hearing must be concerned only with the best interests of the child[]" (*Matter of Aric D.B. [Carrie B.]*, 221 AD3d 1502, 1504 [4th Dept 2023]). We conclude that the record provides ample support for the court's determination that terminating the mother's parental rights is in the best interests of the child.

The mother did not request a suspended judgment and, thus, she failed to preserve for our review her contention that the court abused its discretion in failing to issue one (see *Matter of Jamarion N. [Ernest N.]*, 181 AD3d 1200, 1201-1202 [4th Dept 2020]).

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