



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

DECISIONS FILED
DECEMBER 23, 2025

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. NANCY E. SMITH

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

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_____	1000	CA 24 02000	DONALD MCKEON V JEFFREY J. BLAIR

_____	1013	CAF 24 01899	AHMAD BASTONI V KAWTHER BASTONI
_____	1016	CA 25 00581	ROSS CALARCO V CITY OF SYRACUSE
_____	1018	CA 24 00977	KENNETH MILLER V GRETCHEN BEVARD

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

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CA 24-01203

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

CONNORS & FERRIS, LLP, AND GREGORY R. CONNORS,
PLAINTIFFS-APPELLANTS,

V

ORDER

BROWN CHIARI LLP, DEFENDANT-RESPONDENT.

GROSS SHUMAN P.C., BUFFALO (DAVID H. ELIBOL OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (MICHAEL C. SCINTA OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John DelMonte, J.), entered July 17, 2024. The order denied the motion of plaintiffs for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 7, 2025,

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

606

KA 22-01168

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY JACOBS, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (STEPHANIE M. STARE 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 (Stacey Romeo, A.J.), rendered July 20, 2022. The judgment convicted defendant upon his plea of guilty of attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]), arising out of a carjacking committed when defendant was 16 years old. In the course of the offense, a codefendant possessed a firearm that he used to fatally shoot the victim. As a result, defendant was indicted on counts of, inter alia, murder in the second degree and attempted robbery in the first degree premised on his liability as an accomplice (Penal Law §§ 20.00, 110.00, 125.25 [1], [3]; 160.15 [2]). Defendant's age at the time of the offense rendered him an adolescent offender (see CPL 1.20 [44]). Inasmuch as he was indicted for certain qualifying violent offenses (see CPL 722.23 [2] [a]; Penal Law § 70.02 [1]), County Court was required to schedule an appearance within six days of defendant's arraignment (see CPL 722.23 [2] [a]) to "review the accusatory instrument and any other relevant facts for the purpose of making a determination" whether to order the removal of the action to Family Court (CPL 722.23 [2] [b]). Specifically, the court was required to order removal to Family Court pursuant to CPL 722.23 (1) (a) unless the court determined "in writing that the district attorney proved by a preponderance of the evidence" that defendant "caused significant physical injury to a person other than a participant in the offense"; "displayed a firearm, shotgun, rifle or deadly weapon"; or engaged in statutorily defined unlawful sexual contact (CPL 722.23 [2] [c] [i]-[iii]). The court determined that the People met their burden of establishing that defendant caused significant physical

injury to another person, and no removal was ordered.

Initially, we agree with defendant that his waiver of the right to appeal is invalid. Defendant orally waived his right to appeal and executed a written waiver thereof. The language in the written waiver, however, is "inaccurate and misleading insofar as it purports to impose 'an absolute bar to the taking of a direct appeal' and to deprive defendant of his 'attendant rights to counsel and poor person relief, [as well as] all postconviction relief separate from the direct appeal' " (*People v Nesmith*, 235 AD3d 1239, 1239 [4th Dept 2025], *lv denied* 43 NY3d 964 [2025], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* - US -, 140 S Ct 2634 [2020]; see *People v Ocasio*, 222 AD3d 1364, 1364-1365 [4th Dept 2023]; *People v Fernandez*, 218 AD3d 1257, 1257-1258 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]). Although the court's oral colloquy remedied the written waiver's mischaracterization of the waiver as an absolute bar to the taking of an appeal, the court's verbal statements did nothing to counter the other inaccuracies set forth in the written appeal waiver, including the purported waiver of all state and federal postconviction challenges (see *People v Mason*, 236 AD3d 1354, 1355 [4th Dept 2025], *lv denied* 43 NY3d 1010 [2025]; see also *Nesmith*, 235 AD3d at 1240; *People v Hughes*, 199 AD3d 1332, 1333 [4th Dept 2021]).

Defendant contends that the court erred in concluding that the People established by a preponderance of the evidence that defendant "caused significant physical injury to a person other than a participant in the offense" (CPL 722.23 [2] [c] [i]) and that defendant was therefore disqualified from having the matter transferred to Family Court. Initially, we respectfully disagree with our dissenting colleagues that defendant's contention is forfeited by his guilty plea. It is undisputed that a guilty plea does not "extinguish every claim on appeal" and that the issues that are not forfeited by the plea generally "relate either to jurisdictional matters . . . or to rights of a constitutional dimension that go to the very heart of the process" (*People v Hansen*, 95 NY2d 227, 230 [2000]). "The critical distinction is between defects implicating the integrity of the process, which may survive a guilty plea, and less fundamental flaws, such as evidentiary or technical matters, which do not" (*id.* at 231). Here, although there is no dispute that the court had subject matter jurisdiction to determine whether defendant was disqualified from removal to Family Court (see CPL 722.23 [2] [c]), we disagree with the dissent that the determination belongs to the class of "less fundamental flaws" that should be construed as forfeited by a defendant's plea of guilty (*Hansen*, 95 NY2d at 231).

"There is no mechanical rule that fixes when a claim is forfeited by a guilty plea" (*People v Keizer*, 100 NY2d 114, 122 [2003]). Inasmuch as "a plea usually removes the issue of factual guilt from a case, resolution of the question may be guided by determining whether the claim relates to the factual elements of the crime charged, or to some other, fundamental matter" (*People v Taylor*, 65 NY2d 1, 5 [1985]). Here, although the issue of an adolescent offender's disqualification from removal to Family Court requires review of the allegations and, in some cases, the evidence against that adolescent

offender, a conclusion that the issue survives is not "fundamentally inconsistent with [a] plea of guilty" (*Hansen*, 95 NY2d at 232). Instead, the statutory preference for removal provides an adolescent offender with a better chance at rehabilitation—and a diversion from future criminal activity—by expediting access to the additional services available through Family Court (see CPL 722.23 [1] [a]; NY Assembly Debate on 2017 NY Assembly Bill A3009C, Apr. 8, 2017 at 18, 20, 21). Thus, an admission of factual guilt does not moot the issue whether removal to Family Court is appropriate; rather, it arguably renders the issue more important.

CPL 722.23 also reflects the legislative determination that time is of the essence here. That statute requires the court to consider whether an adolescent offender is disqualified from removal, regardless of any mitigating factors that might exist, within six days from the adolescent offender's arraignment and requires that the People move to prevent removal within 30 days (see CPL 722.23 [1] [a]; [2] [a]). If an adolescent offender's challenge is deemed forfeited by a guilty plea, as the dissent concludes, the only pathway to appellate review of an improper disqualification from removal would be for the adolescent offender to forgo acceptance of responsibility, along with any potentially beneficial plea bargain, and go to trial on the merits. Although such a course would not prevent the eventual appellate review of the issue (see *People v Guerrero*, 235 AD3d 1276, 1276-1277 [4th Dept 2025]; see generally Family Ct Act § 302.1 [2]), the additional passage of time and the deprivation of the benefits of the Family Court proceeding in the first instance would certainly diminish, if not prevent, the effectiveness of any relief ultimately granted. A conclusion that, by pleading guilty, a defendant forfeits the right to challenge a determination that he is disqualified from removal would therefore contravene the legislative intent to provide guilty adolescent offenders the best chance of effective rehabilitation.

The dissent highlights that, pursuant to CPL 722.23 (4), an adolescent offender may waive the opportunity for removal to Family Court. Statutory and even constitutional rights may be waived by a defendant when the waiver is made knowingly and voluntarily (see e.g. *People v Solomon*, 39 NY3d 1114, 1115 [2023]; *People v Leubner*, 143 AD3d 1244, 1245 [4th Dept 2016]). With respect to an adolescent offender, however, the legislature expressly required that a waiver of the opportunity for removal must be made "knowingly, voluntarily and in open court, in the presence of and with the approval of [defense] counsel and the court" in order for any such waiver to be effective (CPL 722.23 [4]). Thus, the legislature made clear that the issue of removal is of such importance with respect to an adolescent offender that a waiver cannot be assumed from a silent record. We decline to circumvent the statutory directive by framing the issue as one of forfeiture.

Further, our conclusion that defendant's contention is not forfeited by his guilty plea is consistent with this Court's review of similar contentions in proceedings involving juvenile offenders (see *People v Weakfall*, 108 AD3d 1115, 1116 [4th Dept 2013], *lv denied* 21

NY3d 1078 [2013]; *People v Charles M.*, 286 AD2d 942, 942-943 [4th Dept 2001]) and judicial diversion (see *People v Chavis*, 151 AD3d 1757, 1758 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]). Even assuming, arguendo, that we had not reviewed similar contentions in those proceedings, we note that a determination pursuant to CPL 722.23 (2) (c) whether an adolescent offender is disqualified from removal to Family Court—a determination notably made without consideration of any potential mitigating factors beyond the circumstances of the charged offenses—is more akin to a required eligibility determination for youthful offenders (see generally *People v Middlebrooks*, 25 NY3d 516, 525-526 [2015]) than it is to a discretionary determination to remove a juvenile offender, which is proper “only in exceptional cases” (*People v Woods*, 143 AD2d 1068, 1068 [2d Dept 1988], *lv denied* 73 NY2d 898 [1989]).

Addressing the merits of defendant’s contention, we agree with defendant that the court erred in concluding that the People established by a preponderance of the evidence that defendant “caused significant physical injury to a person other than a participant in the offense” (CPL 722.23 [2] [c] [i]). In anticipation of the appearance required under CPL 722.23 (2) (a), the People submitted evidence—including witness statements and a video taken from the codefendant’s cell phone—supporting the conclusion that defendant was a knowing and willing participant in the carjacking. That evidence also supported the conclusion, which the People do not dispute, that it was the codefendant who possessed the firearm, drove the vehicle that was used to stop the victim’s vehicle, and ultimately shot the victim. The court rejected defendant’s argument that the People’s reliance solely on accomplice liability principles was insufficient to meet their burden and determined that defendant caused significant injury to the victim such that he was disqualified from having the action removed to Family Court.

We agree with defendant that the court erred in drawing that conclusion. “ ‘As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself,’ ” (*People v Golo*, 26 NY3d 358, 361 [2015]). The plain language of CPL 722.23 (2) (c) supports the conclusion that the Legislature did not intend for the circumstances disqualifying an adolescent offender from removal to Family Court to be coextensive with criminal liability, including principles of accessorial liability, for a statutorily designated violent crime. Indeed, such a result could have been achieved by disqualifying adolescent offenders based solely on the crime charged without reference to any further factors. Instead, the Legislature chose to disqualify from consideration for removal those adolescent offenders who, as relevant to the instant appeal, “caused significant physical injury to a person other than a participant in the offense” (CPL 722.23 [2] [c] [i]) without reference to the principles of accessorial liability included in the Penal Law (see *People v B.H.*, 62 Misc 3d 735, 741 [Nassau County Ct 2018]; see generally Penal Law § 20.00). Further, even assuming, arguendo, that the plain language of the statute could be considered ambiguous, we note that the legislative history of CPL 722.23 (2) (c), originally enacted as part of the Raise

the Age Law, reflects the intent to disqualify from removal those adolescent offenders who "directly caused the injury, who displayed the weapon in [their] own hand, and who personally engaged in the unlawful sexual conduct" (NY Assembly Debate on 2017 NY Assembly Bill A3009C, Apr. 8, 2017 at 51-52; see generally *Simmons v Trans Express Inc.*, 37 NY3d 107, 113 [2021]).

Next, a determination of causation in criminal matters generally requires evidence that an offender's conduct was "a sufficiently direct cause of [the claimed injury], and that there was not an obscure or merely probable connection between [the] conduct and the [injury]" (*People v Li*, 34 NY3d 357, 369 [2019]; see *People v Stewart*, 40 NY2d 692, 696-697 [1976]). Although a defendant's conduct need not be the sole cause of the claimed injury, a defendant's conduct is a "sufficiently direct cause" of a significant injury where "(1) that defendant's actions were an actual contributory cause of [the significant injury], in the sense that they forged a link in the chain of causes which actually brought about the [significant injury]; and (2) that the [injurious] result was reasonably foreseeable" (*Li*, 34 NY3d at 369 [internal quotation marks omitted]; see *People v Davis*, 28 NY3d 294, 300 [2016]).

In the instant case, although the prosecution's submissions established that defendant knew that his codefendant was armed and that defendant participated in the carjacking by pounding on the exterior of the victim's car, the submissions did not support the conclusion that, for example, defendant "position[ed] the vehicle to enable the codefendant to get a clear shot at the victim" (*People v McGee*, 87 AD3d 1400, 1401 [4th Dept 2011], *affd* 20 NY3d 513 [2013]) or "blocked [the victim]'s escape after [the codefendant] pulled the gun" (*People v Gourdine*, 154 AD2d 255, 257 [1st Dept 1989], *lv denied* 75 NY2d 770 [1989]). Inasmuch as defendant's actions did not forge a link in the chain of events that actually brought about the victim's death, the People failed to establish by a preponderance of the evidence that defendant caused a significant injury to the victim.

A determination that the prosecution failed to establish the existence of one of the disqualifying factors set forth in CPL 722.23 (2) (c), however, does not necessarily entitle an adolescent offender to have the action removed to Family Court. As the People correctly argue, the absence of a disqualifying factor only compels the court to "order the action to proceed in accordance with subdivision one of [CPL 722.23]" (CPL 722.23 [2] [c]). Pursuant to that subdivision, the prosecution has 30 days in which to move to prevent removal on the ground that extraordinary circumstances exist that should prevent the transfer of the action to Family Court (see CPL 722.23 [1] [a], [d]; see generally *Guerrero*, 235 AD3d at 1277). We therefore reverse the judgment, vacate the plea, and remit the matter to County Court for further proceedings including, if appropriate, a motion to prevent removal. In light of our determination, we do not address defendant's remaining contentions.

All concur except CURRAN and SMITH, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and vote

to affirm inasmuch as we conclude that defendant's contention that County Court erred in determining that the People established that he caused significant physical injury to the victim (see CPL 722.23) was forfeited by his guilty plea (see generally *People v Parker*, 57 NY2d 136, 140 [1982]), thereby foreclosing this Court from reaching the merits of defendant's contention regardless of the validity of the waiver of the right to appeal (see generally *People v Hansen*, 95 NY2d 227, 230 n 1 [2000]).

"A plea of guilty . . . generally marks the end of a criminal case, not a gateway to further litigation" (*id.* at 230). Indeed, "[a]s a rule, a defendant who in open court admits guilt of an offense charged may not later seek review of claims relating to the deprivation of rights that took place before the plea was entered" (*id.*). "This is so because a defendant's conviction rests directly on the sufficiency of [their] plea, not on the legal or constitutional sufficiency of any proceedings which might have led to [their] conviction after trial" (*id.* [internal quotation marks omitted]; see *People v Di Raffaele*, 55 NY2d 234, 240 [1982]). Thus, generally speaking, "[a] guilty plea will . . . encompass a waiver of specific rights attached to trial . . . and it will also effect a forfeiture of the right to revive certain claims made prior to the plea" (*Hansen*, 95 NY2d at 230).

Nonetheless, "[a] guilty plea does not . . . extinguish every claim on appeal. The limited issues surviving a guilty plea in the main relate either to jurisdictional matters (such as an insufficient accusatory instrument) or to rights of a constitutional dimension that go to the very heart of the process (such as the constitutional speedy trial right, the protection against double jeopardy or a defendant's competency to stand trial)" (*id.*; see *People v Manragh*, 32 NY3d 1101, 1102 [2018]). "The critical distinction is between defects implicating the integrity of the process, which may survive . . . , and less fundamental flaws, such as *evidentiary or technical matters*, which do not" (*Hansen*, 95 NY2d at 231 [emphasis added]; see *People v Guerrero*, 28 NY3d 110, 116 [2016]). "Due concern for finality in criminal prosecutions and for the conservation of judicial resources requires that, in the absence of constitutional or jurisdictional defects, a guilty plea should end the litigation" (*People v Prescott*, 66 NY2d 216, 220 [1985], *cert denied* 475 US 1150 [1986]).

Here, contrary to the majority's determination, we conclude that defendant's contention, that in not removing the case to Family Court, the court erred in determining that the People established that defendant caused significant physical injury to the victim under CPL 722.23, does not fall within any of the limited categories of issues that survive a valid guilty plea. First and foremost, we conclude—and the majority agrees—that defendant's contention is not jurisdictional in nature inasmuch as County Court, while sitting as Youth Part, was clearly empowered to make the evidentiary determination required by the statute (see CPL 722.10, 722.23 [2] [c]; *cf. People v Aaron VV.*, — AD3d —, —, 2025 NY Slip Op 05018, *1-2 [3d Dept 2025]; see generally CPL 10.10 [2] [b]; *Matter of Clark v Boyle*, 210 AD3d 463, 468 [1st Dept 2022], *lv denied* 39 NY3d 974 [2023]).

Also supporting our conclusion that the removal issue is not *jurisdictional* in nature, we note that CPL 722.23 (4) specifically allows a defendant to waive the opportunity for removal of a criminal action from the Youth Part to Family Court, provided that the waiver is made, *inter alia*, "knowingly, voluntarily and in open court." Inasmuch as the opportunity for removal to Family Court is a waiveable statutory right, we conclude that it cannot be equated to a jurisdictional matter, such as the requirement that there be a sufficient accusatory instrument (*cf. Guerrero*, 28 NY3d at 116). Subject matter jurisdiction cannot be waived (*see Lacks v Lacks*, 41 NY2d 71, 75 [1976], *rearg denied* 41 NY2d 862, 901 [1977]; *see also People v Wilson*, 14 NY3d 895, 897 [2010]), and thus the issue of removal cannot be both waivable and a question of subject matter jurisdiction. Although the majority opines that the presence of an express waiver provision constitutes a "statutory directive" precluding us from "framing the [removal] issue as one of forfeiture," that position is irrelevant to whether the issue of removal to Family Court is a jurisdictional issue. Indeed, it bears repeating that the majority agrees with our conclusion that the removal issue is not jurisdictional in nature.

In further support of our determination that the removal issue does not survive the guilty plea, we conclude that the alleged defect is not of "a constitutional dimension that [goes] to the very heart of the process" (*Guerrero*, 28 NY3d at 116 [internal quotation marks omitted]; *see Hansen*, 95 NY2d at 230). Rather, defendant's contention arises from his statutory right to an opportunity for removal pursuant to CPL 722.23, and that right does not implicate any underlying constitutional right that would allow us to conclude that the contention survived (*cf. People v Boston*, 75 NY2d 585, 589 [1990]; *see generally People v Keizer*, 100 NY2d 114, 119 [2003]; *Prescott*, 66 NY2d at 219-220). The majority does not assert that the removal issue survives the plea on the basis that it implicates a constitutional consideration that goes to the heart of the process. Rather, the majority, citing *People v Taylor* (65 NY2d 1 [1985]), concludes that the removal issue is not one of the "less fundamental flaws" that does not survive the plea (*Hansen*, 95 NY2d at 230) inasmuch as the determination did not remove the issue of "factual guilt from [the] case" (*Taylor*, 65 NY2d at 5). *Taylor* did not, however, establish a new category of issues—in addition to jurisdictional and certain constitutional issues—that survive a valid guilty plea. Instead, the Court in *Taylor* merely described the nature of the issues that fall into the existing categories of matters that survive the plea. It also bears noting that, in *Taylor*, the Court was considering whether the defendant's contention fell within the scope of a statutory provision specifically providing that certain contentions survive the plea (*see id.* at 6-7, citing CPL 710.70 [2]).

Let us suppose that the majority is correct in asserting that any issue that does not affect a defendant's factual guilt survives an otherwise valid guilty plea and, consequently, may be raised on appeal. Consistent with that thesis, a defendant's challenge to the denial of a statutory speedy trial motion (*see CPL 30.30 [1]*) would

undoubtedly survive the plea because the question of whether a defendant's statutory speedy trial rights are violated is unrelated to that defendant's factual guilt. Yet we also know that, until CPL 30.30 was amended to expressly provide otherwise (see CPL 30.30 [6]; L 2019, ch 59, § 1, part KKK, § 1 [eff. Jan. 1, 2020]), a valid guilty plea precluded any consideration on appeal of a defendant's challenge to a statutory speedy trial determination (see e.g. *People v O'Brien*, 56 NY2d 1009, 1010 [1982]; *People v Butler*, 170 AD3d 1496, 1496-1497 [4th Dept 2019]; *People v Allen*, 159 AD3d 1588, 1588 [4th Dept 2018]). Like the question of removal at issue in this case, a defendant's statutory speedy trial rights are extremely important and, to borrow the majority's apt turn of phrase "reflect[] the legislative determination that time is of the essence" in prosecuting an individual of a crime. Nevertheless, prior to 2020, that issue was forfeited by a plea of guilty, even though it did not affect a defendant's factual guilt, because it was neither jurisdictional nor constitutional in nature. We see no reason to treat the removal issue differently.

Even accepting the majority's premise, we conclude that the nature of defendant's contention on appeal further supports our view that the issue of removal under CPL 722.23 is more akin to contentions that do not survive a guilty plea than it is to those that do survive. Defendant's contention that the court erred in its determination hinges on the assertion that the evidence presented by the People was insufficient to establish by a preponderance of the evidence that defendant caused the victim significant physical injury (see CPL 722.23 [2] [c] [i]) inasmuch as that evidence relied solely on principles of accessorial liability. In our view, because defendant's contention implicates the admissibility and sufficiency of the evidence supporting the court's determination, it is analogous to a contention challenging the sufficiency of the factual allegations contained in the indictment, which is indisputably forfeited by a guilty plea (see *Guerrero*, 28 NY3d at 116; *People v Seymore*, 188 AD3d 1767, 1768 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Scarbrough*, 162 AD3d 1575, 1575 [4th Dept 2018]). In other words, the removal issue is not as disconnected from defendant's factual guilt as the majority suggests.

We further note that, in a similar statutory context, courts have concluded that removal of a juvenile offender's case to Family Court under CPL 210.43, the precursor to CPL 722.22, does not involve a "right of constitutional dimension or a jurisdictional defect in the proceedings" and therefore a guilty plea forecloses a defendant from raising such a contention on appeal (*People v Woods*, 143 AD2d 1068, 1068 [2d Dept 1988], *lv denied* 73 NY2d 898 [1989]; see *People v Angelo F.*, 172 AD2d 686, 686 [2d Dept 1991]). We do not perceive any reason why removal under CPL 722.23 should be treated differently. Under each statutory provision, one court ceases its involvement in the matter in favor of another, and neither statute undermines "the . . . right [of the state] to prosecute" the offender for the underlying offense (*People v Thomas*, 74 AD2d 317, 320 [2d Dept 1980], *affd* 53 NY2d 338 [1981]; see *People v Spears*, 106 AD2d 417, 418 [2d Dept 1984]). Indeed, neither removal provision deprives the state of the

power to act against the offender. Although certainly not a perfect comparison, the removal process can, in some sense, be analogized to situations in which the court shifts a proceeding to the more appropriate venue. In those circumstances, courts have held that such venue issues are forfeited by a guilty plea (*People v Harris*, 182 AD3d 992, 995 [4th Dept 2020], *lv denied* 35 NY3d 1066 [2020]; see also *People v Williams*, 14 NY2d 568, 570 [1964]; see generally *People v Carvajal*, 6 NY3d 305, 312 [2005]). Therefore, if the analogy holds, the same should be true with respect to removal under CPL 722.23.

Further, it also is highly significant to us that, as we previously stated, the legislature, in providing a statutory right to have a criminal matter removed from the Youth Part to Family Court, did not also provide—as it has in other legislation—that the denial of removal survives a guilty plea (see e.g. CPL 30.30 [6]; 710.70 [2]). Indeed, nothing in the express statutory text of CPL article 722 provides that removal challenges such as the one raised here are not forfeited by an otherwise valid guilty plea. Where, as here, a contention is not otherwise jurisdictional or of a constitutional nature, the absence of language designating the issue as one that would survive a plea indicates that the legislature did not intend for the issue to survive a guilty plea (see generally McKinney's Cons Laws of NY, Book 1, Statutes § 74). Thus, the absence of such a provision here is telling.

Ultimately, because the issue of removal to Family Court under CPL 722.23 is neither jurisdiction nor constitutional—i.e., it does not implicate “the integrity of the process”—and because the legislature has not specifically exempted it from the general rule, we conclude that defendant's challenge to the removal decision relates to a “less fundamental flaw[]” that does not survive the guilty plea (*Hansen*, 95 NY2d at 231). By characterizing the removal issue in this manner, we do not imply that the issue is not important; we merely conclude that it is not so fundamental that it survives the plea even in the absence of a legislative pronouncement to that effect.

Inasmuch as we conclude that defendant's remaining contentions do not warrant reversal or modification of the judgment, we would affirm the judgment.

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

641

KA 22-01452

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER FREEMAN, DEFENDANT-APPELLANT.

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

JOHN NABINGER, DISTRICT ATTORNEY, WATERLOO (KEVIN URBAITIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered July 28, 2021. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the first degree (Penal Law § 120.10 [1]). We affirm.

Defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because County Court and defense counsel coerced him into accepting the plea and because he did not understand the plea proceeding. Although defendant retains the right to appellate review of his challenge to the voluntariness of the plea regardless of the validity of his waiver of the right to appeal (*see People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), defendant correctly concedes that, by failing to move to withdraw the plea or to vacate the judgment of conviction, he failed to preserve his contention for our review (*see People v Evancho*, 236 AD3d 1470, 1470-1471 [4th Dept 2025], *lv denied* 43 NY3d 1045 [2025]; *People v Rounds*, 140 AD3d 1657, 1658 [4th Dept 2016], *lv denied* 28 NY3d 1031 [2016]). Contrary to defendant's contention and the dissent's assertion, we conclude that this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). Defendant equivocated when the court first asked whether, with the requisite intent, he caused serious physical injury to the victim by repeatedly stabbing her, "thereby triggering the trial court's duty to conduct a further inquiry to ensure that defendant's plea was knowingly and voluntarily made" (*People v McNair*, 13 NY3d 821, 822-823 [2009]; *see People v Edwards*, 55 AD3d 1337, 1338 [4th Dept 2008], *lv denied* 11 NY3d 924

[2009]; *People v Castanea*, 265 AD2d 906, 907 [4th Dept 1999]; see also *People v Bovio*, 206 AD3d 1568, 1570 [4th Dept 2022]). With respect to evaluating the sufficiency of that inquiry, " '[a]t a minimum[,] the record of the . . . plea proceedings must reflect . . . that defendant's responses to the court's subsequent questions removed the doubt about defendant's guilt' " (*People v Mox*, 84 AD3d 1723, 1724 [4th Dept 2011], *affd* 20 NY3d 936 [2012]; see *People v Burroughs*, 106 AD3d 1512, 1512 [4th Dept 2013]; *People v Roy*, 77 AD3d 1310, 1310-1311 [4th Dept 2010]).

Here, despite the court's initial inclination to end the plea proceeding and allow the matter to proceed to trial and its indication that it could not accept a plea that was not voluntary, the court continued with the plea proceeding after defendant emphatically insisted that the plea "is voluntary . . . is voluntary . . . is voluntary" and that the court was not pressuring him. Defendant was given another opportunity to consult with defense counsel and then indicated that he wanted to proceed with the plea, and the court thereafter asked again whether defendant, with intent to cause serious physical injury, did in fact cause such injury to the victim by repeatedly stabbing her, to which defendant answered in the affirmative. The court then followed up one more time by asking defendant whether he was telling the truth when he answered that prior question, to which defendant again responded in the affirmative. Therefore, contrary to the dissent's suggestion that the law required more of the court, the record reflects that the court "properly conducted such [a further] inquiry and that defendant's responses to the court's subsequent questions removed [any] doubt about [his] guilt" with respect to the previously negated elements of assault in the first degree (*People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017]; see *People v Shaw*, 222 AD3d 1401, 1402 [4th Dept 2023], *lv denied* 42 NY3d 930 [2024]; *People v Woods*, 126 AD3d 1543, 1543-1544 [4th Dept 2015], *lv denied* 27 NY3d 970 [2016]). Moreover, contrary to defendant's related assertion and the dissent's suggestion, while defendant indicated at the outset of the colloquy that he had been in special education classes when he was in school and that he had not understood unspecified portions of the proceeding thus far, the record establishes that the court properly accepted the plea only after making appropriate "further inquir[ies] to ensure that defendant underst[ood] the nature of the charge and that the plea [was] intelligently entered" (*Lopez*, 71 NY2d at 666; see *Evancho*, 236 AD3d at 1471; *People v Brown*, 305 AD2d 1068, 1068-1069 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]).

In any event, we conclude that defendant's challenge to the voluntariness of the plea lacks merit. Indeed, defendant's contention that the court coerced him into accepting the plea is belied by the record because, during the plea colloquy, defendant denied that he had been threatened or otherwise pressured into pleading guilty and, moreover, defendant specifically denied that the court had pressured him into taking a plea (see *People v Williams*, 198 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 1149 [2021]; *People v Pitcher*, 126 AD3d 1471, 1472 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]).

Further, contrary to defendant's assertion, "[a]lthough it is well settled that '[a] defendant may not be induced to plead guilty by the threat of a heavier sentence if [the defendant] decides to proceed to trial,' " we conclude that the statements made by the court " 'amount to a description of the range of the potential sentences' rather than impermissible coercion" (*People v Boyde*, 71 AD3d 1442, 1443 [4th Dept 2010], *lv denied* 15 NY3d 747 [2010]; see *People v Obbagy*, 147 AD3d 1296, 1297 [4th Dept 2017], *lv denied* 29 NY3d 1035 [2017]). The fact that defendant " 'may have pleaded guilty to avoid receiving a harsher sentence does not render his plea coerced' " (*Boyde*, 71 AD3d at 1443; see *Obbagy*, 147 AD3d at 1297). Likewise, contrary to defendant's assertion, we conclude on this record that the court "did not coerce defendant into pleading guilty merely . . . by commenting on the strength of the People's evidence against him" (*Pitcher*, 126 AD3d at 1472; see *People v Dix*, 170 AD3d 1575, 1577 [4th Dept 2019], *lv denied* 33 NY3d 1030 [2019]; *People v Hall*, 82 AD3d 1619, 1620 [4th Dept 2011], *lv denied* 16 NY3d 895 [2011]). Contrary to defendant's related assertion, we conclude that "defense counsel's advice that [defendant] was unlikely to prevail at trial and that he would likely receive a harsher sentence if convicted after trial . . . does not constitute coercion" (*People v Griffin*, 120 AD3d 1569, 1570 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014]; see *People v Moore*, 229 AD3d 1279, 1280 [4th Dept 2024]; *People v Vargas*, 171 AD3d 1394, 1395 [3d Dept 2019]).

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to pursue an intoxication defense and to seek a mental health competency examination does not survive his guilty plea because defendant " 'failed to demonstrate that the plea bargaining process was infected by the allegedly ineffective assistance or that [he] entered the plea because of defense counsel's allegedly poor performance' " (*People v Blount*, 239 AD3d 1426, 1427 [4th Dept 2025], *lv denied* 44 NY3d 981 [2025]; see *People v Williams*, 159 AD3d 1343, 1343 [4th Dept 2018], *lv denied* 31 NY3d 1123 [2018]; *People v Grandin*, 63 AD3d 1604, 1604 [4th Dept 2009], *lv denied* 13 NY3d 744 [2009]). Moreover, to the extent that defendant's contention is based on matters outside the record, it is not properly before us (see *People v Loper*, 239 AD3d 1473, 1474 [4th Dept 2025]).

All concur except NOWAK, J., who dissents and votes to reverse in the following memorandum:

I respectfully dissent because County Court failed to adequately conduct the requisite "further inquiry" to ensure that defendant's guilty plea was knowing and voluntary (*People v Lopez*, 71 NY2d 662, 666 [1988]), after defendant indicated that he did not cause—or did not intend to cause—serious physical injury to the victim. Thus, this case falls squarely within the *Lopez* exception to the preservation requirement, and defendant "may challenge the sufficiency of the allocution on direct appeal, notwithstanding that a formal postallocution motion was not made" (*id.*; see *People v Worden*, 22 NY3d 982, 985 [2013]; *People v Bovio*, 206 AD3d 1568, 1569 [4th Dept 2022]).

Here, in the factual portion of the colloquy, the court asked defendant whether, on a particular date, at a particular place, he intended to cause serious physical injury to the victim, and did in fact cause her serious physical injury by repeatedly stabbing her. Defendant hesitated, the court asked if he wanted the question repeated, and defendant answered "[n]o. I guess." Nevertheless, the court repeated the question, and the following colloquy between the court and defendant occurred:

"Q. Is it true that on or about [the date in question] while at [the address in question], that you had intent to cause serious physical injury and that you did cause serious physical injury to [the victim] by repeatedly stabbing her? It's either a yes or no answer.

"A. (No response.)

"Q. Do you have an answer to my question?

" A. I'm sorry. I'm not trying to make things hard and difficult.

"Q. How about answering the question. It's either yes or no or I don't know. I need an answer.

"A. I don't know."

The court did not make any further inquiry in an attempt to ascertain whether the plea was knowing and voluntary. Rather, the court threatened to terminate the plea proceeding and force defendant to trial. Defendant replied, "[y]es then."

I disagree with the majority's conclusion that the court was at all reassured by defendant repeatedly imploring that his plea was "voluntary"; quite the contrary, the court recognized that it could not accept the plea despite defendant's exhortations, and permitted defendant to speak off the record with counsel. Once back on the record, the court re-asked the same lengthy question regarding the underlying facts of the offense nearly verbatim, to which defendant now responded "[y]es." The court then asked defendant whether he was "telling . . . the truth when [he] answered that question," and defendant responded, "[y]eah." Despite his prior contradictory statements, defendant also answered "[y]es" moments later when the court inquired whether defendant had "answered all [of the court's] questions truthfully this morning." Soon thereafter in the plea proceeding, when administering warnings pursuant to *People v Outley* (80 NY2d 702 [1993]), defendant indicated that he did not understand what was occurring and expressly stated that his attorney "just told

me to say . . . yes" during their off-the-record discussion. Notably, this was not the first time during the plea proceeding that defendant expressed difficulty understanding what was occurring—shortly after being sworn in, defendant stated that he was in special education classes, had not understood "a lot of things" that had been said, and had only "kind of" understood the proceedings so far.

The court did not, at any point, question defendant about his statements that he did not understand the proceedings and that his counsel just told him to say "yes." Nor did the court, at any point, further inquire into the underlying facts of the offense or attempt to determine what portion of its initial question the defendant was uncertain about. Rather, the court instructed the defendant to speak with his counsel off the record and thereafter, re-asked the same question regarding the underlying facts of the offense nearly verbatim.

While it is certainly laudable to permit a defendant to speak with their counsel off the record, the "duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary" remained with the court and could not be delegated to the attorney (*Lopez*, 71 NY2d at 666; see *People v Mox*, 20 NY3d 936, 939 [2012]). Merely re-asking defendant the same question falls short of the *further* inquiry required under *Lopez* and its progeny.

Finally, I find little comfort in defendant's monosyllabic statement that he truthfully pleaded guilty, particularly where, as here, defendant also stated—despite numerous contradictory statements—that he answered *all* of the court's questions that morning truthfully and claimed that his attorney "just told [him] to say, yes." I would therefore reverse the judgment, vacate the plea and remit the matter to County Court for further proceedings on the indictment (see generally *Bovio*, 206 AD3d at 1571).

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

681

CA 24-01942

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

TAPP PARTNERS, LLC, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

WALL SECTIONS INC. & SAGE LIVESTOCK LLC,
DOING BUSINESS AS WALL SECTIONS INC. & SAGE
LIVESTOCK LLC, AND DONALD K. GARRETT,
DEFENDANTS-APPELLANTS.

COLONNA COHEN LAW, PLLC, BROOKLYN (ASHLEE COLONNA COHEN OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

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

Appeal from an amended order of the Supreme Court, Erie County
(Gerald J. Greenan, III, J.), entered June 6, 2024, in a breach of
contract action. The amended order granted the motion of plaintiff
for summary judgment.

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

Memorandum: Plaintiff commenced this action following
defendants' alleged breach of a revenue purchase agreement (agreement)
between plaintiff and defendants Wall Sections Inc. and Sage Livestock
LLC (collectively, company defendants). Defendant Donald K. Garrett
personally guaranteed company defendants' performance of the
agreement. Under the agreement, plaintiff advanced to the company
defendants \$40,000, less applicable fees, in exchange for 15% of the
future revenues of their business until the purchased amount, i.e.,
\$59,960, was paid to plaintiff. The agreement contained a daily
remittance amount, which constituted "a good faith estimate of"
plaintiff's share of the future revenue stream.

After the company defendants allegedly stopped paying the daily
remittance amount, plaintiff commenced this action asserting causes of
action for breach of contract and personal guarantee. Thereafter,
plaintiff moved for summary judgment on the complaint, and Supreme
Court entered an order granting the motion. The court subsequently
entered an amended order that made nonsubstantive changes to the
original order. Defendants now appeal from the amended order. We
reverse.

As a preliminary matter, we note that, inasmuch as the amended order did not make any substantive changes to the original order, the appeal is properly from the original order, not the amended order (see generally *Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]). Although defendants appeal from the amended order, we conclude that the appeal must be deemed taken from the original order inasmuch as the appeal is timely, no prejudice has resulted, and the original order has been furnished to us (see CPLR 5512 [a]; see also *Tomaselli v Malage*, 242 AD3d 1562, 1563 [4th Dept 2025]; *Tumminia v Staten Is. Univ. Hosp.*, 241 AD3d 17, 21 [2d Dept 2025]).

Contrary to defendants' contention, plaintiff met its initial burden on the motion. "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 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]). Plaintiff met its initial burden of establishing the existence of those elements by submitting the agreement, bank statements, and the affidavit of its manager. The manager averred that plaintiff fulfilled its obligation under the agreement by furnishing the company defendants with the required funds but that, within days of funding, plaintiff was prevented from receiving the daily remittance amount even though the company defendants continued business operations and revenue collection. The manager further averred that in addition to those unpaid amounts, plaintiff also incurred default and other fees. Plaintiff also met its initial burden with respect to the personal guarantee cause of action by submitting the guaranty executed by Garrett and evidence of the company defendants' failure to perform under the agreement (see *Northwoods, L.L.C. v Hale*, 201 AD3d 1357, 1357-1358 [4th Dept 2022]; see generally *Medlock Crossing Shopping Ctr. Duluth, GA. LP v Kitchen & Bath Studio, Inc.*, 126 AD3d 1463, 1464 [4th Dept 2015]).

We agree with defendants, however, that the court erred in granting the motion. Defendants raised "a triable issue of fact regarding the amount of any resulting damages" arising from the alleged breach of the agreement through the submission of Garrett's affidavit (*Bridge Funding Cap LLC v SimonExpress Pizza, LLC* [appeal No. 2], 240 AD3d 1186, 1190 [4th Dept 2025]; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and plaintiff's personal guarantee cause of action "is dependent on the success of the breach of contract cause of action" (*Bridge Funding Cap LLC*, 240 AD3d at 1190).

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

695

CAF 23-01326

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

IN THE MATTER OF HEATHER L. READER,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY S. READER, RESPONDENT-APPELLANT.

CHRISTOPHER K. RODEMAN, ROCHESTER, FOR RESPONDENT-APPELLANT.

TREVETT CRISTO P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR
PETITIONER-RESPONDENT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Livingston County (Kevin Van Allen, J.), dated May 24, 2023, in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to pay attorneys' fees incurred by petitioner.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the petitions are dismissed.

Memorandum: In this family offense proceeding pursuant to Family Court Act article 8, respondent appeals from an order that, inter alia, determined that he committed the family offense of harassment in the second degree against petitioner based on his public posts on Facebook and violated a temporary order of protection. The order also directed respondent to pay attorneys' fees incurred by petitioner.

We agree with respondent that petitioner did not establish that he committed the family offense in question. "A petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" (*Matter of Harvey v Harvey*, 214 AD3d 1462, 1462 [4th Dept 2023] [internal quotation marks omitted]). As relevant here, a "person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person . . . [they] engage[] in a course of conduct or repeatedly commit[] acts which alarm or seriously annoy such other person and which serve no legitimate purpose" (Penal Law § 240.26 [3]). We conclude under the circumstances of this case that the evidence presented by petitioner failed to establish by a preponderance of the evidence that respondent engaged in acts constituting harassment in the second degree (see *Matter of Geremski v Berardi*, 219 AD3d 1713, 1714 [4th Dept 2023];

Matter of Marquardt v Marquardt, 97 AD3d 1112, 1113-1114 [4th Dept 2012]; *cf. Matter of Martin v Flynn*, 133 AD3d 1369, 1370 [4th Dept 2015]). Given our determination, we further conclude that respondent did not violate the temporary order of protection and that petitioner is not entitled to an award of attorneys' fees (see Family Ct Act § 842 [f]).

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

701

CA 24-01066

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

WHITE MANAGEMENT CORP., NORTH COUNTRY CHICKEN CORP.,
M & W FOODS, INC., AND M & W FOODS II, LLC,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

MOUNTAIN MART 105, LLC, AND MOUNTAIN MART 106, LLC,
DEFENDANTS-RESPONDENTS.

SLEVIN & ASSOCIATES PLLC, ALBANY (KATHLEEN MCCAFFREY BAYNES OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THOMPSON HINE LLP, NEW YORK CITY (BRIAN LANCIAULT OF COUNSEL), AND
GOLDBERG SEGALLA LLP, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered May 21, 2024. The order, among other things, granted in part the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking to dismiss the third cause of action insofar as it is predicated upon the allegations of plaintiff White Management Corp. that defendants breached the terms of the December 2020 oral agreement concerning renovations to the Dunkin' Donuts stores and reinstating the third cause of action to that extent, and denying that part of the motion seeking to dismiss the seventh through tenth causes of action and reinstating those causes of action, and as modified the order is affirmed without costs.

Memorandum: In this commercial contract dispute, defendant Mountain Mart 105, LLC (Mountain Mart Massena) owned commercial property in Massena, where plaintiff M & W Foods, Inc. operated a Dunkin' Donuts store pursuant to a lease executed in 2003. Defendant Mountain Mart 106, LLC (Mountain Mart Canton) owned commercial property in Canton, where plaintiff M & W Foods II, LLC operated a Dunkin' Donuts store pursuant to a lease executed in 2004. Both Dunkin' Donuts leases had similar provisions stating that Mountain Mart Massena and Mountain Mart Canton were responsible for, inter alia, repairs and replacements necessary to maintain the property in a safe, usable condition and good order.

In December 2020, defendants allegedly entered into an oral

agreement (Remodel/Drive-Through Agreement) with plaintiff White Management Corp. (White Management) in which defendants agreed to renovate vacated restaurant spaces at the Massena and Canton properties so that plaintiff North Country Chicken Corp. (North Country) could lease the spaces and operate KFC restaurants. In particular, plaintiffs alleged that defendants agreed to construct drive-throughs at the properties and provide North Country with a "Vanilla Box" at each location so that KFC restaurants could be operated thereon. Plaintiffs further alleged that defendants agreed to pay for the cost of remodeling the existing Dunkin' Donuts stores and making improvements to the common areas at the Massena and Canton properties. Plaintiffs alleged that the parties agreed that White Management would manage the work and be reimbursed by defendants.

In June 2021, North Country entered into leases with Mountain Mart Massena and Mountain Mart Canton for North Country to operate KFC restaurants. Pursuant to the KFC leases, defendants agreed to remove the existing infrastructure and deliver a "Vanilla Box" at both locations to North Country.

Plaintiffs commenced this action alleging that defendants reimbursed White Management only in part for the work and had refused to make further payments. In their complaint, plaintiffs alleged causes of action for breach of the leases (first, second, fourth, and fifth causes of action), breach of the Remodel/Drive-Through Agreement (third cause of action), account stated (sixth cause of action), unjust enrichment (seventh and eighth causes of action), and quantum meruit (ninth and tenth causes of action). Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7), and plaintiffs cross-moved for leave to amend the complaint. Supreme Court granted that part of the motion with respect to the third and sixth through tenth causes of action and granted the cross-motion in part. Plaintiffs appeal.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), we must "accept the facts as alleged in the complaint 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]). "[A]ny deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]), such as supporting affidavits (see *Leon*, 84 NY2d at 88). Further, "[d]ismissal under CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks omitted]).

We agree with plaintiffs that the court erred in granting that part of the motion seeking to dismiss the third cause of action insofar as it is predicated upon White Management's allegations that defendants breached the terms of the Remodel/Drive-Through Agreement concerning remodeling the Dunkin' Donuts stores and making

improvements to the common areas, and we therefore modify the order accordingly. Initially, the affidavit of White Management's president submitted in opposition to the motion stated that the Remodel/Drive-Through Agreement was made between White Management and defendants only, and thus the court properly dismissed the third cause of action to the extent it was asserted by the remaining plaintiffs. Relatedly, however, the court erred to the extent that it found that White Management was not a separate corporate entity from the parties to the leases inasmuch as that was an issue of fact " 'that cannot be resolved on [a] motion to dismiss' " (*Cohen & Lombardo, P.C. v Connors*, 169 AD3d 1399, 1401 [4th Dept 2019]).

Contrary to defendants' contention and the conclusion of the court, the fact that the Dunkin' Donuts leases prohibited oral modifications does not preclude White Management from relying on the Remodel/Drive-Through Agreement. The Dunkin' Donuts leases specifically placed the power of repairs, replacements, and improvements, and implicitly the costs, on defendants. Nothing in those leases prohibited defendants from entering into an oral agreement with another company to undertake those repairs and improvements. The Remodel/Drive-Through Agreement therefore did not modify any provision in the Dunkin' Donuts leases (see *Gerard v Cahill*, 66 AD3d 957, 959 [2d Dept 2009]; cf. *Bridge St. Enters. v Pastino's Italian Grill, Inc.*, 43 AD3d 1306, 1307 [4th Dept 2007]). For the same reason, we reject defendants' reliance on General Obligations Law § 15-301 (see *Gerard*, 66 AD3d at 959).

Contrary to plaintiffs' further contention, however, the court properly granted that part of the motion seeking dismissal of the third cause of action insofar as it alleges breach of the Remodel/Drive-Through Agreement concerning constructing a drive-through and building a "Vanilla Box" for each KFC restaurant. The subsequently entered KFC leases contained merger clauses stating that each lease "constitutes the entire Agreement between the parties, and supercedes all prior agreements." The merger clauses preclude plaintiffs' reliance on the Remodel/Drive-Through Agreement with respect to the construction of the KFC restaurants (see *Wilson v Dantas*, 173 AD3d 460, 461 [1st Dept 2019], *lv denied* 34 NY3d 909 [2020]). It is well settled that "evidence of what may have been agreed orally between the parties prior to the execution of an integrated written instrument cannot be received to vary the terms of the writing" (*Braten v Bankers Trust Co.*, 60 NY2d 155, 162 [1983], *rearg denied* 61 NY2d 670 [1983]; see *Bero Contr. & Dev. Corp. v Vierhile*, 19 AD3d 1160, 1161 [4th Dept 2005], *lv dismissed* 6 NY3d 772 [2006], *lv denied* 9 NY3d 808 [2007]). The Remodel/Drive-Through Agreement was "so clearly connected with the [leases] that the parties could have been expected to embody it in [those] writing[s] . . . [, and s]uch a collateral agreement cannot be separately enforced" (*Braten*, 60 NY2d at 162; see *Lentner v Upstate Forestry & Dev., LLC*, 222 AD3d 1369, 1370-1371 [4th Dept 2023]). Contrary to plaintiffs' contention, even though White Management was not a party to the leases, the parol evidence rule prohibits it from relying on the Remodel/Drive-Through Agreement to vary the terms of the KFC leases concerning the same subject matter (see generally *Oxford Commercial*

Corp. v Landau, 12 NY2d 362, 365-366 [1963]). Indeed, the complaint makes clear that White Management was in privity with both defendants and North Country (see generally *id.* at 365).

We reject plaintiffs' contention that the court erred in granting that part of the motion with respect to the sixth cause of action, for account stated. " 'An account stated represents an agreement between the parties reflecting an amount due on a prior transaction . . . An essential element of an account stated is an agreement with respect to the amount of the balance due' " (*Seneca Pipe & Paving Co., Inc. v South Seneca Cent. School Dist.*, 83 AD3d 1540, 1541 [4th Dept 2011]; see *Hull v City of N. Tonawanda*, 6 AD3d 1142, 1142-1143 [4th Dept 2004]; see generally *Newburger-Morris Co. v Talcott*, 219 NY 505, 512 [1916]). Here, the submissions of the parties, which plaintiffs do not contend fail to constitute proper documentary evidence (see *AWL Indus., Inc. v New York City Hous. Auth.*, 237 AD3d 596, 596 [1st Dept 2025]), establish that there was a dispute about the balance of the indebtedness, and thus the sixth cause of action was properly dismissed.

We agree with plaintiffs, however, that the court erred in granting the motion insofar as it sought dismissal of the seventh through tenth causes of action, for unjust enrichment and quantum meruit, and we therefore further modify the order accordingly. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; see *Syracuse Community Health Ctr. v State of New York*, 281 AD2d 939, 941 [4th Dept 2001]). However, where there is a dispute as to the existence of the contract or as to whether the contract covers the disputed issue, " 'the plaintiff may allege causes of action to recover for unjust enrichment and in quantum meruit as alternatives to a cause of action alleging breach of contract' " (*Villnave Constr. Servs., Inc. v Crossgates Mall Gen. Co. Newco, LLC*, 201 AD3d 1183, 1185 [3d Dept 2022]; see *Milherst Constr., Inc. v Natale Bldg. Corp.*, 218 AD3d 1310, 1312 [4th Dept 2023]; *Tutor Perini Corp. v State of New York*, 209 AD3d 692, 698 [2d Dept 2022]; *Beach v Touradji Capital Mgt. L.P.*, 85 AD3d 674, 675 [1st Dept 2011]). Inasmuch as there is a dispute as to the existence of the Remodel/Drive-Through Agreement and whether the leases cover the remodeling and construction projects, plaintiffs may plead the causes of action sounding in quasi contract in the alternative.

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

761

KA 24-01258

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DENNIS SPEED, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 9, 2024. 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 a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arose from defendant's conduct in conjunction with a shooting that occurred outside a bar. We affirm.

Defendant contends that Supreme Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds because the People allegedly failed to comply with their discovery obligations under CPL 245.20 (1). We reject that contention. The People filed an initial certificate of compliance (COC) on January 25, 2024, and four supplemental COCs from February 7, 2024 to May 17, 2024, each with a corresponding statement of readiness (SOR). While defendant now challenges the validity of the initial and the first through the third supplemental COCs, his speedy trial motion challenged only the initial and the first supplemental COC. Thus, defendant's challenges to the validity of the second and third supplemental COCs are unpreserved for our review (*see* CPL 245.50 [4] [a]; 470.05 [2]; *People v Odusanya*, 235 AD3d 1299, 1302 [4th Dept 2025], *lv denied* 43 NY3d 965 [2025]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Newton*, 221 AD3d 1551, 1553 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024]).

With respect to the discovery-related contentions that are

properly before us, we find no basis for reversal of the order denying defendant's speedy trial motion. Defendant argued in his motion papers that the initial COC was invalid because the People failed to disclose certain 911 calls in a timely manner. Although the People provided the defense with those 911 calls on February 7, 2024 when they filed the first supplemental COC, defendant asserted that the evidence should have been disclosed prior to the filing of the initial COC, thus rendering the initial COC invalid and the People's initial SOR illusory.

Because the 911 calls disclosed on February 7, 2024 were not provided to the People until January 31, 2024, we conclude that the People "had complied with their automatic discovery obligations under CPL article 245 to the extent possible" at the time they filed the initial COC and SOR (*People v Geer*, 224 AD3d 1353, 1353 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024]; see also *People v Flowers*, 234 AD3d 1347, 1348 [4th Dept 2025], *lv denied* 43 NY3d 1045 [2025]). In any event, even if we were to conclude that the People failed to exercise due diligence in obtaining and disclosing the 911 calls prior to the filing of the initial COC (see generally *People v Bay*, 41 NY3d 200, 210 [2023]), the only additional time that would be charged to the People for speedy trial purposes is 13 days, which, when added to the 133 days chargeable to the People prior to the filing of the initial COC, falls well short of the six-month deadline within which the People were required to state readiness for trial, which in this case totaled 184 days (see CPL 30.30 [1] [a]; *People v Militello*, 199 AD2d 1053, 1053 [4th Dept 1993]). Thus, standing alone, defendant's challenge to the initial COC has no speedy trial implications, and defendant does not contend that the court should have imposed a discovery sanction under CPL 245.80.

Defendant further contends that the first supplemental COC is invalid because the People had not yet disclosed a 911 call relating to a separate incident, which was relevant only to the extent that it explained why two police officers were in the general vicinity when the shooting occurred. We agree with the People that the 911 call regarding the separate incident was not subject to automatic discovery under CPL 245.20 because it does not relate to the subject matter of the case.

Defendant further contends that the court erred in refusing to suppress evidence obtained by the police as the result of search warrants issued for his home and cellular phone records. As defendant correctly conceded at oral argument on appeal, however, the police recovered no incriminating evidence during either search and, thus, any alleged error in issuing the warrants could not have possibly contributed to defendant's decision to plead guilty (see *People v Hightower*, 207 AD3d 1199, 1201-1202 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]).

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

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

763

KA 23-01774

PRESENT: WHALEN, P.J., LINDLEY, MONTOUT, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT M. COLLINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered June 15, 2010. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree, attempted kidnapping in the first degree and assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of attempted murder in the first degree under the first count of the indictment to attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [3]) and reducing the conviction of attempted kidnapping in the first degree under the second count of the indictment to attempted kidnapping in the second degree (§§ 110.00, 135.20), and vacating the sentence imposed on those counts and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for sentencing on the conviction of attempted murder in the second degree and attempted kidnapping in the second degree.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [vii]; [b]), attempted kidnapping in the first degree (§§ 110.00, 135.25 [2] [a]), and assault in the first degree (§ 120.10 [1]).

Defendant, a janitor in the building where the victim worked, became obsessed with the victim and tracked her to her apartment building. Once there, defendant struck the victim repeatedly with a wooden club, attempted to kidnap her and, when she began to flee, he pursued her until passersby stopped to assist her. The police apprehended defendant the same day at his mobile home and recovered, among other things, a .12-gauge shotgun, a roll of duct tape, a roll

of twine, a necktie, vinyl gloves, a wooden club, and a handwritten letter explaining that it was a "crime of passion" and that he intended to kill the victim.

We reject defendant's contention that County Court erred in admitting in evidence certain photographs depicting the victim's injuries. Those photographs were relevant to disputed material issues (see *People v Smalls*, 70 AD3d 1328, 1330 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010], *reconsideration denied* 15 NY3d 778 [2010]; see generally *People v White-Span*, 182 AD3d 909, 914 [3d Dept 2020], *lv denied* 35 NY3d 1071 [2020]), i.e., the serious physical injury element of the assault in the first degree count (see Penal Law § 120.10 [1]).

Defendant also contends that the conviction of assault in the first degree is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence with respect thereto. The People were required to prove that "[w]ith intent to cause serious physical injury . . . , [defendant] cause[d] such injury to [the victim] by means of a deadly weapon or a dangerous instrument" (*id.*). As relevant here, " '[s]erious physical injury' means physical injury which . . . causes . . . serious and protracted disfigurement" (Penal Law § 10.00 [10]) "A person is 'seriously' disfigured when a reasonable observer would find [their] altered appearance distressing or objectionable" (*People v McKinnon*, 15 NY3d 311, 315 [2010]).

The People established that when defendant struck the victim with the wooden club, he caused her to suffer, inter alia, two lacerations that required stitches on her head; one in the middle back part of her scalp and another over her right eye extending into her scalp. While the photographs in the record depict the victim's condition shortly after the attack, the record is devoid of any other evidence as to the extent of the victim's scars at the time of the trial, when "the jury was able to view" them (*People v Barnett*, 16 AD3d 1128, 1129 [4th Dept 2005], *lv denied* 4 NY3d 883 [2005]). Inasmuch as defendant failed to "develop an adequate record for appellate review" (*People v Johnson*, 205 AD2d 309, 309 [1st Dept 1994], *lv denied* 84 NY2d 827 [1994]; see *People v Goodison*, 196 AD3d 1049, 1050 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]), we are unable to provide meaningful appellate review of defendant's contention that a reasonable observer would not find the permanent scarring on the victim's forehead "distressing or objectionable," when "viewed in context, considering its location on the body and any relevant aspects of the victim's overall physical appearance" (*McKinnon*, 15 NY3d at 315; cf. *People v Coote*, 110 AD3d 485, 485 [1st Dept 2013], *lv denied* 22 NY3d 1198 [2014]; see generally *People v Olivo*, 52 NY2d 309, 320 [1981], *rearg denied* 54 NY2d 797 [1981]).

We agree with defendant, however, that there is legally insufficient evidence to support his conviction of attempted kidnapping in the first degree and attempted murder in the first degree. With respect to the attempted kidnapping in the first degree count, the People were required to prove that defendant attempted to abduct the victim and restrain her for more than 12 hours with the

intent to inflict physical injury or sexually abuse her (see Penal Law §§ 110.00, 135.25 [2] [a])). Here, the People adduced no evidence that defendant intended to hold the victim for more than 12 hours. Instead, the evidence established that, prior to the attempted kidnapping, defendant emptied his trailer of his possessions save for the bed, shotgun, duct tape, twine, necktie, vinyl gloves, and certain personal items of the victim. There was no evidence that the trailer had any food or beverages inside, other than a mostly-consumed bottle of scotch. Defendant stated that he intended to bring the victim back to his residence and "reason" with her and intended to kill her and kill himself in the event he was unsuccessful. Even viewing the evidence in the light most favorable to the People, we conclude that there is no " 'valid line of reasoning and permissible inferences from which a rational jury could have found the element[] of [intent to restrain for more than 12 hours] prove[n] beyond a reasonable doubt' " (*People v Lewis*, 208 AD3d 989, 989 [4th Dept 2022], *lv denied* 39 NY3d 941 [2022], quoting *People v Danielson*, 9 NY3d 342, 349 [2007])).

Inasmuch as the attempted murder in the first degree count in the indictment required proof that the attempted murder was committed in the course of and in furtherance of attempted kidnapping in the first degree, the evidence with respect to that count is likewise insufficient (see Penal Law §§ 110.00, 125.27 [1] [a] [vii])). However, on this record, we conclude that the evidence is legally sufficient to support a conviction of the lesser included offenses of attempted kidnapping in the second degree (§§ 110.00, 135.20) and attempted murder in the second degree (§§ 110.00, 125.25 [3]; see generally *People v Henry*, 159 AD3d 1477, 1478-1479 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018])). We therefore modify the judgment accordingly.

Contrary to defendant's contention, the sentence imposed on the remaining count of assault in the first degree is not unduly harsh or severe. We have reviewed defendant's remaining contention and conclude that it does not require 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 25-00125

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

TRACY A. ENGLISH, III, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BRANDON M. BRADY, BRANDON M. BRADY FARMS, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (KARL Z. DEUBLE OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

PHILIPPONE LAW OFFICES, ROCHESTER (KRISTIAN KLEPES OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Daniel J. Doyle, J.), entered December 27, 2024. The order, insofar as appealed from, granted the motion of plaintiff insofar as it sought leave to amend the complaint to add a cause of action for rescission.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion for leave to amend the complaint to add a cause of action for rescission is denied.

Memorandum: Plaintiff commenced this action in 2023 seeking monetary damages for the alleged breach by defendants-appellants (defendants) of a provision in a deed, by which plaintiff transferred land to defendant Brandon M. Brady, that reserved for plaintiff certain rights with respect to that land (reservation). The deed was executed and recorded in 2012, and Brady later transferred the land to defendant Brandon M. Brady Farms, Inc. After certain motion practice and partial discovery occurred, plaintiff moved for, inter alia, leave to amend the complaint to add a cause of action for rescission, alleging that defendants' understanding of the reservation was materially different from plaintiff's, and therefore there had been no meeting of the minds. Supreme Court granted the motion to that extent, and we now reverse the order insofar as appealed from.

It is well settled that leave to amend a pleading " 'shall be freely given,' " provided the amendment is not palpably insufficient on its face, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983], quoting CPLR 3025 [b]; see *Wojtalewski v Central Sq. Cent. Sch. Dist.*, 161 AD3d 1560,

1561 [4th Dept 2018]; *Bryndle v Safety-Kleen Sys., Inc.*, 66 AD3d 1396, 1396 [4th Dept 2009]). The decision to permit an amendment is within the sound discretion of the court (see *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]).

"Rescission is an equitable cause of action . . . , [and] therefore the six-year [s]tatute of [l]imitations" set forth in CPLR 213 (1) applies (*Van Dussen-Storto Motor Inn, Inc. v Rochester Tel. Corp.*, 63 AD2d 244, 250 [4th Dept 1978]; see *Mandour v Rafalsky*, 238 AD3d 637, 638 [1st Dept 2025]; *Hoffman v Cannone*, 206 AD2d 740, 740 [3d Dept 1994]). Further, inasmuch as plaintiff did not allege continuing fraud or duress (see *Rubin v Rubin*, 275 AD2d 404, 405 [2d Dept 2000], *lv dismissed* 95 NY2d 958 [2000]; *Hoffman*, 206 AD2d at 740-741), the proposed rescission cause of action accrued at the time the deed was executed in 2012 (see *Van Dussen-Storto Motor Inn, Inc.*, 63 AD2d at 250). Because " 'a proposed amendment generally is considered patently devoid of merit if it is time-barred under the applicable statute of limitations' " (*Great Neck Lib. v Kaeyer, Garment & Davidson Architects, P.C.*, 236 AD3d 873, 875-876 [2d Dept 2025]), and because the statute of limitations for the proposed cause of action had expired prior to the time the original complaint was filed in 2023, the court abused its discretion in granting that part of the motion seeking leave to amend the complaint to add a cause of action for rescission (see *Deutsche Bank Natl. Tr. Co. v McAvoy*, 188 AD3d 808, 810 [2d Dept 2020]; *Carlino v Shapiro*, 180 AD3d 989, 990 [2d Dept 2020]; *Gelmac Quality Feeds, Inc. v Ronning*, 23 AD3d 1019, 1020 [4th Dept 2005]). We therefore reverse the order insofar as appealed from and deny plaintiff's motion to that extent.

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

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

773

CA 24-01761

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

GENE TINGUE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ELDON M. KING, JR., AND D&H EXCAVATING, INC.,
DEFENDANTS-APPELLANTS.

HURWITZ FINE P.C., BUFFALO (BRIAN M. WEBB OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered October 22, 2024. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries he sustained as a pedestrian when he was struck by the mirror of a truck operated by defendant Eldon M. King, Jr., and owned by defendant D&H Excavating, Inc. Defendants appeal from an order that denied their motion for summary judgment dismissing the complaint. We affirm.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such [a] showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). Here, we must "view[] the evidence in the light most favorable to plaintiff[]" as the nonmoving party (*Mariacher v LPCiminelli, Inc.*, 225 AD3d 1288, 1292 [4th Dept 2024]). If the proponent meets their burden, "the opposing party must show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks omitted]; see CPLR 3212 [b]).

Plaintiff was walking or running near or on the shoulder of a road when he was struck by the mirror of the defendant driver's passing truck. The incident was captured by a nearby security camera. While defendants contend that plaintiff was struck after running into the road, plaintiff asserts that he was on the shoulder at the time of

impact. Even assuming, arguendo, that defendants met their initial burden, we conclude that plaintiff raised triable issues of fact in opposition to the motion. Inasmuch as the video is grainy, and it is difficult to discern precisely where plaintiff was located when he was struck, resolving that issue would require credibility determinations, which are not proper in the context of a motion for summary judgment (see *Lynch-Miller v State of New York*, 209 AD3d 1294, 1296 [4th Dept 2022]).

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

774.1

CAF 25-00126

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

IN THE MATTER OF TYRONE MORRIS,
PETITIONER-RESPONDENT-RESPONDENT,

V

MEMORANDUM AND ORDER

DOMONIQUE SMITH, RESPONDENT-PETITIONER-APPELLANT,
AND EVETTE BUNTLEY, RESPONDENT-PETITIONER-APPELLANT.

ANDREW J. DIPASQUALE, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

KAMAN BERLOVE LLP, ROCHESTER (BRYANNE L. JONES OF COUNSEL), FOR
RESPONDENT-PETITIONER-APPELLANT EVETTE BUNTLEY.

ANDREW J. DIPASQUALE, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO
SE.

FOLEY HOAG, LLP, NEW YORK CITY (LANGIE CADESCA OF COUNSEL), FOR
RESPONDENT-PETITIONER-APPELLANT DOMONIQUE SMITH.

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

Appeals from an order of the Family Court, Monroe County (John I. Menard, R.), entered January 17, 2025, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner-respondent primary residency and sole decision-making authority with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended petition of respondent-petitioner Domonique Smith and the petition of respondent-petitioner Evette Buntley are reinstated, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner mother, respondent-petitioner maternal grandmother (grandmother), and the Attorney for the Child (AFC) separately appeal from an order that, inter alia, effectively dismissed the amended petition of the mother and the petition of the grandmother for custody of the subject child and granted the petition of petitioner-respondent father for custody of the child. Family Court granted the grandmother, with whom the child and her half-brother had been living for four years, one weekend a month of visitation so that the child could spend time with the

grandmother and the child's half-brother. This Court granted a stay of that order pending appeal.

Although the father initially questioned paternity and did not see the child before she turned four months old, the father did thereafter exercise visitation with the child. The mother, however, unilaterally removed the child from New York and left her with the half-brother's paternal relatives in Mississippi for several months on two separate occasions. As a result of those incidents, the father filed his custody petition in March 2021. Because the father's paternity was not legally established, the child and her half-brother were placed in the custody of the grandmother in September 2021 when the mother needed psychiatric hospitalization. They remained in her custody since that time, with both parents exercising visitation. The grandmother and the mother thereafter filed their own petitions for custody.

We agree with the grandmother and the AFC on their appeals that the court erred in finding that the grandmother failed to establish extraordinary circumstances and thus lacked standing to contest the parents' custody petitions (see *Matter of Tuttle v Worthington* [appeal No. 2], 219 AD3d 1142, 1143-1144 [4th Dept 2023]; see generally *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544-550 [1976]). Initially, we conclude that, contrary to the grandmother's contention, she did not establish extraordinary circumstances with respect to the father based on "[a]n extended disruption of custody" (see Domestic Relations Law § 72 [2] [a]). An extended disruption of custody "include[s], but [is] not . . . limited to, a prolonged separation of the respondent parent and the child for at least [24] continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than [24] months" (§ 72 [2] [b] [emphasis added]; see *Tuttle*, 219 AD3d at 1143-1144). Here, the father did not voluntarily relinquish care and control of the child. A large part of the period of separation between the father and the child "occurred during the father's formal attempts to obtain custody" (*Matter of Jose C. v Janet V.*, 171 AD3d 651, 652 [1st Dept 2019], citing *Matter of Male Infant L.*, 61 NY2d 420, 429 [1984], *affg Matter of Landaverde*, 95 AD2d 29, 31-32 [1st Dept 1983]).

We nevertheless conclude that the grandmother met her burden of demonstrating other extraordinary circumstances with respect to both the mother and the father. The Court of Appeals has explained that "[i]n the absence of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances', a parent may not be denied custody" (*Male Infant L.*, 61 NY2d at 427, quoting *Bennett*, 40 NY2d at 544 [emphasis added]). Consistent with that principle of law, we have determined that "an extended disruption of custody as defined in [the statute] is merely 'a specific example of extraordinary circumstances' . . . and the statute was 'not intended to overrule existing case law relating to third parties obtaining standing in custody cases' " (*Tuttle*, 219 AD3d at 1144, quoting *Matter*

of Suarez v Williams, 26 NY3d 440, 446-447 [2015]).

In determining whether extraordinary circumstances exist, "[n]o one factor should be viewed in isolation . . . , but rather the 'analysis must consider the cumulative effect of all issues present in a given case . . . , including, among others, the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the . . . parent allowed such custody to continue *without trying to assume the primary parental role*' " (*Matter of Cross v Cross*, 235 AD3d 1264, 1265-1266 [4th Dept 2025], *lv denied* 44 NY3d 902, [2025] [emphasis added]; see *Tuttle*, 219 AD3d at 1144; *Matter of Byler v Byler*, 207 AD3d 1072, 1074-1075 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]).

Here, we conclude that there are " 'other like extraordinary circumstances' " that give the grandmother standing to seek custody of the child (*Male Infant L.*, 61 NY2d at 427; see *Tuttle*, 219 AD3d at 1144). Extraordinary circumstances arise from the fact that the now-six-year-old child has resided exclusively with the grandmother since she was two years old, the mother was incapable of caring for the child due to mental illness, and the father has not been significantly involved in the child's life since birth. The father has had limited and sporadic visitation with the child and has never had the child with him overnight. He has not attended school events or medical appointments. Nor has he paid child support to either the mother or the grandmother. Finally, the child is emotionally attached to the grandmother and her half-brother, who has also been raised by the grandmother (see *Byler*, 207 AD3d at 1075).

We note that, according to the AFC, who supports an award of custody to the grandmother, the father's contact with the child was "sporadic" during the first three months following entry of the custody order in January 2025, and that the father has not seen the child since April 2025. Notably, the father did not dispute those allegations, which the AFC proffered to us pursuant to *Matter of Michael B.* (80 NY2d 299, 317-318 [1992]). We therefore reverse the order, reinstate the mother's amended petition and the grandmother's petition, and remit the matter to Family Court for a hearing to determine the best interests of the child, at which new facts may be considered in light of events that have transpired during the pendency of these appeals (see *Tuttle*, 219 AD3d at 1145; see generally *Michael B.*, 80 NY2d at 318).

Inasmuch as we have determined that the grandmother established extraordinary circumstances and that we must remit for a best interests hearing involving both parents and the grandmother, the mother's contentions on her appeal are academic and, upon review, the grandmother's remaining contentions on her appeal lack merit.

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

778

KA 23-01225

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DEMETRIS COLEMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, MORGAN, LEWIS & BOCKIUS LLP,
NEW YORK CITY (MATTHEW E. COOPER 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 (Alex R. Renzi, J.), rendered February 15, 2023. The judgment convicted defendant upon a nonjury verdict of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the seventh degree.

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

Same memorandum as in *People v Coleman* ([appeal No. 2] – AD3d – [Dec. 23, 2025] [4th Dept 2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

779

KA 23-00458

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DEMETRIS COLEMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, MORGAN, LEWIS & BOCKIUS LLP,
NEW YORK CITY (MATTHEW E. COOPER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II,
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 Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 15, 2023. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Monroe County, for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). In appeal No. 2, defendant appeals, by permission of this Court, from an order denying his motion to vacate the judgment of conviction pursuant to CPL 440.10 on the ground that he was denied effective assistance of counsel. Defendant's conviction stems from a traffic stop after which a firearm and oxycodone pills were found in a rental car that defendant was driving.

With respect to appeal No. 1, defendant's present contentions concerning his consent to search his vehicle are "raised for the first time on appeal and thus are not preserved for our review" (*People v Carter*, 39 AD3d 1226, 1227 [4th Dept 2007], *lv denied* 9 NY3d 863 [2007]; see *People v Reed*, 34 AD3d 1364, 1364 [4th Dept 2007], *lv denied* 8 NY3d 884 [2007]). Similarly, defendant's contention that his waiver of the right to a jury trial was not knowing, intelligent, and voluntary is not preserved for our review. Defendant "failed to challenge the adequacy of the allocution related to his jury trial

waiver[and, thus,] failed to preserve . . . [his] challenge to the sufficiency of [Supreme Court's] inquiry" (*People v Barnett*, 221 AD3d 1421, 1422 [4th Dept 2023], *lv denied* 41 NY3d 964 [2024] [internal quotation marks omitted]; see *People v McCoy*, 174 AD3d 1379, 1381 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019], *reconsideration denied* 35 NY3d 994 [2020]; *People v Hailey*, 128 AD3d 1415, 1415-1416 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]). We decline to exercise our power to review defendant's unpreserved contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]) in appeal No. 1.

With respect to appeal No. 2, we note, preliminarily, that defendant was granted leave to appeal pursuant to CPL 460.15 in the interest of justice and judicial economy notwithstanding that the CPL 440.10 motion was prematurely made prior to sentencing (see *People v Burt*, 246 AD2d 919, 923 [3d Dept 1998], *lv denied* 91 NY2d 1005 [1998]; cf. CPL 440.10 [1]; *People v Spirles*, 294 AD2d 810, 811 [4th Dept 2002], *lv denied* 98 NY2d 713 [2002], *reconsideration denied* 99 NY2d 540 [2002]).

Defendant's contention that he was deprived of his right to be present at a material stage of trial when defense counsel attempted to negotiate an adjournment was not raised in the CPL 440.10 motion and, thus, is not properly before us (see *People v Lovette*, 188 AD3d 1726, 1727 [4th Dept 2020], *lv denied* 36 NY3d 1051 [2021]; *People v Ortega*, 70 AD3d 416, 417 [1st Dept 2010], *lv denied* 15 NY3d 808 [2010]; *People v Goodell*, 221 AD2d 1009, 1010 [4th Dept 1995], *lv denied* 88 NY2d 848 [1996]).

Defendant's contention that he was denied his constitutional right to effective assistance of counsel was properly raised in the CPL 440.10 motion, and we agree with defendant that the court "should not have denied the motion without a hearing" (*People v Kellam*, 237 AD3d 1520, 1521 [4th Dept 2025]). In support of that claim, defendant established that there were sufficient questions of fact whether defense counsel failed to prepare for the hearing on defendant's motion to suppress physical evidence recovered during the search of his rental car, failed to establish facts or advance arguments in support of that motion, failed to communicate with defendant about strategy, failed to prepare for trial, pressured defendant to waive his right to a jury trial due to lack of preparation, and failed to present a sufficient defense at the bench trial. Defendant is thus "entitled to an opportunity to establish that [he] was deprived of meaningful legal representation," including with respect to whether defense counsel improperly pressured defendant to waive his right to a jury trial in order to obtain time to prepare for trial (*People v Caldavado*, 26 NY3d 1034, 1036 [2015] [internal quotation marks omitted]; see *Kellam*, 237 AD3d at 1521; *People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592-1593 [4th Dept 2018]), and we therefore reverse the order and remit the matter to Supreme Court for a hearing

pursuant to CPL 440.30 (5) on defendant's claim of ineffective assistance of counsel.

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

793

CA 24-01796

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

HOI TRINH, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

FATHER JOSEPH THIEN NGUYEN, DEFENDANT-RESPONDENT.

HGT LAW, NEW YORK CITY (HUNG G. TA OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

FINNERTY OSTERREICHER & ABDULLA, BUFFALO (KARIM A. ABDULLA OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 18, 2024. The order granted the motion of defendant to dismiss the complaint and awarded defendant costs and attorneys' fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking to dismiss the complaint insofar as it is premised on the alleged defamatory statements set forth in paragraphs 32, 38, 41, 45, 46, 47, 48, 49, 51, 52 and 55 and reinstating the complaint to that extent, and denying that part of the motion seeking attorneys' fees and costs and as modified the order is affirmed without costs.

Memorandum: As noted in a prior appeal (*Hoi Trinh v Nguyen*, 211 AD3d 1623, 1623 [4th Dept 2022]), plaintiff commenced this action against defendant asserting causes of action for defamation and defamation per se. According to the complaint, defendant published statements on two Internet websites alleging, inter alia, that plaintiff engaged in a fraudulent and criminal operation and illegally and improperly received financial gain when he served as the Executive Director of the Vietnamese Overseas Initiative for Conscience Empowerment (VOICE), an organization that assists Vietnamese refugees to emigrate. Defendant moved to dismiss the complaint pursuant to, inter alia, the then-recent amendments to the anti-strategic lawsuits against public participation (anti-SLAPP) statutes (see Civil Rights Law §§ 70-a, 76-a) and CPLR 3211 (a) (7) and (g) and for, among other things, attorneys' fees and costs. Defendant argued that the anti-SLAPP amendments applied retroactively to the defamation causes of action asserted by plaintiff. Supreme Court determined that the amendments to the anti-SLAPP law applied retroactively and, therefore, applied the burdens under that law (see CPLR 3211 [g]). The court thereafter issued an order in which it, inter alia, granted those

parts of defendant's motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (7) and (g) and seeking costs and attorneys' fees. Plaintiff appealed from the order to the extent that it granted defendant's motion, contending that the court erred in applying the anti-SLAPP amendments retroactively. We reversed the order insofar as appealed from on the ground that the court erred in applying the anti-SLAPP amendments retroactively and remitted the matter for the court to address "the alternative grounds for dismissal raised in the motion pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7) insofar as based upon the pleading requirements in section 3016 (a)" (*Hoi Trinh*, 211 AD3d at 1625).

Upon remittal, the court again applied the amended anti-SLAPP statute and dismissed the complaint on that ground. In addition, the court held that, even if the action did not permit application of the anti-SLAPP amendments, the complaint was subject to dismissal on the alternative basis of failure to state a cause of action inasmuch as plaintiff failed to allege the necessary elements to recover damages for defamation as a matter of law with respect to the 20 alleged defamatory statements in the complaint. Plaintiff now appeals.

We agree with plaintiff that the court impermissibly expanded the scope of the remittal. "[A] trial court, upon a remand or remittitur, is without power to do anything except to obey the mandate of the higher court, and render judgment in conformity therewith" (*People v Weber*, 195 AD3d 1544, 1544 [4th Dept 2021], *affd* 40 NY3d 206 [2023] [internal quotation marks omitted]). This Court expressed our remittal directive in our order, and Supreme Court impermissibly expanded the scope of that remittal by accepting supplemental arguments on, inter alia, the effect of new case law relating to the retroactivity of the amended anti-SLAPP statute, and by basing its decision on grounds that were not included within the remittal (see *People v Wiggins*, 197 AD2d 802, 803 [3d Dept 1993]; see also *Matter of Rose v Albany County Dist. Attorney's Off.*, 141 AD3d 912, 913-914 [3d Dept 2016]; see generally *DiFilippo v DiFilippo*, 300 AD2d 1003, 1004 [4th Dept 2002]).

With respect to the alternative grounds for dismissal that the court appropriately considered pursuant to our remittal directive, "when a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]; see *Bisimwa v St. John Fisher Coll.*, 194 AD3d 1467, 1469 [4th Dept 2021]). " 'The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se' " (*D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 962 [4th Dept 2014]). In determining the sufficiency of a defamation pleading, we consider

"whether the contested statements are reasonably susceptible of a defamatory connotation" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks omitted]; see *Howard v Alford*, 229 AD2d 996, 996 [4th Dept 1996]).

In the complaint, plaintiff alleged that defendant made 20 defamatory statements falsely implying that plaintiff "violated Canadian immigration law and deceived the Canadian government and the public with respect to [plaintiff's] work with Vietnamese refugees." We agree with plaintiff that there is a reasonable view of the statements set forth in paragraphs 32, 38, 41, 45, 46, 47, 48, 49, 51, 52 and 55 upon which plaintiff may be entitled to recover for defamation or defamation per se and, therefore, the complaint "must be deemed to sufficiently state a cause of action" (*Davis*, 24 NY3d at 274). Moreover, with respect to each of those allegedly defamatory statements, we conclude that defendant failed to conclusively establish that the statement was not "of and concerning" plaintiff (*Dimond v Time Warner, Inc.*, 119 AD3d 1331, 1332 [4th Dept 2014] [internal quotation marks omitted]; cf. *Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1661 [4th Dept 2009]), an expression of pure opinion (see generally *Landa v Capital One Bank [USA], N.A.*, 172 AD3d 1052, 1053-1054 [2d Dept 2019]; *Balderman v American Broadcasting Cos.*, 292 AD2d 67, 72-73 [4th Dept 2002], lv denied 98 NY2d 613 [2002]) or no more than name-calling or a general insult (cf. *Wahrendorf v City of Oswego*, 72 AD3d 1604, 1605 [4th Dept 2010]; see generally *Bisimwa*, 194 AD3d at 1469; *Olney v Town of Barrington*, 180 AD3d 1364, 1364 [4th Dept 2020]). We therefore modify the order accordingly. Contrary to plaintiff's contention, however, we conclude that the court properly granted defendant's motion insofar as it sought to dismiss the complaint with respect to the remainder of the allegedly defamatory statements set forth therein.

Finally, inasmuch as the court's application of the anti-SLAPP law was outside the scope of this Court's remittal directive, we conclude that the court erred in awarding costs and attorneys' fees pursuant to Civil Rights Law § 70-a (1), and we therefore further modify the order accordingly.

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

795

CA 24-01653

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

ZAKKIYYA C., PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V

MEMORANDUM AND ORDER

KAPIL VERMA AND VAASTU ENERGY LLC,
DEFENDANTS-RESPONDENTS.

ZAKKIYYA C., PLAINTIFF-APPELLANT PRO SE.

FOTI HENRY PLLC, BUFFALO (ANNA MARI REALE SANDERSON OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered September 9, 2024, in an action for damages caused by exposure to mold. The order, among other things, granted the motion of defendants to compel disclosure.

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

Memorandum: Zakkiyya C. (plaintiff) commenced this action seeking damages for injuries allegedly caused by defendants' failure to remediate mold in an apartment. Plaintiff appeals from an order that, inter alia, granted defendants' motion insofar as it sought an order directing plaintiff to provide executed authorizations for, inter alia, certain medical records, tax returns, social security disability records, and Medicaid records, and denied plaintiff's motion for a protective order. We affirm.

Plaintiff's contention that defendants' disclosure demands were not properly served is raised for the first time on appeal and, thus, is not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

With respect to the contentions as they relate to the authorizations concerning plaintiff's records, we note that CPLR 3101 (a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action," which is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "Absent an abuse of discretion, we will not disturb the [trial] court's control of the

discovery process' " (*Marable v Hughes*, 38 AD3d 1344, 1345 [4th Dept 2007]).

"A plaintiff who commences a personal injury action has waived the physician-patient privilege to the extent that [their] physical or mental condition is affirmatively placed in controversy" (*Carter v Fantauzzo*, 256 AD2d 1189, 1190 [4th Dept 1998]). Inasmuch as plaintiff alleges that she sustained extensive physical and mental injuries and limitations as a result of defendants' tortious conduct, we conclude that Supreme Court did not "abuse[] its discretion in ordering plaintiff to execute the broad authorizations sought by defendant" (*Almalahi v NFT Metro Sys., Inc.*, 175 AD3d 1043, 1045 [4th Dept 2019]).

"While tax returns are generally not discoverable in the absence of a strong showing that the information is indispensable and cannot be obtained from other sources," such a showing may be made where a plaintiff is "self-employed, and . . . claiming damages for earnings lost as a result of the alleged [tortious conduct]" (*Singh v Singh*, 51 AD3d 770, 771 [2d Dept 2008]; see *Scholte v Agway, Inc.*, 152 AD2d 928, 929-930 [4th Dept 1989]). Inasmuch as plaintiff alleges that she—"has suffered significant future wage losses as a result of the damages incurred in her small business" because of defendants' tortious conduct, we conclude that the court did not abuse its discretion in ordering her to produce authorizations for the requested tax records.

Social Security Disability (SSD) records are discoverable where a plaintiff who had been receiving disability benefits asserts "broad allegations of injury . . . [that] could have resulted from . . . [the alleged tortious conduct], [a] preexisting . . . condition or some combination thereof" (*Boyea v Benz*, 96 AD3d 1558, 1560 [4th Dept 2012]). Inasmuch as plaintiff was receiving SSD benefits and alleges that she sustained extensive permanent physical and mental injuries, loss of enjoyment of life, and loss of career as a result of defendants' tortious conduct, we conclude that the court did not abuse its discretion in ordering her to produce authorizations for her SSD records.

SSD records are also discoverable where they have been identified by a plaintiff as collateral sources of payment, as are Medicaid records (see *Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 38 [2d Dept 2008], *lv denied* 11 NY3d 705 [2008]; see generally CPLR 4545; *Riley v Rupp*, 233 AD3d 1313, 1314 [3d Dept 2024]). Inasmuch as plaintiff alleges that she received both SSD and Medicaid payments following defendants' tortious conduct, we conclude that the court did not abuse its discretion in ordering her to produce authorizations for her relevant SSD and Medicaid records.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

811

CA 24-00786

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

JUDITH WADE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

COUNTY OF MONROE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ALISSA M. BRENNAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SLATER SLATER SCHULMAN, LLP, MELVILLE (NIRAJ JAYANT PAREKH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Joseph D. Waldorf, J.), entered April 19, 2024, in an action pursuant to the Adult Survivors Act. The order, insofar as appealed from, denied that part of the motion of defendants to dismiss plaintiff's first through seventh causes of action against defendant County of Monroe.

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

Memorandum: Plaintiffs commenced these actions under the Adult Survivors Act (*see* CPLR 214-j) against defendants County of Monroe (County) and Monroe County Sheriff's Office (MCSO) alleging that they were sexually assaulted by certain staff members while confined at the Monroe County Jail. Plaintiffs each asserted negligence as the first cause of action, negligent hiring as the second cause of action, negligent training as the third cause of action, negligent retention as the fourth cause of action, negligent supervision as the fifth cause of action, gross negligence and willful misconduct as the sixth cause of action, violation of the state constitutional prohibition on cruel and unusual punishment as the seventh cause of action, and violation of the state anti-discrimination statutes as the eighth cause of action. Before answering, defendants moved in each action to dismiss the complaint, in relevant part, on the ground of failure to state a cause of action (*see* CPLR 3211 [a] [7]).

Supreme Court granted each motion insofar as it sought to dismiss the complaint against the MCSO inasmuch as "the Sheriff's Department does not have a legal identity separate from the County . . . and thus an action against the Sheriff's Department is, in effect, an action against the County itself" (*Johanson v County of Erie*, 134 AD3d 1530,

1531-1532 [4th Dept 2015] [internal quotation marks omitted]). With respect to the order in appeal No. 1, the court, inter alia, further granted the motion insofar as it sought to dismiss the eighth cause of action against the County but denied the motion insofar as it sought to dismiss the first, second, third, fourth, fifth, sixth, and seventh causes of action against the County. With respect to the orders in appeal Nos. 2 through 5, the court, inter alia, further granted the motion insofar as it sought to dismiss the second, third, fourth, fifth, sixth, and eighth causes of action against the County but denied the motion insofar as it sought to dismiss the first and seventh causes of action against the County. The County now appeals, contending in each appeal that the court should have dismissed the complaint in its entirety for failure to state a cause of action. We affirm in each appeal.

"On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), '[w]e accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). " 'At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration' " (*id.*). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*id.* at 142). "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]; see *Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 153 [2023]).

The County contends in each appeal that the court erred in denying the motion insofar as it sought to dismiss the first cause of action, sounding in negligence, because it owed no duty to plaintiffs. We reject that contention. " 'The threshold question in any negligence action is . . . [whether the] defendant owe[s] a legally recognized duty of care to [the] plaintiff' " (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015], quoting *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]; see generally *Weisbrod-Moore v Cayuga County*, — NY3d —, —, 2025 NY Slip Op 00903, *1 [2025]; *Sanchez v State of New York*, 99 NY2d 247, 252 [2002]). Pursuant to Correction Law § 500-c (4), the Sheriff has the "duty to 'receive and safely keep' prisoners in the jail over which [the Sheriff] has custody" (*Freeland v Erie County*, 122 AD3d 1348, 1350 [4th Dept 2014]; see *Villar v Howard*, 28 NY3d 74, 80 [2016]; *Adams v County of Rensselaer*, 66 NY2d 725, 727 [1985]). "A county may not be held responsible for the negligent acts of the Sheriff and [their] deputies on the theory of respondeat superior, in the absence of a local law assuming such responsibility" (*Marashian v City of Utica*, 214 AD2d 1034, 1034 [4th Dept 1995]; see e.g. *Abate v County of Erie*, 195 AD3d 1531, 1532 [4th Dept 2021]; *Mosey v County of Erie*, 117 AD3d 1381, 1385 [4th Dept 2014]; *Trisvan v County of Monroe*, 26 AD3d 875, 876 [4th Dept 2006],

lv dismissed 6 NY3d 891 [2006]). Inasmuch as the County did not assume such responsibility by local law, the first cause of action cannot be sustained on any allegations seeking to hold the County vicariously liable for the negligent acts of the Sheriff and their deputies (see *D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 959 [4th Dept 2014]; *Trisvan*, 26 AD3d at 876; *Smelts v Meloni* [appeal No. 3], 306 AD2d 872, 873-874 [4th Dept 2003], *lv denied* 100 NY2d 516 [2003]).

Nonetheless, the County has a duty "to maintain a county jail as prescribed by law" (County Law § 217; see generally *Matter of County of Cayuga v McHugh*, 4 NY2d 609, 613, 615-616 [1958]), which "is distinguishable from [the] Sheriff's duty to 'receive and safely keep' prisoners in the jail" (*Freeland*, 122 AD3d at 1350; see Correction Law § 500-c [4]; *Aviles v County of Orange*, 204 AD3d 740, 741 [2d Dept 2022]). We conclude that plaintiffs have each adequately pleaded under the first cause of action that the County's violations of that duty proximately caused their injuries inasmuch as plaintiffs allege, among other things, that the County was negligent in failing to take reasonable measures to maintain the jail in a reasonably safe condition to protect inmates from sexual assault, i.e., that the County did not fulfill its "responsibility to install, set up, and maintain its premises and facilities such that a correctional officer, personnel, or other staff could not sexually abuse an inmate . . . without being detected, recorded, and/or seen" (see *Aviles*, 204 AD3d at 741; *Freeland*, 122 AD3d at 1350).

Relatedly, the courts have recognized that a county owes a duty of care, also separate from the duty of the Sheriff, "to provid[e] reasonable care to protect prisoners from risks of harm that are reasonably foreseeable, i.e., those that the [c]ounty knew or should have known" (*Iannelli v County of Nassau*, 156 AD3d 767, 768 [2d Dept 2017]; see *Villar v County of Erie*, 126 AD3d 1295, 1296 [4th Dept 2015]; *Smith v County of Albany*, 12 AD3d 912, 913 [3d Dept 2004]; see generally *Weisbrod-Moore*, – NY3d at –, 2025 NY Slip Op 00903, *1; *Sanchez*, 99 NY2d at 252-253). Here, accepting the facts as alleged in the complaints as true and according plaintiffs the benefit of every favorable inference (see *Connaughton*, 29 NY3d at 141), we conclude that, irrespective of whether plaintiffs can ultimately establish the County's liability for its own negligence independent of the acts or omissions of the Sheriff and their deputies under the circumstances of these cases, plaintiffs have adequately pleaded facts in support of the claim that the County failed to protect plaintiffs from the risk of sexual assault at the jail that was reasonably foreseeable to the County (see *Villar*, 126 AD3d at 1296; cf. *Schulik v County of Monroe*, 202 AD2d 960, 961 [4th Dept 1994]; see generally *Iannelli*, 156 AD3d at 768-769; *Smith*, 12 AD3d at 913-914). Next, inasmuch as the County's challenge in each appeal to the viability of the seventh cause of action is based entirely on the faulty assertion that the County owes no duty whatsoever to protect jail prisoners from foreseeable harm, we reject the County's contention that the court erred in denying the motion insofar as it sought to dismiss the seventh cause of action against the County.

The County further contends in appeal No. 1 that the court erred in denying the motion insofar as it sought to dismiss the second, third, fourth, fifth, and sixth causes of action against the County. We reject that contention. "The duty to supervise and train Sheriff's deputies rests with the Sheriff" and "the [c]ounty has no similar duty" (*Metcalf v County of Erie*, 173 AD3d 1799, 1800 [4th Dept 2019]). Nonetheless, "[a]llthough a 'county may not be held responsible for the negligent acts of the Sheriff and [their] deputies on the theory of respondeat superior,' . . . a county may be vicariously liable for the negligent acts of the [S]heriff's civilian employees given the general rule that a [S]heriff's office does not exist separately from its corresponding county" (*Abate*, 195 AD3d at 1532 [emphasis added]). Here, accepting the facts as alleged in the complaint in appeal No. 1 as true and according the plaintiff the benefit of every favorable inference (see *Connaughton*, 29 NY3d at 141), we conclude that the court properly determined that, notwithstanding the County's reliance on a single reference in the complaint that the assailant "was a correctional officer," the remaining allegations in the complaint, including that the assailant—whose identity was allegedly within the exclusive knowledge of the County—"worked as a doctor/optometrist" at the jail, did not foreclose the possibility that the assailant was a civilian employee for whose conduct the County could be vicariously liable (see *Abate*, 195 AD3d at 1532).

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

816.1

CA 24-01193

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

KATHLEEN GUMKOWSKI, AS ADMINISTRATOR OF
THE ESTATE OF GREGORY GUMKOWSKI, DECEASED,
AND KATHLEEN GUMKOWSKI, INDIVIDUALLY,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS SCHWAAB, M.D., ET AL., DEFENDANTS,
TOWN OF TONAWANDA, TOWN OF TONAWANDA EMS,
TOWN OF TONAWANDA POLICE DEPARTMENT,
KRISTIAN RUTENKROGER, DAVID RICE, KENMORE MERCY
HOSPITAL, CATHOLIC HEALTH SYSTEM, INC., AND
ERIK DIRINGER, D.O., DEFENDANTS-APPELLANTS.

WALSH ROBERTS & GRACE LLP, BUFFALO (ROBERT P. GOODWIN OF COUNSEL), FOR
DEFENDANTS-APPELLANTS TOWN OF TONAWANDA, TOWN OF TONAWANDA EMS, TOWN
OF TONAWANDA POLICE DEPARTMENT, KRISTIAN RUTENKROGER, AND DAVID RICE.

BARGNESI BRITT PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR
DEFENDANTS-APPELLANTS KENMORE MERCY HOSPITAL, CATHOLIC HEALTH SYSTEM,
INC., AND ERIK DIRINGER, D.O.

THE DEMPSEY FIRM PLLC, BUFFALO (CATHERINE B. DEMPSEY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (John B. Licata, J.), entered July 25, 2024, in a medical malpractice action. The order, insofar as appealed from, denied the motions of defendants Town of Tonawanda, Town of Tonawanda EMS, Town of Tonawanda Police Department, Kristian Rutenkroger, David Rice, Kenmore Mercy Hospital, Catholic Health System, Inc. and Erik Diringer, D.O., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants the Town of Tonawanda, Town of Tonawanda EMS, Town of Tonawanda Police Department, Kristian Rutenkroger, and David Rice and dismissing the complaint and all cross-claims against those defendants, and granting in part the motion of defendants Kenmore Mercy Hospital, Catholic Health System, Inc., and Erik Diringer, D.O., and dismissing plaintiff's claim that defendant Erik Diringer, M.D., was negligent for failing to transfer decedent to a tertiary care facility, and as modified the order is affirmed without costs.

Memorandum: In this medical malpractice action, defendants Thomas Schwaab, M.D., Meghan Kurtz, P.A., and Christine Pieri, R.N. (collectively, Roswell Park defendants) appeal, in appeal No. 1, from an order to the extent that it denied that part of their motion seeking summary judgment dismissing the complaint and cross-claims against them. In appeal No. 2, defendants Town of Tonawanda, Town of Tonawanda EMS, Town of Tonawanda Police Department, Kristian Rutenkroger, and David Rice (collectively, the Town defendants) moved for summary judgment dismissing the complaint and cross-claims against them, and they appeal from the same order insofar as it, inter alia, denied their motion, and defendants Kenmore Mercy Hospital, Catholic Health System, Inc., and Erik Diringer, D.O. (collectively, the Catholic Health defendants) appeal, as limited by their brief, from that part of the same order denying their motion insofar as it sought summary judgment dismissing the complaint against Diringer.

Decedent presented to nonparty Roswell Park Cancer Institute (Roswell Park) on January 4, 2016, for a scheduled retroperitoneal lymph node dissection performed by Schwaab. Following surgery, decedent remained an inpatient at Roswell Park through his discharge on January 11, 2016; during that admission, decedent repeatedly indicated that he was tired, his breathing was uncomfortable, and he had discomfort in his low back.

Following his discharge, decedent called Roswell Park on several occasions, including a call to Pieri on January 13, 2016, wherein decedent reported shallow breathing and lightheadedness. A few hours later, decedent called 911 with a chief complaint of shortness of breath. Rutenkroger and Rice, paramedics employed by the Town of Tonawanda, arrived at the decedent's residence, took his vital signs, and assessed his condition. Given decedent's history of anxiety and the absence of any other clinical indications of respiratory distress, the paramedics concluded that decedent's shortness of breath was caused by anxiety. According to plaintiff's deposition testimony, decedent and the paramedics made "a joint decision" that decedent would not be taken to the emergency room that day, and decedent signed a treatment refusal acknowledgment.

At approximately 11 a.m. on the morning of January 15, 2016, decedent told plaintiff that he felt like he was dying and was unable to breathe. Decedent again called 911, and he was transported by ambulance to Kenmore Mercy Hospital, arriving in the emergency room at 12:07 p.m. He was ultimately transferred to the ICU under Diringer's care at 3:15 p.m. Decedent went into cardiac arrest at approximately 5 p.m. as Diringer was preparing to place a central line in preparation for surgery; decedent was ultimately pronounced dead at 5:31 p.m., as a result of hemorrhagic shock.

Contrary to the Roswell Park defendants' contentions in appeal No. 1, Supreme Court properly denied that part of their motion for summary judgment dismissing the complaint and cross-claims against them. It is well settled that a defendant moving for summary judgment in a medical malpractice action bears "the initial burden of establishing either that there was no deviation or departure from the

applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Zielinski v Blessios*, 227 AD3d 1385, 1386 [4th Dept 2024] [internal quotation marks omitted]; see *Kristie M. v Mercy Hosp. of Buffalo*, 240 AD3d 1228, 1229 [4th Dept 2025]; *McMahon-DeCarlo v Wickline*, 224 AD3d 1388, 1388-1389 [4th Dept 2024]). To meet that burden, the defendant must submit an expert affidavit "that address[es] each of the specific . . . claims of negligence raised in [the] plaintiff's bill of particulars" (*Bubar v Brodman*, 177 AD3d 1358, 1360 [4th Dept 2019] [internal quotation marks omitted]; see *Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011]).

Here, even assuming, arguendo, that the Roswell Park defendants' expert laid an appropriate foundation for his opinion, the expert failed to address each of the claims of negligence on the part of the Roswell Park defendants raised in the amended bills of particulars, and thus the expert's affidavit "is insufficient to support a motion for summary judgment as a matter of law" (*Wulbrecht*, 89 AD3d at 1471 [internal quotation marks omitted]), requiring the denial of the motion "regardless of the sufficiency of plaintiff's opposing papers" (*James v Wormuth*, 74 AD3d 1895, 1895 [4th Dept 2010]).

With respect to appeal No. 2, we agree with the Town defendants that they are entitled to governmental function immunity and the court therefore erred in denying their motion for summary judgment dismissing the complaint and cross-claims against them. "A municipality is immune from liability where the actions of its employees in performing governmental functions involve[] the exercise of discretion" (*Morales v City of New York*, 235 AD3d 595, 597 [1st Dept 2025]; see *McLean v City of New York*, 12 NY3d 194, 202-203 [2009]). "[A]mbulance assistance rendered by first responders . . . should be viewed as a classic governmental, rather than proprietary, function" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 430 [2013] [internal quotation marks omitted]).

"[D]iscretionary . . . acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v Tulevech*, 61 NY2d 34, 41 [1983]). As the First Department recently made clear, "a generally uniform approach in assessment and care does not change the discretionary nature" of a first responder's actions or the governmental function they provide (*Morales*, 235 AD3d at 597). Under the circumstances presented here, we conclude that the Town defendants established that Rutenkroger's and Rice's actions were discretionary and, thus, the Town defendants are entitled to governmental function immunity. Indeed, plaintiff's contentions pertain "to the quality of the care rendered by [Rutenkroger and Rice and,] even if such decisions prove to be erroneous, they do not cast the [Town] in damages" (*id.* at 597 [internal quotation marks omitted]; see *Kinsey v City of New York*, 141 AD3d 420, 421 [1st Dept 2016], *lv denied* 28 NY3d 907 [2016]). We further note that, "[b]ecause the actions of the [Town's employees] were discretionary, this Court need not address the issue of whether a special duty was owed to [decedent]" (*Walker-Rodriguez v City of New York*, 231 AD3d 1090, 1094 [2d Dept 2024]).

[internal quotation marks omitted]).

With respect to plaintiff's claims arising from the care and treatment rendered by defendant Diringer, we agree with the Catholic Health defendants in appeal No. 2 that they met their initial burden in support of their motion, including by addressing plaintiff's claim regarding Diringer's alleged failure to timely transfer the decedent to a tertiary care facility. Insofar as "plaintiff's expert failed to address th[at] legal theor[y] in opposition to the motion," the Catholic Health defendants were entitled to partial summary judgment on that theory of liability (*Van Hook v Doak*, 227 AD3d 1537, 1540 [4th Dept 2024]). Contrary to the Catholic Health defendants' further contentions, however, we conclude that plaintiff raised triable issues of fact with respect to the remaining theories of liability based upon the care and treatment rendered by Diringer.

We therefore modify the order by granting the motion of the Town defendants and dismissing the complaint and cross-claims against them, and by granting in part the motion of the Catholic Health defendants and dismissing plaintiff's claim that defendant Erik Diringer, M.D., was negligent for failing to transfer decedent to a tertiary care facility.

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

816

CA 25-00388

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

KATHLEEN GUMKOWSKI, AS ADMINISTRATOR OF
THE ESTATE OF GREGORY GUMKOWSKI, DECEASED,
AND KATHLEEN GUMKOWSKI, INDIVIDUALLY,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS SCHWAAB, M.D., MEGHAN KURTZ, P.A.,
CHRISTINE PIERI, R.N., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

THE DEMPSEY FIRM PLLC, BUFFALO (CATHERINE B. DEMPSEY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered July 25, 2024, in a medical malpractice action. The order, insofar as appealed from, denied that part of the motion of defendants Thomas Schwaab, M.D., Meghan Kurtz, P.A., and Christine Pieri, R.N. for summary judgment dismissing the complaint and cross-claims against them.

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

Same memorandum as in *Gumkowski v Schwaab* ([appeal No. 2] – AD3d – [Dec. 23, 2025] [4th Dept 2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

817

CA 24-00788

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

CHRISTINE PLATT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

COUNTY OF MONROE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ALISSA M. BRENNAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SLATER SLATER SCHULMAN, LLP, MELVILLE (NIRAJ JAYANT PAREKH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Joseph D. Waldorf, J.), entered April 19, 2024, in an action pursuant to the Adult Survivors Act. The order, insofar as appealed from, denied that part of the motion of defendants to dismiss plaintiff's first and seventh causes of action against defendant County of Monroe.

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

Same memorandum as in *Wade v County of Monroe* ([appeal No. 1] – AD3d – [Dec. 23, 2025] [4th Dept 2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

818

CA 24-00789

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

DENISE KILLEEN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

COUNTY OF MONROE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 3.)

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ALISSA M. BRENNAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SLATER SLATER SCHULMAN, LLP, MELVILLE (NIRAJ JAYANT PAREKH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Joseph D. Waldorf, J.), entered April 19, 2024, in an action pursuant to the Adult Survivors Act. The order, insofar as appealed from, denied that part of the motion of defendants to dismiss plaintiff's first and seventh causes of action against defendant County of Monroe.

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

Same memorandum as in *Wade v County of Monroe* ([appeal No. 1] – AD3d – [Dec. 23, 2025] [4th Dept 2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

819

CA 24-00790

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

JYNASIA BECOATS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

COUNTY OF MONROE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 4.)

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ALISSA M. BRENNAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SLATER SLATER SCHULMAN, LLP, MELVILLE (NIRAJ JAYANT PAREKH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Joseph D. Waldorf, J.), entered April 19, 2024, in an action pursuant to the Adult Survivors Act. The order, insofar as appealed from, denied that part of the motion of defendants to dismiss plaintiff's first and seventh causes of action against defendant County of Monroe.

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

Same memorandum as in *Wade v County of Monroe* ([appeal No. 1] – AD3d – [Dec. 23, 2025] [4th Dept 2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

820

CA 24-00791

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

MICHELLE FAIRMAN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

COUNTY OF MONROE, DEFENDANT-APPELLANT
ET AL., DEFENDANT.
(APPEAL NO. 5.)

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ALISSA M. BRENNAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SLATER SLATER SCHULMAN, LLP, MELVILLE (NARAJ JAYANT PAREKH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Joseph D. Waldorf, J.), entered April 19, 2024, in an action pursuant to the Adult Survivors Act. The order, insofar as appealed from, denied that part of the motion of defendants to dismiss plaintiff's first and seventh causes of action against defendant County of Monroe.

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

Same memorandum as in *Wade v County of Monroe* ([appeal No. 1] – AD3d – [Dec. 23, 2025] [4th Dept 2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

830

TP 25-00639

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

IN THE MATTER OF SARAH BLAIR, PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY
SERVICES, NEW YORK STATE CENTRAL REGISTER OF
CHILD ABUSE AND MALTREATMENT AND ERIE COUNTY
DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL RAIMONDI OF COUNSEL),
FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Emilio Colaiacovo, J.], entered April 15, 2025) to review a determination of respondents. The determination found that the indicated report of maltreatment against petitioner maintained in the New York State Central Register of Child Abuse and Maltreatment is relevant and reasonably related to her employment in childcare.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination following a fair hearing finding that the indicated report of maltreatment against her is relevant and reasonably related to her employment in childcare (see Social Services Law § 422 [8] [c] [ii]). Contrary to petitioner's contention, we conclude on the record before us that the determination that petitioner's acts of maltreatment were relevant and reasonably related to childcare is supported by substantial evidence (see *Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492, 1494 [4th Dept 2016]; *Matter of Garzon v New York State Off. of Children & Family Servs.*, 85 AD3d 1603, 1604 [4th Dept 2011]). We have considered petitioner's remaining contentions and conclude that they lack merit.

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

831

CA 24-01438

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

VINCENTO DEPALMA AND JEANNINE DEPALMA,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

WESTERN NEW YORK UROLOGY ASSOCIATES AND
BRIAN D. RAMBARRAN, M.D., DEFENDANTS-RESPONDENTS.

VANDETTE LAW PLLC, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Kelly A. Vacco, J.), entered February 16, 2024. The judgment dismissed plaintiffs' complaint upon a jury verdict in favor of defendants.

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

Memorandum: In this medical malpractice action, plaintiffs appeal from a judgment dismissing the complaint upon a jury verdict rendered in favor of defendants. We affirm.

We reject plaintiffs' contention that the verdict is against the weight of the evidence (*see generally McClain v Lockport Mem. Hosp.*, 236 AD2d 864, 865 [4th Dept 1997], *lv denied* 89 NY2d 817 [1997]). 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]). It cannot be said that the evidence so preponderated in favor of plaintiffs that the verdict could not be reached upon any fair interpretation of the evidence (*see Peevey v Unity Health Sys.*, 196 AD3d 1139, 1141 [4th Dept 2021]; *Root v DiRaddo*, 302 AD2d 987, 988 [4th Dept 2003], *lv denied* 100 NY2d 504 [2003]). Contrary to plaintiffs' further contention, Supreme Court did not abuse its discretion in refusing to admit in evidence a photograph offered by plaintiffs (*see Graney v Ryan*, 19 AD3d 1172, 1172-1173 [4th Dept 2005]). Additionally, plaintiffs failed to preserve their contention with respect to the jury's receipt and use of revised verdict sheets (*see Schmidt v Buffalo Gen. Hosp.*, 278 AD2d 827, 828 [4th Dept 2000], *lv denied* 96 NY2d 710 [2001]). We also reject plaintiffs' contention that the jury's receipt and use of

revised verdict sheets is a fundamental error that warrants reversal despite the alleged lack of preservation (*see id.*; *see generally Breitung v Canzano*, 238 AD2d 901, 902 [4th Dept 1997]). Nothing in this record indicates that the jury was confused or prevented from fairly considering the issues (*see Aguilar v New York City Tr. Auth.*, 81 AD3d 509, 510 [1st Dept 2011]; *Klein-Bullock v North Shore Univ. Hosp. at Forest Hills*, 63 AD3d 536, 537 [1st Dept 2009]; *cf. Breitung*, 238 AD2d at 902).

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

832

CA 24-01825

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

SCOTT MILLER BEAUTY SALON, INC.,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

HAMILTON STERN CONSTRUCTION, LLC,
ET AL., DEFENDANTS.

HAMILTON STERN CONSTRUCTION, LLC,
THIRD-PARTY PLAINTIFF-RESPONDENT,

V

ES SYSTEMS, INC., THIRD-PARTY DEFENDANT-APPELLANT,
ET AL., THIRD-PARTY DEFENDANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR
THIRD-PARTY DEFENDANT-APPELLANT.

VAHEY LAW OFFICES, PLLC, ROCHESTER (LAURIE A. VAHEY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

PILLINGER MILLER TARALLO, LLP, SYRACUSE (MARIA T. MASTRIANO OF
COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered October 31, 2024. The order, insofar as appealed from, denied the motion of third-party defendant ES Systems, Inc. for summary judgment dismissing the third-party complaint against it.

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

Memorandum: Plaintiff contracted with defendant-third-party plaintiff, Hamilton Stern Construction, LLC (Hamilton), to serve as the general contractor for an expansion project at its salon, and Hamilton, in turn, subcontracted with third-party defendant ES Systems, Inc. (ES Systems) for plumbing work. Plaintiff commenced this action asserting, as relevant to this appeal, causes of action against Hamilton for breach of express and implied warranty and breach of contract based upon allegedly defective plumbing work, and Hamilton thereafter commenced the third-party action against, among others, ES

Systems asserting causes of action for common-law and contractual indemnification, contribution, and failure to procure insurance. ES Systems appeals from that part of an order that denied its motion for summary judgment dismissing the third-party complaint against it. We affirm.

Contrary to ES Systems's contention, viewing the evidence in the light most favorable to plaintiff and Hamilton and giving them the benefit of every reasonable inference, as we must in the context of ES Systems's motion (see *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that ES Systems's own submissions raise triable issues of fact whether the plumbing work that it performed was defective (see *Scutella v Dill*, 240 AD3d 1318, 1319 [4th Dept 2025]; *McLaren v Mid-Town Athletic Club, LLC*, 195 AD3d 1539, 1540 [4th Dept 2021]). Inasmuch as ES Systems did not meet its initial burden on the motion, the burden never shifted to plaintiff or Hamilton to submit evidence that ES Systems's plumbing work was defective, and denial of the motion was required regardless of the sufficiency of the opposing papers (see *Scutella*, 240 AD3d at 1319; *Walker v Town of Webster*, 197 AD3d 942, 943 [4th Dept 2021]; see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Contrary to ES Systems's further contention, section 12.2.2.1 of the contract between plaintiff and Hamilton, from AIA Document A201 2007 General Conditions of the Contract for Construction, was an optional specific performance provision under which plaintiff could demand Hamilton to correct defects discovered within one year of substantial completion on the project and was not a condition precedent to the present action (see *Board of Educ. of the Marlboro Cent. Sch. Dist. v Piazza Bros., Inc.*, 107 AD3d 1089, 1090 [3d Dept 2013]; cf. *Rifenburg Constr., Inc. v State of New York*, 90 AD3d 1498, 1498 [4th Dept 2011]).

In light of our determination, we do not reach the parties' remaining contentions.

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

834

CA 24-01535

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

ETERNAL BEVERAGES, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MAYER BROS. APPLE PRODUCTS, INC.,
DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

LIPPES MATHIAS LLP, BUFFALO (SEAN M. O'BRIEN OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 11, 2024. The order, insofar as appealed from, denied in part the motion of defendant for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendant's motion seeking summary judgment with respect to liability on the first counterclaim, and as modified the order is affirmed without costs.

Memorandum: This action arises out of agreements by the parties pertaining to a longstanding business arrangement. Under that arrangement, defendant, an apple cider and bottled water processor, agreed to bottle spring water for plaintiff, who thereafter sold the bottled water to consumers. Defendant produced several different sizes of water bottles for plaintiff, including bottles sized at 600 milliliters, 1 liter, and 1.5 liters. In 2019, the parties discussed whether defendant would produce for plaintiff a new, 2.5-liter sized, bottle. After some back and forth on the specifics, the parties made an arrangement with respect to the production of the 2.5-liter bottles. Several months later, however, defendant ceased producing the 2.5-liter bottles. The bottles had allegedly become cost-prohibitive in light of quality issues in their production.

Subsequently, in November 2020, defendant notified plaintiff by letter that it was increasing the prices for bottling the other sizes of water bottles. Plaintiff continued to place purchase orders with defendant at the increased price levels, and—for a time—paid the resulting invoices from defendant. Plaintiff never objected to the new price increases. In December 2021, plaintiff stopped paying invoices from defendant entirely. Indeed, plaintiff did not pay

invoices sent by defendant dated from December 2021 to April 2022.

Plaintiff subsequently commenced this action alleging, inter alia, that defendant breached an agreement to perform certain agreed-upon bottling services in an acceptable fashion, i.e., its failure to continue producing the 2.5-liter bottles. Defendant answered, and interposed counterclaims for breach of contract and unjust enrichment with respect to the unpaid invoices pertaining to the bottling of the other sizes of water bottles. Plaintiff moved for summary judgment on its breach of contract cause of action and sought dismissal of defendant's counterclaims. Defendant opposed plaintiff's motion and, separately, moved for partial summary judgment dismissing, inter alia, plaintiff's breach of contract cause of action, and for judgment on its counterclaims. Defendant appeals from an order insofar as it denied those parts of its motion for partial summary judgment seeking dismissal of the first cause of action and for judgment on its counterclaims.

We agree with defendant that Supreme Court erred in denying that part of its motion for partial summary judgment on its first counterclaim, for breach of contract as it pertained to the agreement to bottle water at sizes other than 2.5 liters. "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 *Bridge Funding Cap LLC v SimonExpress Pizza, LLC* [appeal No. 2], 240 AD3d 1186, 1189 [4th Dept 2025]; *Pearl St. Parking Assoc. LLC v County of Erie*, 207 AD3d 1029, 1031 [4th Dept 2022]).

Here, defendant met its initial burden on the motion of establishing that plaintiff breached the parties' agreement with respect to the bottled water at the 600-milliliter, 1-liter, and 1.5-liter sizes when plaintiff failed to pay invoices sent by defendant starting in December 2021 pursuant to the purchase orders issued by plaintiff. Specifically, we conclude that the November 2020 letter that contained the price increases for the aforementioned bottles constituted a proposal that plaintiff accepted—resulting in a valid contract—when it issued purchase orders in response to the letter, paid the resulting invoices for a period of over a year, and did not object to the terms of the November 2020 letter containing the price increases (see *Please Me, LLC v State of New York*, 215 AD3d 1149, 1151 [3d Dept 2023]; see generally UCC 2-201 [2]; 2-204 [1]; 2-207 [3]). We further conclude that, in opposition, plaintiff failed to raise an issue of fact that would warrant denial of the motion with respect to liability under the first counterclaim (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiff did not submit any evidence to show that it did not issue purchase orders under the new prices set by the November 2020 letter, nor did plaintiff dispute that it paid defendant's invoices at the increased price for over a year. Rather, plaintiff seemingly argues that the motion should be denied because there are issues of fact whether it was under duress at the time defendant increased its prices that would vitiate its obligation

to pay the unpaid invoices. To the contrary, we conclude that plaintiff's failure to repudiate the agreement—i.e., by not promptly objecting to the price increases before issuing its purchase orders and paying the resulting invoices—renders any reliance on a duress defense unavailable here (see *Livathinos v Vaughan*, 121 AD3d 485, 486 [1st Dept 2014]; *C & H Engrs. v Klagester, Inc.*, 262 AD2d 984, 985 [4th Dept 1999]). We therefore modify the order by granting that part of defendant's motion for partial summary judgment with respect to liability on the first counterclaim. Contrary to defendant's contention, however, issues of fact remain with respect to the amount of damages owed to defendant on the first counterclaim, and therefore the court properly denied that part of defendant's motion (see generally *Zuckerman*, 49 NY2d at 562).

We reject defendant's contention that the court erred in denying its motion to the extent it sought summary judgment dismissing plaintiff's breach of contract cause of action. Even assuming, arguendo, that defendant met its initial burden on the motion, plaintiff's submissions raised questions of fact with respect to whether the parties had an agreement to produce the 2.5-liter bottles, and with respect to which party was responsible for the breach of any such agreement (see generally *Bridge Funding Cap LLC*, 240 AD3d at 1189-1190). More specifically, there remain factual disputes over the length of the parties' agreement with respect to defendant's production of the 2.5-liter bottles, i.e., whether or not the parties agreed to produce the 2.5-liter bottles for merely a short period of time as a trial run, and with respect to which party was responsible for the decision to cease production of the 2.5-liter bottles and which party was responsible for the lack of success in producing the 2.5-liter bottles during the time defendant was producing them.

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

846

KA 20-00054

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSHUA HOBES, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, 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 (Sheila A. DiTullio, J.), rendered December 4, 2019. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (four counts) and attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of four counts of burglary in the second degree (Penal Law § 140.25 [2]) and one count of attempted burglary in the second degree (§§ 110.00, 140.25 [2]). We affirm.

Defendant contends that he was arrested without probable cause and thus that County Court should have granted that part of his motion seeking suppression of any statements he made to the police following his arrest. "A guilty plea generally results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings" (*People v Fernandez*, 67 NY2d 686, 688 [1986]). Although "CPL 710.70 (2) carves out a limited exception providing that an order finally denying a motion to suppress evidence may be reviewed on appeal from a final judgment of conviction, even one entered upon a guilty plea," that exception does not apply where a defendant pleads guilty "before obtaining such an order" (*id.*; see *People v Powless*, 66 AD3d 1353, 1353 [4th Dept 2009], *lv denied* 14 NY3d 843 [2010]). We thus conclude that defendant forfeited the right to appellate review of the suppression issue by pleading guilty before the court issued an order finally denying that part of defendant's motion seeking to suppress evidence (see *Fernandez*, 67 NY2d at 688; *People v Kates*, 162 AD3d 1627, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019], *cert denied* – US –, 141 S Ct 117 [2020]; *Powless*, 66 AD3d at 1353).

Defendant's further contention that he was denied effective assistance of counsel survives his guilty plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney[s'] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; see *People v Seymore*, 188 AD3d 1767, 1769 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). To the extent that defendant contends that he was denied effective assistance of counsel on the grounds that defense counsel failed to investigate and that his former attorney failed to effectuate defendant's intent to testify before the grand jury, that contention largely concerns matters outside the record. Thus, it is not reviewable on direct appeal and must be raised in a motion pursuant to CPL article 440 (see *People v Castro*, 207 AD3d 1027, 1028 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]; *People v Irvine*, 197 AD3d 988, 991 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]). To the extent that defendant's contention survives his plea and is reviewable on direct appeal, we conclude that it lacks merit inasmuch as defendant "received an advantageous plea, and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]; see *Seymore*, 188 AD3d at 1769). "[A] '[d]efense counsel's failure to timely facilitate [a] defendant's intention to testify before the [g]rand [j]ury does not, per se, amount to a denial of effective assistance of counsel' " (*People v Hogan*, 26 NY3d 779, 787 [2016]). On this record, defendant has not demonstrated the absence of strategic or other legitimate explanations for his former attorney's alleged failure and has not established—as required to succeed on that particular ineffective assistance of counsel claim—that he was prejudiced by that purported failure or that the outcome would have been different if he had testified (see *People v Williams*, 235 AD3d 1245, 1246 [4th Dept 2025], *lv denied* 43 NY3d 1059 [2025]; *People v Hernandez*, 192 AD3d 1528, 1529-1530 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]; see generally *Hogan*, 26 NY3d at 785-787). Moreover, to the extent that defendant contends otherwise, we conclude that the record establishes that defense counsel engaged in effective cross-examination of the People's witnesses at the suppression hearing by raising the potential inconsistency between the description of the suspect's race in the initial reports to the police and defendant's race (see *People v Dogan*, 181 AD3d 1343, 1344 [4th Dept 2020], *affd* 37 NY3d 1007 [2021]; *People v Parson*, 27 NY3d 1107, 1108 [2016]).

Defendant also contends that the plea allocution was factually insufficient because he gave only monosyllabic responses to the court's questions. As defendant correctly concedes, he failed to preserve that contention for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (see *People v Davilla*, 202 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]; *People v Pryce*, 148 AD3d 1625, 1625-1626 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]). Contrary to defendant's assertion, this case does not fall within the rare exception to the preservation

requirement (see *People v Lopez*, 71 NY2d 662, 666-667 [1988]; *Davilla*, 202 AD3d at 1453; *Pryce*, 148 AD3d at 1626). In any event, we conclude that defendant's contention lacks merit inasmuch as his monosyllabic responses to the court's questions did not render the plea invalid (see *Davilla*, 202 AD3d at 1453; *Pryce*, 148 AD3d at 1626). "[T]here is no requirement that a defendant personally recite the facts underlying [the] crime[s] during the plea colloquy," and the record here establishes that defendant "confirmed the accuracy of [the court's] recitation of the facts underlying the crime[s]" (*Pryce*, 148 AD3d at 1626 [internal quotation marks omitted]; see *People v Coston*, 208 AD3d 1601, 1602 [4th Dept 2022], *lv denied* 39 NY3d 1071 [2023]).

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

849

CAF 24-01421

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

IN THE MATTER OF PHILLIP M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

PHILLIP M., RESPONDENT-APPELLANT.

MINDY L. MARRANCA, BUFFALO, FOR RESPONDENT-APPELLANT.

AMY INZINA, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Shannon E. Filbert, J.), entered June 25, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, temporarily removed the subject child from respondent's care.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, temporarily removed the subject child and placed the child in the custody of a relative during the pendency of the neglect proceeding against the father. While this appeal was pending, Family Court entered a superseding permanency order, and the father's appeal from the temporary order must therefore be dismissed as moot (see *Matter of Zyion B. [Fredisha B.]*, 224 AD3d 1285, 1285-1286 [4th Dept 2024]; *Matter of Nyjeem D. [John D.]*, 174 AD3d 1424, 1425 [4th Dept 2019], lv denied 34 NY3d 911 [2020]; see also *Matter of Breeyanna S.*, 45 AD3d 498, 498 [1st Dept 2007], lv denied 10 NY3d 706 [2008]). We note that, "[i]nasmuch as a temporary order is not a finding of wrongdoing, the exception to the mootness doctrine does not apply" (*Matter of Faith B. [Rochelle C.]*, 158 AD3d 1282, 1282-1283 [4th Dept 2018], lv denied 31 NY3d 910 [2018] [internal quotation marks omitted]; see *Matter of Destiny F. [Takara E.]*, 210 AD3d 1399, 1400 [4th Dept 2022]; *Matter of Nickolas B. [Katherine F.L.]*, 167 AD3d 1538, 1539 [4th Dept 2018]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

853

CA 24-00981

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

AKEED, INC., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JOHN BARCOMB, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

DUKE, HOLZMAN, PHOTIADIS & RITTER LLP, BUFFALO (NICOLE K. JOERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET P.C., WILLIAMSVILLE (ALAN J. BEDENKO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered June 17, 2024. The order granted the motion of defendant John Barcomb for summary judgment dismissing the complaint against him and denied the motion of plaintiff for partial summary judgment against defendant John Barcomb.

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

Memorandum: Plaintiff commenced this action seeking to recover for damages to a residential property it owned caused by a fire that was allegedly started by a cigarette smoked by John Barcomb (defendant), one of its tenants. Plaintiff asserted a cause of action for negligence and a cause of action for common-law and contractual indemnification. Defendant moved for summary judgment dismissing the complaint against him, and plaintiff moved for partial summary judgment on liability based on defendant's alleged negligence in causing the fire. Supreme Court granted defendant's motion and denied plaintiff's motion. We affirm.

We reject plaintiff's contention that the court erred in granting defendant's motion and denying plaintiff's motion with respect to the negligence cause of action. "In a premises liability case, a defendant can establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of [the] injury without engaging in speculation" (*Cameron v Palmeri*, 230 AD3d 1100, 1101 [2d Dept 2024] [internal quotation marks omitted]; see *Smart v Zambito*, 85 AD3d 1721, 1721-1722 [4th Dept 2011]; *McGill v United Parcel Serv., Inc.*, 53 AD3d 1077, 1077 [4th Dept 2008]).

We conclude that defendant met his initial burden of establishing that none of his acts or omissions was a proximate cause of the fire (see *Utica First Ins. Co. v Infinity Mech. & Heating, Inc.*, 124 AD3d 630, 630-631 [2d Dept 2015]; *92 Ct. St. Holding Corp., LLC v Monnet*, 106 AD3d 1404, 1405 [3d Dept 2013]; *Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130 [4th Dept 2006]). Defendant submitted his own deposition testimony that the fire started outside his bedroom after he went to sleep, and he submitted the fire investigation report, which determined that the cause of the fire was undetermined (see *Cameron*, 230 AD3d at 1101; *Cataract Metal Finishing, Inc.*, 31 AD3d at 1130; *New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.*, 280 AD2d 652, 653 [2d Dept 2001]).

In opposition to defendant's motion, plaintiff failed to raise a triable issue of fact regarding whether defendant's conduct proximately caused the fire (see *Utica First Ins. Co.*, 124 AD3d at 631). Plaintiff did not submit the testimony or report of any expert regarding the cause of the fire (see *92 Ct. St. Holding Corp., LLC*, 106 AD3d at 1406; cf. *Cameron*, 230 AD3d at 1101-1102; *Rand v Finger Lakes Premier Props., Inc.*, 198 AD3d 1340, 1341 [4th Dept 2021]). Instead, plaintiff relied merely on speculation that the cigarette defendant was smoking before going to bed was the cause of the fire (see *Tower Ins. Co. of N.Y. v M.B.G. Inc.*, 288 AD2d 69, 69 [1st Dept 2001]).

Contrary to plaintiff's contention, the doctrine of *res ipsa loquitur* does not apply and thus, for that reason and for the reasons set forth above, the court properly denied its motion. "To establish an inference of negligence pursuant to *res ipsa loquitur*, (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Greater Binghamton Dev., LLC v Stellar 83 Ct., LLC*, 173 AD3d 1512, 1512 [3d Dept 2019] [internal quotation marks omitted]; see *Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). "Only when these essential elements have been established, after the plaintiff has first demonstrated the nature of the instrumentality which caused the injury and its connection with the defendant . . . , does a *prima facie* case of negligence exist" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 227 [1986]). Although plaintiff is not required to eliminate every alternative explanation for the event, "it was required to demonstrate that the probability of other causes was so reduced that defendant['s] negligence was more likely than . . . the others" (*Greater Binghamton Dev., LLC*, 173 AD3d at 1513 [internal quotation marks omitted]; see *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-495 [1997]; *92 Ct. St. Holding Corp., LLC*, 106 AD3d at 1407).

Here, inasmuch as the cause of the fire was unknown, it cannot be said that the fire could not occur in the absence of negligence (see *Utica First Ins. Co.*, 124 AD3d at 631; *92 Ct. St. Holding Corp., LLC*, 106 AD3d at 1406-1407). It also cannot be said that defendant had

exclusive control of the instrumentality that caused the fire (see *Greater Binghamton Dev., LLC*, 173 AD3d at 1513; *Archer v Suburban Propane Gas Co.*, 69 AD2d 993, 993 [4th Dept 1979]).

We reject plaintiff's further contention that the court erred in granting defendant's motion with respect to the contractual indemnification claim. General Obligations Law § 5-321 renders void and unenforceable lease provisions that purport to exempt a landlord from liability for damages for injuries to person or property caused by its own acts of negligence. The lease entered into between plaintiff and defendant required defendant to pay monthly rent of \$750 and obtain "fire and property damage and public liability insurance" in the amount of \$1 million. It further required defendant to indemnify plaintiff "against any and all claims, actions, damages, liability and expenses in connection with . . . damage to the property arising from any occurrence in the Rented Premises." We conclude that the indemnification provision violates General Obligations Law § 5-321 because it shifted the entire responsibility for damages to defendant, regardless of plaintiff's own negligence (see *Wagner v Ploch*, 85 AD3d 1547, 1547-1548 [4th Dept 2011]; *Graphic Arts Supply v Raynor*, 91 AD2d 827, 827-828 [4th Dept 1982]).

Plaintiff's contention that the indemnification provision is nevertheless enforceable because the parties allocated the risk of loss to an insurer is without merit. "[A]n indemnity agreement in a commercial lease negotiated at arm's length between two sophisticated parties, which includes a provision requiring the tenant to obtain insurance and name the landlord as an additional insured, does not run afoul of General Obligations Law § 5-321, even if the agreement results in the tenant indemnifying the landlord for the landlord's own negligence, as the insurance provision amounts to a permissible allocation of risk" (*Lammon v Bayberry Sq., LLC*, 200 AD3d 1170, 1172 [3d Dept 2021]; see *Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 418-419 [2006]; *Wagner*, 85 AD3d at 1548). Here, however, the lease was a residential lease, not a commercial lease, and it was not negotiated at arm's length between two sophisticated business entities or persons (see *Wagner*, 85 AD3d at 1548; *Port Auth. of N.Y. & N.J. v Evergreen Intl. Aviation*, 275 AD2d 358, 359-360 [2d Dept 2000], *lv denied* 96 NY2d 709 [2001]).

In light of our determination, there is no need to address defendant's alternative basis for affirmance that the lease is unconscionable and therefore unenforceable (see Real Property Law § 235-c [1]).

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

854

CA 24-01897

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

MICHAEL LAMICA, II, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

PATRICIA A. SISKAR AND BAKK VENTURES, LLC,
DEFENDANTS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, BUFFALO (ALBERT J. D'AQUINO OF COUNSEL), FOR
DEFENDANTS-APPELLANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (ERIC M. SHELTON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 18, 2024. The order denied the motion of defendants for summary judgment dismissing the complaint, granted in part and denied in part the cross-motion of plaintiff for partial summary judgment and dismissed the complaint against defendant Bakk Ventures, LLC, on stipulation.

It is hereby ORDERED that said appeal insofar as taken by defendant Bakk Ventures, LLC is unanimously dismissed and the order is modified on the law by granting the motion in part and dismissing the first and second causes of action and by denying the cross-motion in its entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking to recover damages for injuries that he sustained when he fell from the roof of a building owned by Patricia A. Siskar (defendant). Plaintiff's employer was a contractor hired to repair the roof. Defendants moved for summary judgment dismissing the complaint, and plaintiff cross-moved for summary judgment on the Labor Law §§ 240 (1) and 241 (6) causes of action against defendant. Supreme Court denied the motion in its entirety, denied the cross-motion with respect to the section 240 (1) cause of action against defendant and granted it with respect to the § 241 (6) cause of action against defendant, and dismissed the complaint against defendant Bakk Ventures, LLC upon stipulation. Defendants appeal, and plaintiff cross-appeals. We note at the outset that the appeal insofar as taken by Bakk Ventures, LLC must be dismissed because it is not aggrieved by the order (see CPLR 5511).

As a preliminary matter, we note that the court erred in denying defendants' motion with respect to the Labor Law § 200 and common-law

negligence causes of action against defendant inasmuch as plaintiff abandoned those causes of action by not opposing the motion to that extent and by not addressing those causes of action on appeal (see *Parsons v County of Steuben*, 240 AD3d 1333, 1337 [4th Dept 2025]; *Bacon v Shults Mgt. Group, Inc.*, 233 AD3d 1481, 1483 [4th Dept 2024]). Consequently, we modify the order accordingly.

Contrary to their contentions on appeal and cross-appeal, neither plaintiff nor defendant established entitlement to judgment as a matter of law with respect to the Labor Law § 240 (1) cause of action against defendant. "Labor Law § 240 (1) requires owners and contractors to construct, place and operate elevation-related safety devices to afford the worker proper protection from the risks inherent in working at an elevated work site" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]; see *Spike v Hollands' Lbr. Co.*, 198 AD2d 891, 891 [4th Dept 1993]; see generally *Ward v Cedar Key Assoc., L.P.*, 13 AD3d 1098, 1098 [4th Dept 2004]). " 'Generally, the issue of whether a particular safety device provided proper protection is a question of fact for the jury' " (*Welsch v Maimonides Med. Ctr.*, 80 AD3d 755, 756 [2d Dept 2011]; see generally *Leo v Artco Contr.*, 266 AD2d 808, 809 [4th Dept 1999]). Here, the parties' submissions raised issues of fact whether the tie-off brackets were properly placed on the roof to provide plaintiff with adequate protection and, if so, whether plaintiff's failure to use the tie-off brackets at the time of the accident was the sole proximate cause of the accident (see *Cantineri v Carrere*, 60 AD3d 1331, 1333 [4th Dept 2009]; see also *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015]; see generally *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to the parties' further contentions on appeal and cross-appeal, we conclude that neither plaintiff nor defendant established entitlement to judgment as a matter of law with respect to the Labor Law § 241 (6) cause of action against defendant (see generally *Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504-505 [1993]). We agree with defendant's alternative contention on appeal that the court erred in granting the cross-motion with regard to that cause of action inasmuch as there are triable issues of fact whether plaintiff was the sole proximate cause of the accident (see *Ballard v 300 E. Blvd. Canandaigua LLC*, 230 AD3d 1557, 1559 [4th Dept 2024]; *Garcia v Emerick Gross Real Estate, L.P.*, 196 AD3d 676, 678 [2d Dept 2021]; see generally *Gurung v Arnav Retirement Trust*, 79 AD3d 969, 970 [2d Dept 2010]). We therefore further modify the order accordingly.

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

861

KA 23-01261

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAVYON J. OGDEN, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (CATHERINE A. MENIKOTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered July 12, 2023. The judgment convicted defendant upon his plea of guilty of burglary in the first degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [4]) and assault in the first degree (§ 120.10 [1]). We affirm.

Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Williams*, 228 AD3d 1316, 1316 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024], *reconsideration denied* 42 NY3d 1055 [2024]; 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]). Moreover, on this record, defendant's "monosyllabic affirmative responses to questioning by [County Court] do not render his [waiver of the right to appeal] unknowing and involuntary" (*People v Burch*, 234 AD3d 1246, 1246-1247 [4th Dept 2025], *lv denied* 43 NY3d 1006 [2025] [internal quotation marks omitted]; see *People v Allen*, 174 AD3d 1456, 1457 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]; *People v Harris*, 94 AD3d 1484, 1485 [4th Dept 2012], *lv denied* 19 NY3d 961 [2012]). Further, we note that, although the written waiver form executed by defendant incorrectly portrays the waiver as an absolute bar to the taking of an appeal and was therefore defective, the oral colloquy, which followed the appropriate model colloquy, cured the defect in the written waiver (see *People v Tandle*, 238 AD3d 1503, 1504 [4th Dept 2025], *lv denied* 43 NY3d 1059 [2025]; *Williams*, 228 AD3d at

1317; *see generally Thomas*, 34 NY3d at 563).

Defendant contends that his plea was not knowingly, intelligently, and voluntarily entered. Although a challenge to the voluntariness of the plea survives the valid waiver of the right to appeal (*see People v McMurtry*, 224 AD3d 1310, 1310 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]), defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Fernandez*, 218 AD3d 1257, 1259 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]; *People v Toney*, 153 AD3d 1583, 1584 [4th Dept 2017], *lv denied* 30 NY3d 1064 [2017]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see CPL 470.15 [3] [c]*).

Although not explicitly stated in the published memorandum, we previously concluded in *People v Blount* (239 AD3d 1426, 1427 [4th Dept 2025], *lv denied* 44 NY3d 981 [2025]) that a defendant's valid waiver of the right to appeal precludes our review of a contention that the court erred in declining to remove the case to Family Court under CPL 722.23. Thus, we are precluded from reaching defendant's contention with respect to that issue here. The valid waiver of the right to appeal also precludes our review of defendant's challenge to the court's consideration of and denial of his request to be adjudicated a youthful offender (*see Burch*, 234 AD3d at 1247; *People v Stackhouse*, 214 AD3d 1303, 1304 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]; *Allen*, 174 AD3d at 1457), his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *Burch*, 234 AD3d at 1247), and his contention that the mandatory surcharge and fees imposed at sentencing should be waived pursuant to CPL 420.35 (2-a) (*see People v Germinario*, 237 AD3d 743, 743 [2d Dept 2025], *lv denied* 43 NY3d 1008 [2025]; *People v Antoine B.*, 215 AD3d 496, 496 [1st Dept 2023], *lv denied* 40 NY3d 1012 [2023]; *People v Naquan H.*, 213 AD3d 426, 427 [1st Dept 2023], *lv denied* 40 NY3d 930 [2023]).

Our dissenting colleagues assert that the otherwise valid waiver of the right to appeal does not preclude our review of one of the aforementioned contentions, i.e., defendant's contention with respect to the issue of removal to Family Court. More specifically, they assert, *inter alia*, that the waiver "does not bar our review" of that issue inasmuch as defendant did not knowingly, intelligently, and intentionally waive his right to challenge the court's removal determination. We respectfully disagree. We have previously rejected contentions that a "waiver of the right to appeal is invalid because the court failed to identify the precise claims that survived the waiver of appeal" (*People v Wood*, 217 AD3d 1407, 1408 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023]; *see People v Giles*, 219 AD3d 1706, 1706-1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]). Indeed, a court " 'need not expressly delineate for a defendant those appellate issues that are foreclosed by a waiver of the right to appeal, and those that survive, in order for the court to obtain a valid appeal waiver' " (*People v Parker*, 151 AD3d 1876, 1876 [4th Dept 2017], *lv*

denied 30 NY3d 982 [2017]; see *Giles*, 219 AD3d at 1707). That is entirely consistent with what the Court of Appeals has repeatedly said on the matter—i.e., that it has “never required any particular litany explaining the finer distinctions in appeal waiver colloquies” (*Thomas*, 34 NY3d at 559 [emphasis added]; see *People v Sanders*, 25 NY3d 337, 341 [2015]; *Lopez*, 6 NY3d at 256).

Moreover, contrary to the assertion in the dissent, defendant’s failure to expressly waive the opportunity for removal to Family Court pursuant to CPL 722.23 (4) has no bearing on whether he thereafter validly waived his right to appeal the court’s ultimate removal determination. Waiver of the opportunity for removal under CPL 722.23 (4) and the waiver of the right to appeal are separate concepts. Indeed, if we were to follow the dissent’s logic to its natural conclusion, we would be compelled to conclude, for example, that any defendant who unsuccessfully moved for the suppression of evidence—and therefore did not waive the issue—could, despite an otherwise valid waiver of the right to appeal, nevertheless raise an appellate challenge to the court’s suppression determination unless the court specifically informed the defendant that the waiver of the right to appeal would encompass the issue. Such a conclusion, of course, is entirely at odds with existing precedent (see *Giles*, 219 AD3d at 1707; see also *Parker*, 151 AD3d at 1876; see generally *People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]).

Finally, despite some suggestions to the contrary, we read the dissent as agreeing that the right to challenge the removal issue on appeal may, in the proper case, be validly waived provided that there is express record evidence that the defendant knowingly and intelligently intended to do so. However, to the extent that the dissent also suggests that the removal issue survives a valid appeal waiver because it is jurisdictional in nature, we note that, contrary to the dissent’s assertion, that issue is not unsettled before *this* Court (see generally *People v Jacobs*, — AD3d —, — [Dec. 23, 2025] [4th Dept 2025]; cf. *People v Aaron VV.*, — AD3d —, —, 2025 NY Slip Op 05018, *1-2 [3d Dept 2025]). Indeed, in previously concluding that the removal issue did not survive the valid waiver of the right to appeal, we necessarily concluded that the issue was not jurisdictional in nature (see *Blount*, 239 AD3d at 1427; cf. *People v King*, 147 AD3d 1540, 1541 [4th Dept 2017], *lv denied* 29 NY3d 1033 [2017]; see generally *Thomas*, 34 NY3d at 566).

All concur except OGDEN and NOWAK, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. In our view, defendant’s contention that County Court erred in declining to remove defendant’s case to Family Court pursuant to CPL 722.23 is not encompassed by his waiver of the right to appeal. We further conclude that the court erred in granting the People’s motion to prevent removal of the action to Family Court.

Preliminarily, we are compelled to address the “tortured jurisprudence” on waivers of the right to appeal (*People v Thomas*, 34 NY3d 545, 587 [2019, Wilson, J., dissenting in part and concurring in part], *cert denied* — US —, 140 S Ct 2634 [2020]). “[T]he final and

prompt conclusion of litigation is an important goal of public policy in criminal" matters (*People v Seaberg*, 74 NY2d 1, 8 [1989]). However, that goal remains unmet despite the use of appeal waivers, which have become "part and parcel of plea bargaining" and are required as part of nearly every plea (*People v Batista*, 167 AD3d 69, 81 [2d Dept 2018, Scheinkman, P.J., concurring], lv denied 32 NY3d 1169 [2019]).

Rather, as is the case here, appeal waivers invite an additional round of litigation during which an appellate court is required to sort out their validity. Moreover, appeal waivers too often foreclose meritorious arguments advanced by defendants—arguments that our Court internally evaluates despite the existence of an appeal waiver. Although finality in the resolution of criminal matters is an important public policy goal, we believe that goal must yield to effective judicial review in order to ensure that a defendant received the protections to which they were entitled. We cannot in good conscience conclude that expedience and finality outweigh those protections.

Appellate courts "have an integral role in reviewing the validity of appeal waivers" and are "vested with the responsibility" of ensuring that a defendant's waiver of the right to appeal was a knowing, intelligent, and voluntary choice (*Thomas*, 34 NY3d at 559 [internal quotation marks omitted]), considering "the age, experience and background of the accused" (*id.* at 560 [internal quotation marks omitted]). To that end, "[a]n appellate waiver is effective only when 'a defendant has a full appreciation' of its consequences, and a defendant 'must comprehend' that the appellate waiver is separate and distinct from the plea" (*id.* at 589-590 [Wilson, J., dissenting in part and concurring in part], quoting *People v Bradshaw*, 18 NY3d 257, 264 [2011]). To knowingly and intelligently waive a right, a defendant must have " 'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it' " (*Patterson v Illinois*, 487 US 285, 292 [1988], quoting *Moran v Burbine*, 475 US 412, 421 [1986]).

The question of whether a defendant knowingly and intelligently waived their right to appeal has engendered countless appeals over what, in our view, is a largely unsolvable question. Even the Model Colloquy fails to properly ensure that a defendant is fully aware of—and fully comprehends—the nature of the rights being abandoned and the consequences of abandoning those rights. Indeed, unlike the Model Colloquy on guilty pleas (see NY Model Colloquies, Plea of Guilty) the Model Colloquy on waivers of the right to appeal (see NY Model Colloquies, Waiver of Right to Appeal) does not include the necessary questions designed to assess a defendant's awareness and appreciation of the consequences of foregoing appellate rights in any particular case and thus does not allow a judge to "truly determine whether the defendant knows the rights waived and their import" (*Thomas*, 34 NY3d at 590 [Wilson, J., dissenting in part and concurring in part]). In short, the current practice—which forecloses meritorious arguments in appeals actually perfected, and perhaps discourages far more—is antithetical to a criminal justice system designed to ensure fairness

to all who are touched by it.

Understanding, however, that appeal waivers are enforceable under our current jurisprudence (see *Seaberg*, 74 NY2d at 8; see also *Thomas*, 34 NY3d at 557) and assuming, arguendo, that defendant validly waived his right to appeal, we nevertheless consider whether defendant knowingly and intelligently relinquished his challenge to the court's removal determination as part of his waiver of the right to appeal. Under the circumstances of this case and contrary to the majority's conclusion, we conclude that he did not.

"A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed" (*Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37 [1917]; see *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982], rearg denied 57 NY2d 674 [1982]). "It is essentially a matter of intention" (*Alsens Am. Portland Cement Works*, 222 NY at 37 [emphasis added]; see *McGuire v McGuire*, 197 AD3d 897, 901 [4th Dept 2021]). To be enforceable, a waiver of the right to appeal in a criminal matter "must not only be voluntary but also knowing and intelligent" (*Seaberg*, 74 NY2d at 11). Proper considerations in determining the validity of a defendant's waiver of the right to appeal include "the defendant's consultation with counsel[,] . . . on-the-record acknowledgments of understanding, a written appeal waiver that supplements or clarifies the court's oral advice[,] and the defendant's experience with the criminal justice system" (*Thomas*, 34 NY3d at 560).

Here, we conclude that defendant's waiver of the right to appeal does not bar our review of his challenge to the court's determination under CPL 722.23 because defendant never *intended* to relinquish his right to challenge the court's determination concerning his removal to Family Court and certainly did not *knowingly and intelligently* do so. Defendant's lack of intent is apparent on this record. Defendant did not waive the opportunity for removal to Family Court under CPL 722.23 (4), and defense counsel opposed the People's motion to prevent removal. Moreover, at the time of defendant's plea, defense counsel indicated that he had advised defendant that "limited things would survive [the] waiver of appeal, including . . . if the Court didn't have jurisdiction." Defendant now challenges the court's decision declining to remove this action to Family Court. As defendant's appellate counsel explained during oral argument, defendant—and, more to the point, defense counsel—believed that challenge to be jurisdictional, and defendant therefore argued that it survives even if his waiver of the right to appeal is valid.

Although the majority criticizes our reference to the fact that defendant did not waive the opportunity for removal under CPL 722.23 (4), we respectfully believe that their criticism misses the mark. There is a well-established "presumption against waiver by a defendant," and for a waiver to be enforceable, the record must show "an intentional relinquishment or abandonment of a known right or privilege" (*People v Harris*, 61 NY2d 9, 17 [1983]). Our reference to actions that defendant took concerning removal to Family Court before

he agreed to the waiver of his right to appeal merely demonstrates that at no point in our record is there any indication that defendant intended to waive an opportunity for his case to proceed in Family Court, and we do not believe that, at the time he agreed to the appeal waiver, he knowingly and intelligently waived his right to challenge the court's ruling on the People's motion to prevent removal.

Given that "jurisdiction is a word of elastic, diverse, and disparate meanings" (*Artibee v Home Place Corp.*, 28 NY3d 739, 747 [2017] [internal quotation marks omitted]; see also *Henry v New Jersey Tr. Corp.*, 39 NY3d 361, 372 [2023]), defendant's point on appeal is well-taken: there is nothing settled about whether his challenge does, in fact, survive an otherwise valid and enforceable waiver (see *People v Aaron VV.*, – AD3d –, –, 2025 NY Slip Op 05018, *2 [3d Dept 2025]; see generally *People v Blount*, 239 AD3d 1426, 1427 [4th Dept 2025], lv denied 44 NY3d 981 [2025]; *Matter of Clark v Boyle*, 210 AD3d 463, 467-468 [1st Dept 2022], lv denied 39 NY3d 974 [2023]). Even assuming, arguendo, that the majority is correct that this Court has since squarely settled that question, we cannot conclude on this record that defendant understood and appreciated that he was waiving his challenge to the court's removal determination. We therefore conclude that defendant did not voluntarily, knowingly, and intelligently waive his right to challenge the court's determination on the People's motion to prevent removal to Family Court under CPL 722.23 (1).

We further conclude that the court abused its discretion in granting the People's motion to prevent removal to Family Court. A motion to prevent removal must be denied unless the court makes a determination that "extraordinary circumstances exist that should prevent the transfer of the action to family court" (CPL 722.23 [1] [d]). The court's determination must include "findings of fact and to the extent practicable conclusions of law" (CPL 722.23 [1] [e]). Although the term "extraordinary circumstances" is not defined in the statute, the legislative history for CPL 722.23 reveals that, in making an extraordinary circumstances determination, the court should look at all the circumstances of the case, as well as all of the circumstances of the young person, including both mitigating and aggravating factors (see NY Assembly Debate on 2017 NY Assembly Bill A3009C, Apr. 8, 2017 at 39-40, 65).

In our view, although the court considered aggravating factors, it failed to consider relevant mitigating factors in reaching its determination. Defendant had no prior criminal history, had not received Family Court services, and had strong familial support. Further, defendant's role in the crime was minimal because he served only as the getaway driver and did not personally harm any individual (cf. *People v Guerrero*, 235 AD3d 1276, 1277 [4th Dept 2025]).

Upon our review of all the circumstances of the case, we conclude that this is not one of the "extremely rare and exceptional cases" that should remain in the Youth Part of criminal court (*Aaron VV.*, – AD3d at –, 2025 NY Slip Op 05018, *3 [internal quotation marks

omitted]; *see People v Lloyd F.*, – AD3d –, –, 2025 NY Slip Op 04583, *4 [2d Dept 2025]; NY Assembly Debate on 2017 NY Assembly Bill A3009C, Apr. 8, 2017 at 38). In our view, the People failed to establish that defendant’s conduct falls outside the range of behavior that the Legislature presumed would be more appropriately addressed in Family Court (*see Lloyd F.*, – AD3d at –, 2025 NY Slip Op 04583, *5). Rather, defendant’s behavior “exhibited the very characteristics of adolescent decision-making . . . that warrant the sensitive treatment of youth in the justice system” (*Lloyd F.*, – AD3d at –, 2025 NY Slip Op 04583, *6). We would therefore reverse the judgment, vacate the plea, deny the People’s motion pursuant to CPL 722.23 (1) to prevent removal of the action to Family Court, and remit the matter to County Court for the entry of an order removing this action to Family Court.

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

862/24

CA 24-00602

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

GLEND A S. CHRISTIAN, PLAINTIFF-RESPONDENT,

V

ORDER

BROOKDALE SENIOR LIVING COMMUNITIES, INC.,
JOHN E. SHATRAW, JR., DOING BUSINESS AS
MODERN DOMAINS, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

THOMAS J. KAPINOS, JR., DOING BUSINESS AS
PRECISION FLOORING,
THIRD-PARTY PLAINTIFF-RESPONDENT,

V

MICHAEL P. DROZDOWSKI, THIRD-PARTY
DEFENDANT-APPELLANT.

BURDEN & HANSEN, LLC, BUFFALO (DONNA L. BURDEN OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

CHELUS HERDZIK SPEYER & MONTE, LLP, BUFFALO (MARK A. FORDEN OF
COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (CHERIE L. PETERSON OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE, JR., OF
COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered October 13, 2023. The order, among other things, denied the motion of defendants Brookdale Senior Living Communities, Inc. and John E. Shatraw, Jr., doing business as Modern Domains, for summary judgment and denied the motion of third-party defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 22, 2024 and January 13, 2025,

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

862

KA 23-00428

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EH KER LER JOHN, 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 (Robert Bauer, J.), rendered November 15, 2022. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (see *People v Spratt*, 239 AD3d 1325, 1325-1326 [4th Dept 2025], lv denied 44 NY3d 984 [2025]; *People v Lyon*, 227 AD3d 1521, 1522 [4th Dept 2024], lv denied 42 NY3d 928 [2024]; see generally *People v Thomas*, 34 NY3d 545, 564-566 [2019], cert denied — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of the sentence (see *People v Resto*, 222 AD3d 1425, 1425 [4th Dept 2023], lv denied 41 NY3d 966 [2024]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]).

Defendant further contends that his sentence constitutes cruel and unusual punishment. Even assuming again, arguendo, that the waiver of the right to appeal is invalid and thus does not foreclose our review of that contention (cf. *People v Warner*, 167 AD3d 1492, 1493 [4th Dept 2018], lv denied 33 NY3d 955 [2019]; *People v Marshall*, 144 AD3d 1544, 1545 [4th Dept 2016]), we note that defendant failed to preserve it for our review (see *People v Thompson*, 206 AD3d 1708, 1710 [4th Dept 2022], lv denied 38 NY3d 1153 [2022]; *People v Pruitt*, 169

AD3d 1367, 1368 [4th Dept 2019]; *see generally People v Pena*, 28 NY3d 727, 730 [2017]).

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

863

KA 22-01812

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AAMONI ROUSE, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (STEPHANIE M. STARE 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 (Julie M. Hahn, J.), rendered September 23, 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.

By pleading guilty, defendant forfeited his present challenge to evidentiary rulings at the suppression hearing (*see People v Poole*, 55 AD3d 1354, 1354-1355 [4th Dept 2008], *lv denied* 11 NY3d 929 [2009]; *see also People v Hansen*, 95 NY2d 227, 230-231 [2000]). Contrary to defendant's further contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Brinson*, 240 AD3d 1376, 1377 [4th Dept 2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [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]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

864

KA 22-01811

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES H. WILSON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, BANASIAK LAW OFFICE, PLLC,
SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (James E. Walsh, Jr., J.), rendered June 23, 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 unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), arising from an incident in which police officers recovered weapons in the course of investigating a report that defendant had fired a gun at his wife while she was driving. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention that the evidence is not legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contentions that the prosecutor improperly elicited hearsay testimony from a law enforcement witness regarding certain statements by and about defendant's wife, including her residence, ownership of the vehicle damaged by a gunshot, and the name of her husband (*see People v Morman*, 145 AD3d 1435, 1438 [4th Dept 2016], *lv denied* 29 NY3d 1044 [2014]) and that the admission of that testimony violated his right of confrontation (*see People v Irvin*, 111 AD3d 1294, 1295 [4th Dept 2013], *lv denied* 24 NY3d 1044 [2014], *reconsideration denied* 26 NY3d

930 [2015]; *People v Davis*, 87 AD3d 1332, 1334-1335 [4th Dept 2011], *lv denied* 18 NY3d 858 [2011], *reconsideration denied* 18 NY3d 956 [2012]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). With respect to defendant's contention that Supreme Court erred in admitting in evidence hearsay testimony that defendant's wife reported to police that she had been "shot at," we conclude that any such error was harmless (see *People v Hernandez*, 28 NY3d 1056, 1058 [2016]; *People v Emanuel*, 240 AD3d 1324, 1325 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]; see generally *People v Crimmins*, 36 NY2d 230, 241-242 [1975]), particularly in light of the photographic and other evidence that the wife's vehicle had been struck by a bullet. Finally, we reject defendant's contention that he was denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 146-147 [1981]). 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 Benevento*, 91 NY2d 708, 712 [1998]; *Baldi*, 54 NY2d at 147).

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

865

KA 22-01845

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERIC WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered October 21, 2022. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

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]), arising from an incident in which the police recovered a handgun from the pocket of defendant's jacket during a pat frisk that took place following an automobile stop. Defendant was a back seat passenger in a vehicle that was lawfully stopped by the police for traffic infractions. While a police officer was speaking to the driver, another officer on the other side of the vehicle observed marihuana on the center console. The officers questioned the driver about the marihuana, whereupon the driver showed the officer a blunt and said that there was no other illegal substance in the vehicle. The police eventually directed defendant to exit the vehicle, and defendant complied with that request. When an officer began to conduct a pat frisk, however, defendant pulled away and attempted to flee. The officers quickly apprehended defendant and found a loaded handgun in his jacket. During an interrogation at the police station, defendant said that he obtained the handgun earlier that day for self-protection. After unsuccessfully seeking suppression of the handgun and his statements to the police at the station, defendant pleaded guilty.

Defendant contends that Supreme Court erred in refusing to suppress the handgun. We reject that contention. As a threshold matter, we note that the officers lawfully directed defendant to exit the vehicle. "In light of the heightened dangers faced by investigating police officers during traffic stops, a police officer may, as a precautionary measure and without particularized suspicion, direct the occupants of a lawfully stopped vehicle to step out of the car" (*People v Garcia*, 20 NY3d 317, 321 [2012]; see *People v Robinson*, 74 NY2d 773, 775 [1989], cert denied 493 US 966 [1989]; *People v Roberson*, 155 AD3d 1683, 1683 [4th Dept 2017], lv denied 31 NY3d 1086 [2018]; see generally *Pennsylvania v Mimms*, 434 US 106, 111 [1977]). We further conclude that, based on the presence of marihuana inside the vehicle, the officers had probable cause to search all occupants (see *People v Singleton*, 237 AD3d 1509, 1509 [4th Dept 2025]; *Matter of Q.P.*, 225 AD3d 570, 571 [1st Dept 2024]; *People v Mills*, 93 AD3d 1198, 1199 [4th Dept 2012], lv denied 19 NY3d 964 [2012]; see also *People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], lv denied 22 NY3d 1087 [2014]; see generally *People v Chestnut*, 36 NY2d 971, 973 [1975]).

Defendant further contends that the frisk was unlawful under the Marihuana Regulation and Taxation Act ([MRTA]; L 2021, ch 92), which took effect after his arrest but before his suppression hearing. The MRTA added Penal Law § 222.05, pursuant to which the odor of marihuana or possession of marihuana in legally authorized amounts "can no longer be the basis for a police search" (*People v Pastrana*, 41 NY3d 23, 29 [2023], cert denied – US –, 144 S Ct 1066 [2024]; see § 222.05 [3]). Because defendant did not argue in his suppression motion or at the hearing that section 222.05 (3) applied retroactively to the police conduct in this case, he failed to preserve that contention for our review (see *People v Panton*, 27 NY3d 1144, 1145 [2016]; *People v Baker*, 219 AD3d 1678, 1679 [4th Dept 2023], lv denied 41 NY3d 942 [2024]), 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 [3] [c]).

We reject defendant's alternative contention that defense counsel was ineffective in failing to preserve his MRTA issue. For a single error or omission in an otherwise competent performance to rise to the level of ineffective assistance of counsel, the error or omission "must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy" (*People v McGee*, 20 NY3d 513, 518 [2013]). That standard is not met where the success of an omitted argument "depended on the resolution of novel questions . . . or when . . . there was no clear appellate authority supporting the argument the defendant claims that counsel should have made" (*People v Hayward*, 42 NY3d 753, 756 [2024] [internal quotation marks omitted]).

Here, during the pendency of defendant's case at the trial level, there was no appellate authority supporting his current contention that Penal Law § 222.05 (3) applied in this procedural context, i.e.,

where the search took place before the statute's enactment but the suppression hearing occurred after enactment. As of this writing, the only such authority is *People v Martin* (242 AD3d 18, 21-22 [3d Dept 2025]), a 3-2 decision issued by the Third Department more than three years after defendant pleaded guilty (*cf. People v Fasoli*, 242 AD3d 900, 901-902 [2d Dept 2025]).

In fact, prior to defendant's plea, the Second Department rejected a claim that Penal Law § 222.05 (3) applied retroactively to invalidate searches that were lawful when undertaken (*see People v Babadzhanov*, 204 AD3d 685, 687 [2d Dept 2022], *lv denied* 38 NY3d 1069 [2022], *reconsideration denied* 39 NY3d 939 [2022]), a position later affirmed by the Court of Appeals (*see Pastrana*, 41 NY3d at 29-30; *see also People v Vaughn*, 203 AD3d 1729, 1730 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]). Thus, even assuming, *arguendo*, that we would now agree with the majority in *Martin* that section 222.05 (3) applies to pre-enactment searches where the resulting suppression hearings are held post-enactment, it cannot be said that defense counsel was ineffective in failing to advance before the motion court what was then a novel argument (*see generally People v Watkins*, 42 NY3d 635, 640 [2024], *cert denied* — US —, 145 S Ct 459 [2024]).

We agree with defendant, however, that the court erred in refusing to suppress statements that he made to the police after he was advised of his *Miranda* rights. Following his arrest, defendant was transported to the police station, where he was placed in an interview room and advised of his *Miranda* rights by one of the arresting officers. After defendant indicated that he understood those rights, the officer asked whether defendant would agree to waive them and speak to the officer. Defendant did not respond in the affirmative. Instead, he said, "I ain't got nothing to talk about. I just want to go to jail. I want to go to sleep."

Rather than confirming whether defendant wished to waive his constitutional rights, including the right to remain silent, the officer stated, "Well, I don't want to waste your time but I am curious about the fight you had been in in the morning," a matter defendant had discussed with another officer at the scene or on the way to the station. Defendant proceeded to speak to the interrogating officer about the fight and made incriminating statements about his unlawful possession of the handgun. Even assuming, *arguendo*, that defendant waived his *Miranda* rights in the first instance, we conclude that he unequivocally invoked his right to remain silent and that the officer did not scrupulously honor that right (*see generally People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]).

"[I]n order to terminate questioning, the assertion by a defendant of his right to remain silent must be unequivocal and unqualified . . . Whether that request was unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,], including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant" (*People v Johnston*, 192 AD3d 1516, 1518 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021] [internal quotation

marks omitted]; see *People v Glover*, 87 NY2d 838, 839 [1995]). Here, defendant said in no uncertain terms that he did not want to talk to the officer and instead wanted to be taken to jail (see e.g. *People v Marrero*, 199 AD3d 1471, 1473-1474 [4th Dept 2021], *lv denied* 38 NY3d 929 [2022]; *Johnston*, 192 AD3d at 1519; *People v Colon*, 185 AD3d 1510, 1512 [4th Dept 2020], *lv denied* 35 NY3d 1093 [2020]; *People v Reid*, 34 AD3d 1273, 1273 [4th Dept 2006], *lv denied* 8 NY3d 884 [2007]), and "[n]o reasonable police officer could have interpreted that statement as anything other than a desire not to talk to the police" (*Colon*, 185 AD3d at 1512; see *Marrero*, 199 AD3d at 1474). The officer nevertheless continued to ask defendant questions that were "reasonably likely to elicit an incriminating response" (*People v Paulman*, 5 NY3d 122, 129 [2005] [internal quotation marks omitted]; see *Reid*, 34 AD3d at 1273; see generally *Rhode Island v Innis*, 446 US 291, 300-301 [1980]). Under the circumstances, we conclude that the court's determination that defendant did not unequivocally invoke his right to remain silent is "unsupported by the record" (*People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; see *Johnston*, 192 AD3d at 1518-1519; cf. *People v Brown*, 240 AD3d 1278, 1279 [4th Dept 2025]).

We therefore reverse the judgment, vacate the plea, and grant that part of the omnibus motion seeking to suppress all statements made after defendant invoked his right to remain silent, and we remit the matter to Supreme Court for further proceedings on the indictment (see *People v Corey*, 209 AD3d 1306, 1307 [4th Dept 2022]; *People v Hughes*, 199 AD3d 1332, 1335 [4th Dept 2021]). In light of our determination, we do not address defendant's challenge to the severity of the sentence. We have reviewed defendant's remaining contentions and conclude that none warrants further relief.

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

867

CAF 24-01319

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

IN THE MATTER OF TRISTINA DEAS, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

RONALD CONTRERAS, RESPONDENT-RESPONDENT.

BRIAN P. DEGNAN, BATAVIA, FOR PETITIONER-APPELLANT.

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

ANDREW J. DIPASQUALE, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Nicole E. Bayly, R.), entered August 9, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal and physical custody of the subject child to respondent.

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 mother appeals from an order that, inter alia, granted respondent father sole legal and physical custody of the parties' daughter. We affirm.

We reject the mother's contention that Family Court erred in granting the father sole custody of the subject child. "A court's custody determination, including its evaluation of a child's best interests, is entitled to great deference and will not be disturbed as long as it is supported by a sound and substantial basis in the record" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]). Here, the court's determination that the father was better able to provide for the child is supported by the requisite sound and substantial basis in the record and thus will not be disturbed (see *Matter of Riley v Kidney*, 208 AD3d 1651, 1651-1652 [4th Dept 2022], lv denied 39 NY3d 904 [2022]). Contrary to the mother's further contention, the court did not fail to consider allegations that the father engaged in acts of domestic violence. Rather, the court rejected those allegations, as evidenced by its dismissal of the parties' family offense petitions for lack of evidence (see generally *Matter of Russell v Russell*, 173 AD3d 1607, 1609 [4th Dept 2019]).

We reject the mother's contention that the court improperly

considered matters outside the record—specifically the mother’s attempts to contact the court after the close of proof—in making its determination. The court clearly stated that the mother’s actions following the trial had neither “been reviewed nor considered for purposes of [its] decision.” We reject the mother’s contention that she received ineffective assistance of counsel based on her attorney’s failure to reopen the proof to permit the mother to properly submit additional evidence (*see generally Matter of Pfalzer v Pfalzer*, 150 AD3d 1705, 1706 [4th Dept 2017], *lv denied* 29 NY3d 918 [2017]). We also conclude that the court properly denied the mother’s request to relieve her attorney inasmuch as the mother failed to demonstrate good cause warranting substitution of counsel (*see Matter of Burley v Richmond*, – AD3d –, 2025 NY Slip Op 06506, *2 [4th Dept 2025]; *Matter of Alexander S. [David S.]*, 130 AD3d 1463, 1464 [4th Dept 2015], *lv denied* 26 NY3d 910 [2015], *appeal dismissed & lv denied* 26 NY3d 1030 [2015], *rearg denied* 26 NY3d 1132 [2016]). We have considered the mother’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

869

CAF 24-00134

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

IN THE MATTER OF WOODROW ABRAMS, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LAUREEN SMITH, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated November 21, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition for modification of a prior order of custody and visitation.

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

Memorandum: In these proceedings pursuant to Family Court Act article 6, petitioner-respondent father appeals in appeal No. 1 from an order that, inter alia, denied his petition seeking modification of the parties' prior order of custody and visitation to provide him with increased and unsupervised access to the subject child. In appeal No. 2, the father appeals from a subsequent order that, upon the petition of respondent-petitioner, who is the maternal grandmother and custodian of the subject child, modified the prior order of custody and visitation by, inter alia, designating an agency to supervise the father's access with the child. The father's access had previously been supervised by the child's paternal grandmother.

The father contends in appeal No. 1 that Family Court's determination with respect to his petition is not supported by the record. We reject that contention. "Visitation decisions are generally left to [the court's] sound discretion, requiring reversal only where the decision lacks a sound and substantial basis in the record" (*Matter of Lydia C. [Albert C.]*, 89 AD3d 1434, 1436 [4th Dept 2011] [internal quotation marks omitted]; see *Matter of Helles v Helles*, 87 AD3d 1273, 1273 [4th Dept 2011]). Visitation issues are determined based on the best interests of the child (see *Veronica S. v Philip R.S.*, 70 AD3d 1459, 1459 [4th Dept 2010]), and a court's determination with respect to a child's best interests is entitled to great deference (see *Matter of Michael G. v Letitia M.B.*, 45 AD3d 1405, 1405 [4th Dept 2007], lv denied 10 NY3d 715 [2008]; *Matter of*

Westfall v Westfall, 28 AD3d 1229, 1230 [4th Dept 2006], *lv denied* 7 NY3d 706 [2006]; *Matter of Frederick v Cattaraugus County Dept. of Social Servs.*, 302 AD2d 891, 892 [4th Dept 2003]). Here, a sound and substantial basis in the record supports the court's determination that it would not be in the child's best interests to increase the father's access time. The father did not regularly use all of the access offered, and when he did exercise his access rights, he did not consistently comply with the terms of the required supervision. The record further supports the court's determination that visitation should continue to be supervised in light of the father's conduct during his supervised access, which included discussing these proceedings with the child and leaving the bathroom door open so the child could see him (see generally *Matter of Masri v Masri*, 171 AD3d 1183, 1185 [2d Dept 2019]).

We reject the father's challenge in appeal No. 2 to the court's determination that his access should be supervised by an agency rather than by the paternal grandmother. The record supports the court's conclusion that another form of supervision was needed due to the paternal grandmother's poor health.

We reject the father's further contention in each appeal that he was denied effective assistance of counsel at the hearing. Although the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings (see *Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015]; *Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010]), the father failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" at the hearing (*People v Benevento*, 91 NY2d 708, 712 [1998]; see *Brown*, 125 AD3d at 1390; *Matter of Reinhardt v Hardison*, 122 AD3d 1448, 1449 [4th Dept 2014]).

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

870

CAF 24-00136

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

IN THE MATTER OF LAUREEN SMITH, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

WOODROW ABRAMS, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated December 15, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted respondent supervised visitation.

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

Same Memorandum as in *Matter of Abrams v Smith* ([appeal No. 1] – AD3d – [Dec. 23, 2025] [4th Dept 2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

873

CA 24-00876

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

P.E., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ERIE COUNTY, ET AL., DEFENDANTS,
AND CHILD AND FAMILY SERVICES OF ERIE COUNTY,
DEFENDANT-RESPONDENT.

HERMAN LAW, NEW YORK CITY (MELISSA MARIE KUBIAK 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, Erie County (Daniel Furlong, J.), entered April 25, 2024, in a personal injury action. The order granted the motion of defendant Child and Family Services of Erie County to dismiss the amended complaint against it.

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

Memorandum: Plaintiff appeals from an order that granted the motion of defendant Child and Family Services of Erie County (CFS) seeking to dismiss the amended complaint against CFS pursuant to CPLR 3211 (a) (5) and dismissed the amended complaint against CFS with prejudice. We affirm.

In moving to dismiss on statute of limitations grounds, a defendant has "the initial burden of establishing prima facie that the time in which to sue ha[s] expired" (*Chaplin v Tompkins*, 173 AD3d 1661, 1662 [4th Dept 2019] [internal quotation marks omitted]; see *Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011]). "If the defendant meets that burden, the burden then shifts to the plaintiff to aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*Morales v Arrowood Indem. Co.*, 203 AD3d 1603, 1607 [4th Dept 2022] [internal quotation marks omitted]).

Here, CFS met its initial burden of establishing that the limitations period had expired by the time plaintiff filed the supplemental summons and amended complaint naming CFS as a defendant in the primary action (see *Falletta v Norman*, 220 AD3d 1207, 1208 [4th

Dept 2023]; see generally *Patterson v Nassau County Social Servs. Dept.*, 231 AD3d 742, 743 [2d Dept 2024]).

We reject plaintiff's contention that she averred evidentiary facts establishing the elements of the relation back exception. "Section 203 of the CPLR codifies the relation back doctrine and provides that 'a claim asserted in the complaint [commenced by filing] is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced' " (*Matter of Nemeth v K-Tooling*, 40 NY3d 405, 410 [2023], quoting CPLR 203 [c]; see CPLR 203 [f]). Under the three-pronged test, "[t]he relation back doctrine applies when (1) the claims arise out of the same conduct, transaction or occurrence; (2) the new party is 'united in interest' with an original defendant and thus can be charged with such notice of the commencement of the action such that a court concludes that the party will not be prejudiced in defending against the action; and (3) the new party knew or should have known that, but for a mistaken omission, they would have been named in the initial pleading" (*Nemeth*, 40 NY3d at 407-408; see *Buran v Coupal*, 87 NY2d 173, 178 [1995]). "The doctrine focuses on the notice and prejudice to the added party" (*Nemeth*, 40 NY3d at 408). Indeed, "the linchpin of the relation back doctrine [is] notice to the [added party] within the applicable limitations period" (*id.* at 411 [internal quotation marks omitted]; see *Buran*, 87 NY2d at 180; *Falletta*, 220 AD3d at 1209; *Lostracco v Mt. St. Mary's Hosp. of Niagara Falls*, 38 AD3d 1312, 1312 [4th Dept 2007]).

With respect to the third prong of the relation back doctrine, plaintiff was required to "establish that the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well" (*Lostracco*, 38 AD3d at 1312 [internal quotation marks omitted]; see *Buran*, 87 NY2d at 178; *Williams v Majewski*, 291 AD2d 816, 817 [4th Dept 2002]). Here, plaintiff failed to meet her burden of averring evidentiary facts establishing that CFS knew or should have known that the action would have been brought against it within the limitations period but for a mistake by plaintiff concerning its identity (see *C.R.J. v Oswego County*, 237 AD3d 1515, 1517-1518 [4th Dept 2025]; *Lostracco*, 38 AD3d at 1312). On this record, there is no basis to conclude that CFS had notice that the action had been commenced, much less that it knew or should have known within the limitations period that, but for plaintiff's error, this action would have been brought against it as well (see *Cole v Tat-Sum Lee*, 309 AD2d 1165, 1167 [4th Dept 2003]; see also *Norton v County of Westchester*, 241 AD3d 833, 835 [2d Dept 2025]).

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

875

CA 24-01904

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

CITIBANK, N.A., NOT IN ITS INDIVIDUAL
CAPACITY, BUT SOLELY AS TRUSTEE OF
NRZ PASS-THROUGH TRUST VI,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS J. GIFFORD, ALSO KNOWN AS THOMAS JAY
GIFFORD, ALSO KNOWN AS THOMAS GIFFORD,
MARLENE E. GIFFORD, ALSO KNOWN AS MARLENE GIFFORD,
ALSO KNOWN AS MARLENE LOU GIFFORD,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

LEGAL AID SOCIETY OF MID-NEW YORK, INC., UTICA (NICHOLAS J. TESINY OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROACH & LIN, P.C., SYOSSET (HANS H. AUGUSTIN OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered May 2, 2024, in a mortgage foreclosure proceeding. The order denied the cross-motion of defendants Thomas J. Gifford and Marlene E. Gifford for summary judgment and granted the motion of plaintiff for a judgment of foreclosure and sale.

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

Memorandum: In this residential foreclosure action, defendants-appellants (defendants) appeal from an order that granted plaintiff's motion seeking, inter alia, a judgment of foreclosure and sale and denied defendants' cross-motion for summary judgment dismissing the complaint against them based on plaintiff's lack of standing.

We note that a final judgment of foreclosure and sale has been entered in this action. Although defendants appealed from the judgment, that appeal was previously dismissed by operation of 22 NYCRR 1250.10 (a). Inasmuch as the right to appeal from the intermediate order terminated with the entry of the final judgment, defendants' appeal from the intermediate order must be dismissed (see *Matter of Aho*, 39 NY2d 241, 248 [1976]; *Lakeview Loan Servicing, LLC v Finn*, 176 AD3d 1599, 1599 [4th Dept 2019]; *Norwest Mtge. v Clifford*, 271 AD2d 721, 721 [3d Dept 2000]). We note that a dismissal pursuant

to 22 NYCRR 1250.10 (a) may be vacated on motion; such a motion must be "made within one year of the date of the dismissal" (22 NYCRR 1250.10 [c]).

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

886

CA 24-00948

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

JULIE MORSE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BRADFORD J. MORSE, DEFENDANT-APPELLANT.

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

MACKENZIE HUGHES LLP, SYRACUSE (CHRISTOPHER A. POWERS OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

CATHERINE M. SULLIVAN, LIVERPOOL, ATTORNEY FOR THE CHILDREN.

Appeal from a judgment of the Supreme Court, Onondaga County
(Danielle M. Fogel, J.), entered May 29, 2024, in a divorce action.
The judgment, inter alia, granted plaintiff sole legal and primary
physical custody of the subject children.

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

Memorandum: In this divorce action, defendant father appeals
from a judgment that, inter alia, granted plaintiff mother sole legal
and primary physical custody of the children. During the pendency of
this appeal, the parties entered into a transcribed oral stipulation
in open court that rendered the custodial issues raised on this appeal
moot (*see Matter of Charles N.F. v Terry R.F.* [appeal No. 1], 261 AD2d
884, 884 [4th Dept 1999], *lv denied* 93 NY2d 814 [1999]; *see generally*
Kelly v Kelly, 19 AD3d 1104, 1106 [4th Dept 2005], *appeal dismissed* 5
NY3d 847 [2005], *reconsideration denied* 6 NY3d 803 [2006]). The
appeal must therefore be dismissed (*see Charles N.F.*, 261 AD2d at
884).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

887

CA 24-02027

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

RYAN DACKO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

IRAKLI KILADZE, DEFENDANT-APPELLANT.

CERIO LAW OFFICES, PLLC, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered May 31, 2024. The order and judgment, insofar as appealed from, granted the motion of plaintiff insofar as it sought summary judgment on the ejectment causes of action and summary judgment dismissing the counterclaims.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, those parts of the motion for summary judgment seeking an order ejecting defendant and for summary judgment dismissing the counterclaims are denied, the counterclaims are reinstated, and the second and third ordering paragraphs are vacated.

Memorandum: Plaintiff commenced this action seeking, inter alia, an order ejecting defendant from plaintiff's residential property. According to the complaint, defendant began living at the property with plaintiff's permission in July 2019, at which time plaintiff and defendant entered into an oral agreement requiring defendant to pay plaintiff \$40,000 for the purchase of the home within one year. Based upon defendant's purported breach of the agreement and his continued occupancy of the home, the complaint sought an order ejecting defendant from the property. Defendant answered and asserted counterclaims. Plaintiff moved for, inter alia, summary judgment on his causes of action for ejectment and summary judgment dismissing defendant's counterclaims. Supreme Court granted the motion with respect to the ejectment causes of action and the counterclaims on the grounds that the purported oral agreement was void as a result of the statute of frauds and that the part performance exception thereto did not apply. As limited by his brief, defendant appeals from the order and judgment to that extent, and we reverse the order and judgment insofar as appealed from.

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "This burden is a heavy one and on a motion for summary judgment, 'facts must be viewed in the light most favorable to the non-moving party' " (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]), and "every available inference must be drawn in the [non-moving party's] favor" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). "To establish a prima facie entitlement to ejectment, a plaintiff must show that (1) [they are] 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" (*MRR Prop. Solutions, LLC v Jiang*, 240 AD3d 1300, 1301 [4th Dept 2025] [internal quotation marks omitted]).

In support of his motion, plaintiff submitted, inter alia, defendant's deposition testimony. Defendant testified that he and plaintiff were friends and that plaintiff allowed him to move into plaintiff's then-vacant home in 2019 with no agreement to pay rent. Sometime thereafter, the parties orally agreed that, over a period of three years, defendant would pay plaintiff \$40,000 for the purchase of the home. Defendant was to pay \$600 per month during the first year, and there was no specified payment schedule for the remainder of the term. Defendant made 12 monthly payments of \$600 in the first year and thereafter made various lump-sum payments to plaintiff, for a total of \$33,200. Defendant also tendered the funds to pay the outstanding balance, but plaintiff rejected that payment and commenced court proceedings.

Viewing the evidence in the light most favorable to defendant and giving him the benefit of every favorable inference (see *De Lourdes Torres*, 26 NY3d at 763; *William J. Jenack Estate Appraisers & Auctioneers, Inc.*, 22 NY3d at 475), we agree with defendant that the court erred in granting the motion with respect to the ejectment causes of action inasmuch as the above testimony raises questions of fact whether the doctrine of part performance takes the alleged oral agreement outside the statute of frauds and thereby raises questions of fact as to plaintiff's entitlement to ejectment, specifically his status as owner and right to possession of the property (see generally *MRR Prop. Solutions, LLC*, 240 AD3d at 1301-1302; *GSMS 2015-GC34 Commerce Ct., LLC v Calamar Constr. Mgt., Inc.*, 235 AD3d 1290, 1291 [4th Dept 2025]).

Although such an oral agreement would generally be unenforceable under the statute of frauds, which provides, inter alia, that a "contract for . . . the sale[] of any real property . . . is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing" (General Obligations Law § 5-703 [2]), an exception exists "in cases of part performance" (§ 5-703 [4]), i.e., where a party to an otherwise unenforceable oral agreement has partially performed under it. The exception is an equitable one,

which recognizes that a party may "waive [the] protection [of the statute of frauds] . . . by inducing or permitting without remonstrance another party to the agreement to do acts, pursuant to and in reliance upon the agreement, to such an extent and so substantial in quality as to irremediably alter [the] situation and make the interposition of the statute against performance a fraud" (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999] [internal quotation marks omitted]). Importantly, "[t]he [part] performance must be unequivocally referable to the agreement" (*id.*; see *Dates v Key Bank Natl. Assn.*, 300 AD2d 1090, 1090 [4th Dept 2002]; *Gier v Bissell*, 188 AD2d 1040, 1041 [4th Dept 1992]).

Based on defendant's deposition testimony, we conclude that questions of fact exist regarding defendant's part performance under the alleged oral agreement, such that it may be enforced despite the statute of frauds (see generally *Ognenovski v Wegman*, 275 AD2d 1013, 1014-1015 [4th Dept 2000]). Therefore, we likewise conclude that questions of fact exist regarding plaintiff's status as an owner and right to possession of the property (see generally *MMR Prop. Solutions, LLC*, 240 AD3d at 1301-1302; *GSMS 2015-GC34 Commerce Ct., LLC*, 235 AD3d at 1291).

We further conclude that, based on those same questions of fact, the court erred in granting the motion with respect to the counterclaims, which themselves were based upon the terms and performance under the oral agreement alleged by defendant (see generally *Corter-Longwell v Juliano*, 200 AD3d 1578, 1584 [4th Dept 2021]).

Because the above questions of fact were raised by plaintiff's own submissions, the motion with respect to the ejectment causes of action and the counterclaims must be denied without regard to the sufficiency of the opposing papers (see generally *Matter of Rodriguez*, 239 AD3d 1270, 1271 [4th Dept 2025]).

We have reviewed plaintiff's contentions raised as alternative grounds for affirmance (see generally *Ardalan v Safaie*, 239 AD3d 1433, 1436 [4th Dept 2025]) and conclude that none has merit.

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

891

KA 23-00083

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MATTHEW T. ZAKRZEWSKI, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KERRY A. CONNER 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 October 18, 2022. The judgment convicted defendant upon a plea of guilty of arson in the second degree and arson 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 arson in the second degree (Penal Law § 150.15) and arson in the third degree (§ 150.10 [1]). Contrary to defendant's contention, a waiver of the right to appeal is not unconscionable per se (*see People v Brinkman*, 240 AD3d 1431, 1431-1432 [4th Dept 2025], *lv denied* – NY3d – [2025]; *People v Barr*, 192 AD3d 1571, 1571 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *see also People v Thomas*, 34 NY3d 545, 557-558 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). Further, the record establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see Brinkman*, 240 AD3d at 1432). The valid waiver encompasses defendant's challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Hoose*, 236 AD3d 1294, 1296 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

892

KA 24-00398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RANDALL A. SCOTT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (Meredith A. Vacca, J.), rendered May 9, 2023. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law §§ 20.00, 125.25 [1]). Defendant's conviction is based on a theory of accessorial liability and arises from his alleged involvement in the fatal shooting of the victim by the codefendant, who was tried separately and convicted. On appeal, defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. We agree, and we therefore reverse the judgment and dismiss the indictment.

"[E]ven in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]; *see People v Rossey*, 89 NY2d 970, 971-972 [1997]; *People v Cabey*, 85 NY2d 417, 420-421 [1995]). A person is guilty of murder in the second degree when, "[w]ith intent to cause the death of another person, [they] cause[] the death of such person or of a third person" (Penal Law § 125.25 [1]). A person is criminally liable for the conduct of another that constitutes an offense "when, acting with the

mental culpability required for the commission thereof, [they] solicit[], request[], command[], importune[], or intentionally aid[] such person to engage in such conduct" (§ 20.00; see *People v Ramos*, 218 AD3d 1113, 1113-1114 [4th Dept 2023]; *People v McDonald*, 172 AD3d 1900, 1901 [4th Dept 2019]). "Intent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Price*, 35 AD3d 1230, 1231 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007]; see *McDonald*, 172 AD3d at 1901-1902). A jury is also "entitled to infer that a defendant intended the natural and probable consequences of [the defendant's] acts" (*People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017] [internal quotation marks omitted]). Nonetheless, "[i]t is essential that the intent . . . to kill be fairly deducible from the proof and that the proof exclude any other purpose" (*People v Monaco*, 14 NY2d 43, 46 [1964]; see *McDonald*, 172 AD3d at 1902).

Here, because the codefendant was wearing a GPS-equipped ankle bracelet that constantly reported his location to the authorities, the People were able to establish the codefendant's whereabouts throughout the day in question and that it was the codefendant who shot and killed the victim. Viewing the evidence in the light most favorable to the People, we further conclude that the People established that defendant transported the codefendant to and from the scene of the victim's murder. Indeed, defendant admitted that much to the police, and video footage admitted in evidence at trial placed defendant's distinctive vehicle at various locations that corresponded with the codefendant's location on the day in question. Because there is no dispute that defendant did not shoot the victim, his guilt as an accessory depends entirely on whether his intent to commit the murder can be inferred from his actions as the codefendant's driver at the time in question.

Of course, "[a] defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability" (*McDonald*, 172 AD3d at 1902 [internal quotation marks omitted]; see *Ramos*, 218 AD3d at 1114; see generally *Cabey*, 85 NY2d at 421). Indeed, evidence that a defendant was at the crime scene and even assisted the perpetrator in removing evidence of that crime is insufficient to support a defendant's conviction where the People fail to offer evidence from which the jury could rationally exclude the possibility that the defendant was without knowledge of the perpetrator's intent (see *People v La Belle*, 18 NY2d 405, 411-412 [1966]; see also *People v Robinson*, 90 AD2d 249, 251 [4th Dept 1982], *affd* 60 NY2d 982 [1983]). "An aider and abettor must share the intent or purpose of the principal actor, and there can be no partnership in an act where there is no community of purpose" (*La Belle*, 18 NY2d at 412 [internal quotation marks omitted]). Here, we have no difficulty concluding, based on the video evidence showing defendant picking up the codefendant immediately after the shots were fired and speeding away from the scene, that there is a valid line of reasoning and permissible inferences by which the jury could have found that defendant intentionally aided the codefendant after the murder, but we cannot conclude that there is legally sufficient evidence to support

the inference that defendant shared the codefendant's intent to kill the victim (see *People v Eldridge*, 302 AD2d 934, 935 [4th Dept 2003], lv denied 99 NY2d 654 [2003]; see generally *Robinson*, 90 AD2d at 251). Indeed, we note that none of the factors cited by the People in support of defendant's guilt as an accessory—even the codefendant's use of a disguise when exiting defendant's vehicle and defendant's suspicious movement of his vehicle to facilitate quicker escape—is inconsistent with a scenario in which the codefendant intended to rob the victim, or even a scenario in which defendant truly had no idea that the codefendant was armed and intended to shoot and kill the victim (see *Ramos*, 218 AD3d at 1114). Further, there was no evidence at trial establishing that defendant and the codefendant had any conversations pertaining to the shooting of the victim; indeed, there is hardly any evidence establishing that defendant and the codefendant had much, if any interaction with each other before the day of the murder. Consequently, we conclude that the evidence was insufficient to establish that defendant was aware of, and shared, the codefendant's intent to kill the victim (see *McDonald*, 172 AD3d at 1903).

Even assuming, arguendo, that the evidence is legally sufficient to support the conviction, we further conclude that, 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]), the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). As previously noted, "a defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability" (*Ramos*, 218 AD3d at 1114 [internal quotation marks omitted]). Moreover, the People failed to prove beyond a reasonable doubt that defendant "shared the codefendant's intent to kill" (*McDonald*, 172 AD3d at 1904; see generally *People v Hawkins*, 192 AD3d 1637, 1640 [4th Dept 2021]), particularly given the lack of evidence that defendant "knew that the codefendant was armed at the time defendant transported him" or knew that the codefendant planned to shoot and kill the victim at that time (*Ramos*, 218 AD3d at 1116). In sum, even if the evidence is legally sufficient, we are simply not "convinced that the jury was justified in finding that [defendant's] guilt [as an accessory] was proven beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 117 [2011]).

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

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

896

KA 25-00225

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ROBERT D. FINCH, DEFENDANT-APPELLANT.

STEVEN A. FELDMAN, MANHASSET, 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 November 7, 2024. The judgment convicted defendant, upon his plea of guilty, of attempted sexual abuse in the first degree, attempted assault in the second degree and endangering the welfare of a child (two counts).

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

897

KA 23-00076

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PRINCE K. WILSON, ALSO KNOWN AS PRINCE WILSON,
ALSO KNOWN AS PRINCE NEIHTKQUEIRAAH VALENTINO
TRMONE WILSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE 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 22, 2022. The judgment convicted defendant upon a 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, a waiver of the right to appeal is not unconscionable per se (see *People v Brinkman*, 240 AD3d 1431, 1431-1432 [4th Dept 2025], lv denied – NY3d – [2025]; *People v Barr*, 192 AD3d 1571, 1571 [4th Dept 2021], lv denied 37 NY3d 954 [2021]; see also *People v Thomas*, 34 NY3d 545, 557-558 [2019], cert denied – US –, 140 S Ct 2634 [2020]). Further, the record establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (see *Brinkman*, 240 AD3d at 1432). The valid waiver encompasses defendant's challenge to the severity of his sentence (see *People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Hoose*, 236 AD3d 1294, 1296 [4th Dept 2025], lv denied 44 NY3d 993 [2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

898

KA 23-01079

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RANDALL SCOTT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (Meredith A. Vacca, J.), rendered May 9, 2023. The judgment convicted defendant upon a guilty plea of tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of tampering with physical evidence (Penal Law § 215.40 [2]), arising out of allegations that he removed a gun from the vicinity of a shooting. We affirm.

Defendant's sole contention on appeal is that his plea must be vacated pursuant to *People v Fuggazzatto* (62 NY2d 862 [1984]) in light of our reversal of a judgment convicting defendant of an unrelated murder (*People v Scott*, – AD3d – [Dec. 23, 2025] [4th Dept 2025]). Initially, we note that defendant's contention, which goes to the voluntariness of the plea, survives even a valid waiver of the right to appeal (see *People v Walker*, 148 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1088 [2017]; see also *People v Griffin*, 119 AD3d 605, 606 [2d Dept 2014]). We nevertheless reject defendant's contention on the merits. After defendant was convicted of the unrelated murder but before he was sentenced, defendant pleaded guilty to tampering with physical evidence and County Court promised to impose a sentence that would run concurrently with the sentence imposed on the murder conviction. Crucially, however, at the time of the plea, defendant was expressly informed that his tampering conviction would stand even if he succeeded on his appeal from the judgment convicting him of murder, and both defense counsel and defendant acknowledged their understanding of that term of the plea. Defendant thus is not entitled to vacatur of his plea inasmuch as the

reversal of the judgment convicting him of murder and the removal of the sentence imposed on that conviction does not nullify "a benefit that was expressly promised and was a material inducement to the guilty plea" (*People v Rowland*, 8 NY3d 342, 345 [2007]; *see generally* *People v Pichardo*, 1 NY3d 126, 129-130 [2003]; *People v Kalinowski*, 84 AD3d 1739, 1741 [4th Dept 2011]).

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

899

CAF 24-01766

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

IN THE MATTER OF SHANA RILEY, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JASON TURNER, RESPONDENT-RESPONDENT.

ANDREW J. DIPASQUALE, ROCHESTER, FOR PETITIONER-APPELLANT.

VERA A. VENKOVA, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Maria Cubillos Reed, J.), entered September 17, 2024, in a proceeding pursuant to Family Court Act article 8. The order, inter alia, dismissed the petition with prejudice.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, petitioner appeals from an order that, inter alia, dismissed her family offense petition. Petitioner contends that Family Court erred in dismissing the petition to the extent it alleged that respondent committed the family offenses of harassment in the second degree and disorderly conduct. We conclude that petitioner's contention lacks merit.

"A petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" (*Matter of Washington v Davis*, 207 AD3d 1078, 1079 [4th Dept 2022], lv denied 39 NY3d 902 [2022] [internal quotation marks omitted]; see Family Ct Act § 832). " 'The determination of whether a family offense was committed is a factual issue to be resolved by the [court], and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed if supported by the record' " (*Washington*, 207 AD3d at 1079; see *Matter of Whitney v Lord*, 234 AD3d 1350, 1350 [4th Dept 2025]; *Matter of KC B. Mench v Majerus*, 188 AD3d 1651, 1652 [4th Dept 2020]).

Here, we see no reason to disturb the court's credibility determinations or its conclusion that respondent committed neither harassment in the second degree nor disorderly conduct (see *KC B. Mench*, 188 AD3d at 1652-1653; *Matter of Brazie v Zenisek*, 99 AD3d

1258, 1259 [4th Dept 2012]; see generally Penal Law §§ 240.20 [1]; 240.26 [1]). As the court properly determined, the record does not support the conclusion that respondent, in his attempts to have petitioner allow him to hold their child during a church service pursuant to their established practice, "inten[ded] to harass, annoy or alarm [petitioner]" (§ 240.26; see *KC B. Mench*, 188 AD3d at 1653) or "inten[ded] to cause public inconvenience, annoyance or alarm, or recklessly creat[ed] a risk thereof" (§ 240.20; see *Brazie*, 99 AD3d at 1259). Thus, contrary to petitioner's contention, she failed to meet her burden of establishing by a preponderance of the evidence that respondent committed either of those family offenses (see *KC B. Mench*, 188 AD3d at 1653; *Brazie*, 99 AD3d at 1259).

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

900

CA 24-01837

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

MAEGAN GIRGA, PLAINTIFF-RESPONDENT,

V

ORDER

FAIRPORT PEDIATRICS, LLP, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

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

MERSON LAW, PLLC, NEW YORK CITY (ANNETTE G. HASAPIDIS OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered November 6, 2024. The order, insofar as appealed from, denied in part the motion of defendant Fairport Pediatrics, LLP, for summary judgment dismissing plaintiff's complaint against it.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see *Matter of William Mattar, P.C. v Hall* [appeal No. 1], 199 AD3d 1416, 1417 [4th Dept 2021]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

901

CA 25-00445

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

MAEGAN GIRGA, PLAINTIFF-RESPONDENT,

V

ORDER

FAIRPORT PEDIATRICS, LLP, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

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

MERSON LAW, PLLC, NEW YORK CITY (ANNETTE G. HASAPIDIS OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered February 10, 2025. The order granted the motion of defendant Fairport Pediatrics, LLP insofar as it sought leave to reargue and, upon reargument, adhered to a prior order denying in part the motion of Fairport Pediatrics, LLP, for summary judgment dismissing the complaint against it.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

902

CA 24-01336

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

KESHIA GWATHNEY, PLAINTIFF-APPELLANT,

V

ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

CAVETTE CHAMBERS, CORPORATION COUNSEL, BUFFALO (WILLIAM MATHEWSON OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Edward Pace, J.), entered April 30, 2024. The order denied the motion of plaintiff to dismiss the motion of defendant for summary judgment and allowed defendant to amend the motion.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

903

CA 24-01337

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

KESHIA GWATHNEY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

CAVETTE CHAMBERS, CORPORATION COUNSEL, BUFFALO (WILLIAM MATHEWSON OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Edward Pace, J.), entered July 30, 2024. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained in a motor vehicle accident. At the time of the accident, a police officer employed by defendant's police department was responding to a radio dispatch to assist another officer. The police officer's vehicle approached plaintiff's vehicle from behind, traveling in excess of 50 miles per hour in a residential area. The officer attempted to pass plaintiff's vehicle on the left by crossing into the oncoming lane of travel, at which point it collided with plaintiff's vehicle, which was beginning to turn left onto an intersecting road. Defendant moved for summary judgment dismissing the complaint on the ground that, at the time of the accident, its employee was operating his police vehicle while involved in an emergency operation and that his operation of the police vehicle was not reckless as a matter of law. Supreme Court granted the motion, and plaintiff now appeals. We reverse.

Initially, we note that there is no dispute that the officer's conduct is governed by the reckless disregard standard of care set forth in Vehicle and Traffic Law § 1104 (e), rather than the ordinary negligence standard of care, inasmuch as the officer was operating an "authorized emergency vehicle" (§ 101) and was " 'engage[d] in . . . specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)' " (*Torres-Cummings v Niagara Falls Police*

Dept., 193 AD3d 1372, 1374 [4th Dept 2021], quoting *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]), i.e., exceeding the maximum speed limit and disregarding regulations governing directions of movement (see § 1104 [b] [3], [4]). The "reckless disregard standard demands more than a showing of a lack of due care under the circumstances—the showing typically associated with ordinary negligence claims Rather, for liability to be predicated upon a violation of Vehicle and Traffic Law § 1104, there must be evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*Frezzell v City of New York*, 24 NY3d 213, 217 [2014] [internal quotation marks omitted]). Although the reckless disregard standard is a heightened standard compared to ordinary negligence, it "retains and recognizes the potential for liability as a protection for the general public against disproportionate, overreactive conduct" (*Campbell v City of Elmira*, 84 NY2d 505, 512 [1994]).

We agree with plaintiff that the court erred in granting the motion. Even assuming, arguendo, that defendant met its initial burden on the motion of establishing as a matter of law that the police officer's conduct did not rise to the level of reckless disregard for the safety of others (see *Szczerbiak v Pilat*, 90 NY2d 553, 556-557 [1997]), we conclude that plaintiff raised a triable issue of fact in opposition (see *Farwell v City of Syracuse*, 203 AD3d 1733, 1734 [4th Dept 2022]). Specifically, "view[ing] the evidence in the light most favorable to the party opposing the motion [and] giving that party the benefit of every reasonable inference," as we must (*Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that plaintiff's submissions raise questions of fact as to the speed at which the officer's vehicle was traveling at the time of the accident and whether the officer was operating the siren in his vehicle, which would have been required by department policy (see *Gernatt v Gregoire*, 217 AD3d 1340, 1342 [4th Dept 2023]; *Portis v Yates*, 207 AD3d 1137, 1138 [4th Dept 2022]; *McLoughlin v City of Syracuse*, 206 AD3d 1600, 1602 [4th Dept 2022]; see also *Regdos v City of Buffalo*, 132 AD3d 1343, 1343 [4th Dept 2015]).

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

904

CA 24-01318

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

IN THE MATTER OF THE INTERMEDIATE ACCOUNTING OF
MANUFACTURERS AND TRADERS TRUST COMPANY, AS TRUSTEE
OF THE ROBERT S. BASSETT TRUST NUMBER 7 OF 1974,
FOR THE PERIOD COVERING SEPTEMBER 7, 1983 TO
OCTOBER 18, 2013,
PETITIONER-RESPONDENT;

IN THE MATTER OF THE INTERMEDIATE ACCOUNTING OF
MANUFACTURERS AND TRADERS TRUST COMPANY, AS TRUSTEE
OF THE ROBERT S. BASSETT TRUST NUMBER 7 OF 1974,
FOR THE PERIOD COVERING OCTOBER 19, 2013 TO
MAY 15, 2017,
PETITIONER-RESPONDENT.

ORDER

SUE M. WILLIAMS, DANIEL H. WILLIAMS, IV,
JENNIFER B. WILLIAMS, AMELIA J. WILLIAMS, A MINOR
BY AND THROUGH HER NATURAL FATHER AND GUARDIAN
DANIEL H. WILLIAMS, IV, BRODERICK D. WILLIAMS,
A MINOR BY AND THROUGH HIS NATURAL FATHER AND
GUARDIAN DANIEL H. WILLIAMS, IV, AND JOSEPH H.
CHAPMAN, A MINOR BY AND THROUGH HIS NATURAL
MOTHER AND GUARDIAN, JENNIFER B. WILLIAMS,
OBJECTANTS-APPELLANTS.
(APPEAL NO. 1.)

DANIEL H. WILLIAMS, III, BUFFALO, FOR OBJECTANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County
(Stephen W. Cass, A.S.), entered August 1, 2024. The order, among
other things, approved the fees and costs of the guardians ad litem.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed with costs for reasons stated in the decision by
the Surrogate.

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

905

CA 25-00341

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

IN THE MATTER OF THE INTERMEDIATE ACCOUNTING OF
MANUFACTURERS AND TRADERS TRUST COMPANY, AS TRUSTEE
OF THE ROBERT S. BASSETT TRUST NUMBER 7 OF 1974,
FOR THE PERIOD COVERING SEPTEMBER 7, 1983 TO
OCTOBER 18, 2013,
PETITIONER-RESPONDENT;

IN THE MATTER OF THE INTERMEDIATE ACCOUNTING OF
MANUFACTURERS AND TRADERS TRUST COMPANY, AS TRUSTEE
OF THE ROBERT S. BASSETT TRUST NUMBER 7 OF 1974,
FOR THE PERIOD COVERING OCTOBER 19, 2013 TO
MAY 15, 2017,
PETITIONER-RESPONDENT.

ORDER

SUE M. WILLIAMS, DANIEL H. WILLIAMS, IV,
JENNIFER B. WILLIAMS, AMELIA J. WILLIAMS, A MINOR
BY AND THROUGH HER NATURAL FATHER AND GUARDIAN
DANIEL H. WILLIAMS, IV, BRODERICK D. WILLIAMS,
A MINOR BY AND THROUGH HIS NATURAL FATHER AND
GUARDIAN DANIEL H. WILLIAMS, IV, AND JOSEPH H.
CHAPMAN, A MINOR BY AND THROUGH HIS NATURAL MOTHER
AND GUARDIAN, JENNIFER B. WILLIAMS,
OBJECTANTS-APPELLANTS.
(APPEAL NO. 2.)

DANIEL H. WILLIAMS, III, BUFFALO, FOR OBJECTANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County
(Stephen W. Cass, A.S.), entered February 3, 2025. The order, among
other things, denied the motion of objectants insofar as it sought
leave to reargue.

It is hereby ORDERED that said appeal from the order insofar as
it denied leave to reargue is unanimously dismissed (*see Empire Ins.*
Co. v Food City, 167 AD2d 983, 984 [4th Dept 1990]) and the order is
affirmed with costs for reasons stated in the decision by the
Surrogate.

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

907

CA 24-00821

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

R.L., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

HOLLAND CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.

HERMAN LAW, NEW YORK CITY (JEFFREY M. HERMAN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

PERSONIUS MELBER LLP, BUFFALO (BRIAN M. MELBER OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 5, 2023. The order, insofar as appealed from, granted that part of defendant's motion seeking summary judgment dismissing the complaint insofar as it asserts claims against defendant for negligent supervision of plaintiff while acting in loco parentis and for negligent supervision and retention of the teacher.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the complaint is reinstated insofar as it asserts claims against defendant for negligent supervision of plaintiff while acting in loco parentis and for negligent supervision and retention of the teacher.

Memorandum: Plaintiff commenced this action pursuant to the Child Victims Act (see CPLR 214-g), alleging that he was sexually abused by a middle school math teacher while he was a student in defendant, Holland Central School District, in the late 1970s and early 1980s. Plaintiff alleged that, on at least three separate occasions, the teacher had him stay after school, walked with him to the boys' locker room, and then sexually abused him. Plaintiff appeals, as limited by his brief, from an order to the extent that it granted that part of defendant's motion seeking summary judgment dismissing the remaining claims in the complaint that had not been previously dismissed, for negligent supervision of plaintiff while acting in loco parentis and negligent supervision and retention of the teacher. We now reverse the order insofar as appealed from.

We agree with plaintiff that Supreme Court erred in granting that part of defendant's motion seeking summary judgment dismissing the complaint insofar as it asserts a claim against defendant for

negligent supervision of plaintiff while acting in loco parentis. With respect to that claim, "[a] school district has the duty to exercise the same degree of care and supervision over [students] under its control as a reasonably prudent parent would exercise under the same circumstances" (*Lisa P. v Attica Cent. School Dist.*, 27 AD3d 1080, 1081 [4th Dept 2006]). "The standard for determining whether this duty was breached is whether a parent of ordinary prudence placed in an identical situation and armed with the same information would invariably have provided greater supervision" (*id.* [internal quotation marks omitted]). Prior knowledge of an individual's propensity to engage in criminal conduct is not required to establish a cause of action for the negligent supervision of a student inasmuch as there are situations in which such conduct " 'may . . . be a "reasonably foreseeable" consequence of circumstances created by the defendant' " (*Murray v Research Found. of State Univ. of N.Y.*, 283 AD2d 995, 997 [4th Dept 2001], *lv denied* 96 NY2d 719 [2001], quoting *Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946 [1997]; see *Blanchard v Moravia Cent. Sch. Dist.*, 229 AD3d 1098, 1099-1100 [4th Dept 2024]; *AB 511 Doe v Lyndonville Cent. Sch. Dist.*, 229 AD3d 1268, 1269 [4th Dept 2024]). In other words, even without actual or constructive notice of an individual's criminal propensity, a school district may "be held liable for an injury that is the reasonably foreseeable consequence of circumstances it created by its inaction" (*Doe v Fulton School Dist.*, 35 AD3d 1194, 1195 [4th Dept 2006]; see *Blanchard*, 229 AD3d at 1100; *AB 511 Doe*, 229 AD3d at 1269).

Here, viewing the facts in the light most favorable to plaintiff as the nonmovant and drawing every available inference in his favor (see *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *Doe v Houk*, 224 AD3d 1250, 1254 [4th Dept 2024] [hereinafter *Houk*]), we conclude that defendant's own submissions raise a triable issue of fact whether the teacher's sexual abuse of plaintiff was a reasonably foreseeable consequence of the failure of defendant and its employees to prevent the teacher from routinely touching other male students inappropriately while spending time alone with them on school grounds before or contemporaneous with plaintiff's dates of abuse and to prevent the teacher from creating situations in which he was alone with plaintiff by having plaintiff stay after school and taking him into the boys' locker room for no legitimate reason (see *Blanchard*, 229 AD3d at 1100; *AB 511 Doe*, 229 AD3d at 1269-1270). Indeed, defendant's own submissions raise a triable issue of fact whether the teacher's conduct was so open and prevalent that a reasonable person would have been on notice to protect against the injury-causing conduct (see *Visiko v Fleming*, 229 AD3d 1355, 1357 [4th Dept 2024]; see generally *Mirand v City of New York*, 84 NY2d 44, 49-50 [1994]).

We further agree with plaintiff that the court erred in granting that part of defendant's motion seeking summary judgment dismissing the complaint insofar as it asserts a claim against defendant for negligent supervision and retention of the teacher. To establish a claim of negligent supervision and retention of an employee, a plaintiff must show "that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Shapiro v Syracuse Univ.*, 208 AD3d 958, 960 [4th Dept 2022] [internal

quotation marks omitted]; see *AB 511 Doe*, 229 AD3d at 1270). That is because "[t]he employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the [supervision] and retention of the employee" (*Shapiro*, 208 AD3d at 960 [internal quotation marks omitted]; see *Harper v Buffalo City Sch. Dist.*, 242 AD3d 1600, 1602 [4th Dept 2025]). With respect to the theory of constructive knowledge at issue here, "[a]n 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' " (*Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 158 [2023]; see *Nellenback v Madison County*, — NY3d —, —, 2025 NY Slip Op 02263, *1 [2025]). When a person acquires knowledge within the scope of their employment, that "knowledge is imputed to [the employer] and the latter is bound by such knowledge [even if] the information is never actually communicated to [the employer]" (*BL Doe 5 v Fleming*, 229 AD3d 1076, 1080 [4th Dept 2024] [internal quotation marks omitted]; see *Harper*, 242 AD3d at 1601).

Viewing the evidence in the appropriate light (see *De Lourdes Torres*, 26 NY3d at 763; *Houk*, 224 AD3d at 1254), we conclude that defendant's own submissions raise a triable issue of fact whether defendant should have known about the teacher's propensity to engage in sexual abuse of male students while spending time alone with them on school grounds and elsewhere (see *AB 511 Doe*, 229 AD3d at 1270). Notably, defendant submitted an excerpt of the deposition of another male student who testified about an incident in which a gym teacher walked into the boys' locker room to find the teacher and the other male student alone in the shower area just after the teacher had sexually abused the other male student; that incident predated or was contemporaneous with plaintiff's alleged dates of abuse (see *id.*). Defendant's submissions also included evidence that the teacher was repeatedly having plaintiff stay after school and taking him into the boys' locker room for no legitimate reason and that other school employees were aware that the teacher, among other things, frequently drove male students off campus during school hours and babysat at least one male student overnight (see *Blanchard*, 229 AD3d at 1101; *AB 511 Doe*, 229 AD3d at 1270). Defendant's submissions thus "raised a triable issue of fact whether [defendant] had notice of the potential for harm to . . . plaintiff such that its alleged negligence in supervising and retaining [the subject teacher] placed [him] in a position to cause foreseeable harm" (*AB 511 Doe*, 229 AD3d at 1270 [internal quotation marks omitted]; see *Blanchard*, 229 AD3d at 1101).

Inasmuch as defendant failed to meet its initial burden on the motion, we do not consider the sufficiency of plaintiff's submissions

in opposition to the motion (see *Winegrad v New York Univ. Med. Ctr.*,

64 NY2d 851, 853 [1985]; *BL Doe* 5, 229 AD3d at 1082).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

910

KA 23-00639

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SCOTT W. FROEBEL, DEFENDANT-APPELLANT.

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

VINCENT A. HEMMING, DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered April 6, 2023. The judgment convicted defendant upon a plea of guilty of driving while intoxicated, as a class E felony.

It is hereby ORDERED that said appeal is unanimously dismissed

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. Because defendant has completed serving the sentence imposed, his challenge to the severity of the sentence has been rendered moot (*see People v Savino*, 239 AD3d 1452, 1454 [4th Dept 2025]; *People v Fulcott*, 236 AD3d 1350, 1350 [4th Dept 2025]; *People v Ismael*, 210 AD3d 1528, 1529-1530 [4th Dept 2022]), and we conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]; *People v Parente*, 4 AD3d 793, 794 [4th Dept 2004]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

915

KA 24-01594

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARKELL STRANGE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered July 17, 2024. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [3]). Even assuming, *arguendo*, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Pascalar*, 221 AD3d 1538, 1538 [4th Dept 2023], *lv denied* 40 NY3d 1094 [2024]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

919

CAF 24-00126

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

IN THE MATTER OF APRIL MCCANTS-BASKIN,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DOCK ANTONIO MACK, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR
PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

DEBORAH K. JESSEY, CLARENCE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Thomas M. DiMillo, A.J.), dated November 17, 2023, in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: In appeal No. 1, respondent appeals from an order of protection issued in this proceeding pursuant to Family Court Act article 8. After a fact-finding hearing, Family Court determined that respondent committed acts constituting various family offenses (see Family Ct Act § 812 [1]). In appeal No. 2, respondent appeals from an order denying in part his motion to settle the record on appeal in appeal No. 1.

We first address respondent's contention in appeal No. 2. Contrary to respondent's contention, the court did not abuse its discretion in denying in part the motion to settle the record (see *Kalbfliesh v McCann*, 129 AD3d 1671, 1672 [4th Dept 2015], lv denied 26 NY3d 907 [2015]; see generally *Matter of Warren v Planning Bd. of the Town of W. Seneca*, 225 AD3d 1248, 1249 [4th Dept 2024]). "[T]he record on appeal is . . . limited to those papers that were before the court in deciding [the petition]" (*Chaudhuri v Kilmer*, 158 AD3d 1276, 1276 [4th Dept 2018] [internal quotation marks omitted]), and the letters respondent sought to include in the record were never filed with the court or considered by the court in determining the petition.

With respect to appeal No. 1, initially, we note that the court did not specify each of the subsections of the criminal statutes upon which it based its findings. However, upon exercising our independent review power (see *Matter of Naas v Wurth*, 234 AD3d 1289, 1290 [4th Dept 2025], *lv denied* 44 NY3d 901 [2025]; *Matter of Tara N. P.-T. v Emma P.-T.*, 204 AD3d 1414, 1415 [4th Dept 2022]; *Matter of Telles v DeWind*, 140 AD3d 1701, 1701 [4th Dept 2016]), we conclude, contrary to respondent's contention, that the record is sufficient to establish, by a preponderance of the evidence, that respondent committed the family offenses of assault in the third degree under Penal Law § 120.00 (1) (see *Matter of Holli H. v Joseph R.*, 179 AD3d 1522, 1523 [4th Dept 2020]) and criminal mischief in the third degree under section 145.05 (2).

The court's assessment of the credibility of the witnesses is entitled to great weight, and the court's determinations that petitioner was a credible witness and that respondent was not acting in self-defense are supported by the record (see *Matter of Mohammed v Mohammed*, 174 AD3d 615, 615-616 [4th Dept 2019]; *Matter of Dietzman v Dietzman*, 112 AD3d 1370, 1370 [4th Dept 2013]; *Matter of Helles v Helles*, 87 AD3d 1273, 1274 [4th Dept 2011]). Petitioner testified that, during an altercation, respondent placed his fingers inside her cheeks and ripped her mouth open, causing bleeding. Petitioner further testified that she sought medical attention and was in severe pain for several months. Petitioner's testimony is sufficient to establish that respondent committed the family offense of assault in the third degree, including the element of physical injury (see generally Penal Law § 10.00 [9]; *People v Soto*, 242 AD3d 1613, 1613-1614 [4th Dept 2025]). Petitioner further testified that respondent broke her television, valued at between \$200 and \$300, and damaged her apartment, resulting in the loss of her \$700 security deposit. Her testimony is sufficient to establish that respondent committed the family offense of criminal mischief in the third degree, including the element of damage in the amount exceeding \$250 (see generally § 145.05 [2]; *People v Khudan*, 187 AD3d 792, 793 [2d Dept 2020], *lv denied* 36 NY3d 1051 [2021]; *People v Towsley*, 85 AD3d 1549, 1550 [4th Dept 2011], *lv denied* 17 NY3d 905 [2011]).

We reject respondent's contention that the court erred in denying his request for an adjournment to call two police officers to testify. It is well settled that the determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court (see *Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *Matter of Clausell v Salame*, 156 AD3d 1401, 1401-1402 [4th Dept 2017]; *Matter of Biles v Biles*, 145 AD3d 1650, 1650 [4th Dept 2016]). "In making such a determination, the court must undertake a balanced consideration of all relevant factors" (*Matter of Sicurella v Embro*, 31 AD3d 651, 651 [2d Dept 2006], *lv denied* 7 NY3d 717 [2006]; see *Matter of Latonia W. [Anthony W.]*, 144 AD3d 1692, 1693 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]). Here, respondent's attorney "failed to demonstrate that the need for the adjournment . . . was not based on a lack of due diligence on the part of [respondent] or [his] attorney" (*Matter of Sophia M.G.-K. [Tracy G.-*

K.], 84 AD3d 1746, 1747 [4th Dept 2011]; *see Latonia W.*, 144 AD3d at 1693; *Matter of Venditto v Davis*, 39 AD3d 555, 555 [2d Dept 2007]). Respondent's attorney had already received one adjournment in order to review the transcript of petitioner's testimony before finishing his direct examination of respondent, and he could have called the officers to testify on the next court date, but failed to do so. We therefore conclude that the court did not abuse its discretion in denying respondent's request for a second adjournment (*see Clausell*, 156 AD3d at 1401-1402).

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

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

920

CAF 25-00517

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

IN THE MATTER OF APRIL MCCANTS-BASKIN,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DOCK MACK, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR
PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

DEBORAH K. JESSEY, CLARENCE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Thomas M. DiMillo, A.J.), dated February 14, 2025, in a proceeding pursuant to Family Court Act article 8. The order granted in part respondent's motion to settle the record on appeal.

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

Same memorandum as in *Matter of McCants-Baskin v Mack* ([appeal No. 1] – AD3d – [Dec. 23, 2025] [4th Dept 2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

925

CA 24-01234

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

IN THE MATTER OF FRIENDS OF ST. THOMAS
THE APOSTLE, ET AL., PETITIONERS-APPELLANTS,

V

ORDER

TOWN OF IRONDEQUOIT ZONING BOARD OF APPEALS,
43 NORTH REAL ESTATE, LLC, ST. KATERI TEKAKWITHA
PARISH, DIOCESE OF ROCHESTER, ST. THOMAS THE
APOSTLE ROMAN CATHOLIC CHURCH OF IRONDEQUOIT,
ST. THOMAS CHURCH OF IRONDEQUOIT,
RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENTS.

UNDERBERG & KESSLER LLP, ROCHESTER (JACOB H. ZOGHLIN OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

NIXON PEABODY LLP, VICTOR (ERIC M. FERRANTE OF COUNSEL), HARRIS BEACH
MURTHA CULLINA PLLC, PITTSFORD, AND DAVIDSON FINK LLP, FOR
RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the
Supreme Court, Monroe County (Sam L. Valleriani, J.), entered July 2,
2024, in a proceeding pursuant to CPLR article 78. The judgment,
among other things, dismissed the petition.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

926

CAF 24-00992

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

IN THE MATTER OF APRIL MCCANTS-BASKIN,
PETITIONER-RESPONDENT-RESPONDENT,

V

ORDER

DOCK MACK, RESPONDENT-PETITIONER-APPELLANT.

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

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR
PETITIONER-RESPONDENT-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Thomas M. DiMillo, A.J.), dated May 10, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner-respondent sole custody of the subject child.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

930

CA 25-00522

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

VAN BUREN FARMS, LLC, VERNE VAN BUREN AND
WALTER VAN BUREN, PLAINTIFFS-RESPONDENTS,

V

ORDER

HENDRIX FARMS, ET AL., DEFENDANTS,
AND CONKLIN COMPANY, INC., DEFENDANT-APPELLANT.

PHILLIPS LYTTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), FOR
DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County
(Deborah A. Chimes, J.), entered March 6, 2025. The order denied the
motion of defendant Conklin Company, Inc. to dismiss the amended
complaint against it.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

935

KA 24-00428

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BENJI REED, JR., DEFENDANT-APPELLANT.

ADAM AMIRAUT, BUFFALO, 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 (Robert Bauer, J.), rendered April 26, 2023. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Lyon*, 227 AD3d 1521, 1522 [4th Dept 2024], *lv denied* 42 NY3d 928 [2024]; *People v Tennant*, 217 AD3d 1564, 1564 [4th Dept 2023]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Mendoza*, 37 NY3d 1075, 1076 [2021]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

936

KA 22-01788

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FELIX E., DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Judith A. Sinclair, J.), dated September 13, 2022. The order denied the application of defendant for resentencing pursuant to CPL 440.47.

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

Memorandum: Defendant appeals from an order that denied his application for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (see CPL 440.47; Penal Law § 60.12). Defendant contends that Supreme Court erred in determining that he failed to meet his burden of proof. We affirm.

After a verbal and physical altercation, defendant shot his uncle twice, once in the shoulder and then once in the back. Defendant pleaded guilty to assault in the first degree (Penal Law § 120.10 [1]). Defendant thereafter requested permission from the court to apply for resentencing pursuant to the DVSJA, and the court granted that request. Following a hearing, the court denied defendant's application for resentencing, determining that he failed to establish by a preponderance of the evidence that he met any of the three conditions stated in Penal Law § 60.12 (1).

Pursuant to Penal Law § 60.12 (1), the sentencing court may, in its discretion, apply an alternative sentence if it determines following a hearing that the defendant has established the existence of three conditions: (1) "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 as the defendant"; (2) "such abuse was a significant contributing factor to the defendant's criminal behavior"; and (3) "having regard for the nature and circumstances of the crime

and the history, character and condition of the defendant, . . . a sentence of imprisonment [in the original sentencing range] would be unduly harsh" (*id.*; see *People v Krista M.G.*, 228 AD3d 1300, 1301 [4th Dept 2024], *lv denied* 42 NY3d 1036 [2024]).

Here, assuming, *arguendo*, that defendant established the existence of the second condition by a preponderance of the evidence, we conclude that he failed to establish the existence of the first or third condition. With respect to the first condition, defendant failed to establish that he was a victim of substantial abuse "at the time of" the offense (Penal Law § 60.12 [1] [a]). "Although the DVSJA does not require that the abuse occur simultaneously with the offense . . . , the 'at the time of' language must create some requirement of a temporal nexus between the abuse and the offense or else it is meaningless" (*People v Williams*, 198 AD3d 466, 466-467 [1st Dept 2021], *lv denied* 37 NY3d 1165 [2022]). At the hearing, defendant testified that, as a youth, he lived with the uncle for a time, during which the uncle inflicted substantial physical and psychological abuse on him. Defendant further testified that, in later years, he had more limited encounters with the uncle and largely avoided seeing him entirely. That testimony failed to establish by a preponderance of the evidence that defendant was a victim of substantial abuse during the years leading up to the shooting (see generally *id.*).

With respect to the third condition, contrary to defendant's contention, we conclude that the original sentence is not "unduly harsh" in light of the "nature and circumstances of the crime and the history, character and condition of the defendant" (Penal Law § 60.12 [1] [c]; see generally *People v Wendy B.-S.*, 229 AD3d 1317, 1321 [4th Dept 2024], *lv denied* 42 NY3d 1022 [2024]).

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

937

KA 24-01248

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DAMARIO A. JOHNSON, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), 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 July 11, 2024. The judgment convicted defendant, upon a plea of guilty, of aggravated family offense and criminal contempt in the second degree.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

938

KA 23-00683

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JACQUEE D. FLEMMING, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (REZVANEH GANJI OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County
(Judith A. Sinclair, J.), rendered February 21, 2023. The judgment
revoked defendant's sentence of probation and imposed a sentence of
imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the
sentence of probation previously imposed upon his conviction of
criminal possession of a controlled substance in the third degree
(Penal Law § 220.16 [1]) and sentencing him to a term of imprisonment,
followed by a period of postrelease supervision.

Initially, we note that even assuming, arguendo, that defendant's
waiver of the right to appeal during the underlying plea proceeding
was valid, it would not encompass his challenge to the severity of the
sentence imposed following his violation of probation (*see People v*
Kibler, 187 AD3d 1569, 1569 [4th Dept 2020]; *People v White* [appeal
No. 2], 173 AD3d 1852, 1852 [4th Dept 2019]). We conclude, however,
that the sentence imposed upon defendant's violation of probation is
not unduly harsh or severe.

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

939

KA 25-00211

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN R. ALBANESE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Stephen T. Miller, A.J.), entered November 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 risk pursuant to the Sex Offender Registration Act (Correction Law § 168 et seq.). We reject the contention of defendant that Supreme Court's assessment of 20 points against him under risk factor 4, continuing course of sexual misconduct, is not supported by clear and convincing evidence (see § 168-n [3]). "[I]t is well settled that . . . the hearing court is not limited to [consideration of] the crime of which defendant was convicted" (*People v Gardiner*, 92 AD3d 1228, 1229 [4th Dept 2012], lv denied 19 NY3d 801 [2012]; see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 5 [2006]; § 168-n [3]; *People v Callan*, 62 AD3d 1218, 1218-1219 [3d Dept 2009]). Here, the court, which had presided over defendant's criminal proceeding, was entitled to take judicial notice of the presentence report (PSR) in determining the number of points to assess against defendant (see *People v Byrd*, 57 AD3d 442, 443 [1st Dept 2008], lv denied in part & dismissed in part 12 NY3d 795 [2009]; *People v Wright*, 53 AD3d 963, 964 [3d Dept 2008], lv denied 11 NY3d 710 [2008]; see generally § 168-n [3]). The PSR included the victim's allegations of a course of sexual misconduct by defendant and

defendant's corroborating admission to certain alleged acts of sexual misconduct (*see People v Di John*, 48 AD3d 1302, 1303 [4th Dept 2008]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

940

KA 14-01486

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT A. FORBES, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ADAM AMIRAUT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered May 30, 2014. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Same memorandum as in *People v Forbes* ([appeal No. 2] – AD3d – [Dec. 23, 2025] [4th Dept 2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

941

KA 14-01487

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT A. FORBES, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ADAM AMIRAUT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered May 30, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (four counts).

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

Memorandum: In these consolidated appeals, defendant appeals in appeal No. 1 from a judgment convicting him, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [1]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of four counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). In appeal No. 3, defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (§ 220.16 [1]) and criminally using drug paraphernalia in the second degree (§ 220.50 [2]). The three pleas were entered in a single plea proceeding. We affirm in each appeal.

Defendant contends in appeal No. 2 that Supreme Court (Affronti, J.) erred in summarily denying that part of his omnibus motion seeking to suppress, among other things, tangible evidence, including two handguns that defendant discarded while he was fleeing from the police, as the products of an unlawful search and seizure. We reject that contention.

A motion to suppress tangible evidence on the ground that it was obtained by means of an unlawful search and seizure may be summarily denied if the defendant's motion papers do not allege a proper "legal basis" for suppression or if "[t]he sworn allegations of fact do not as a matter of law support the ground alleged" (CPL 710.60 [3] [a],

[b]; see *People v Mendoza*, 82 NY2d 415, 421 [1993]; *People v Collier*, 238 AD3d 1530, 1531 [4th Dept 2025], lv denied 44 NY3d 981 [2025]; *People v Smith*, 207 AD3d 1066, 1066 [4th Dept 2022], lv denied 39 NY3d 942 [2022]; *People v Davis*, 142 AD3d 1387, 1387 [4th Dept 2016], lv denied 28 NY3d 1144 [2017]). "Hearings are not automatic or generally available for the asking by boilerplate allegations. Rather, . . . factual sufficiency [is to] be determined with reference to the face of the pleadings, the context of the motion and [the] defendant's access to information" (*Mendoza*, 82 NY2d at 422). "[C]onclusory allegations of a general constitutional violation or lack of probable cause are of no avail in meeting the statutory requirements for entitlement to a hearing" (*People v Jones*, 95 NY2d 721, 726 [2001]).

Here, the allegations in defendant's moving papers were insufficient to warrant a hearing (see *Smith*, 207 AD3d at 1067; *Davis*, 142 AD3d at 1387-1388). Despite having the opportunity to do so, defendant failed to adequately address the People's assertion, as supported by their submissions in opposition, that the police conduct was "justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], lv denied 92 NY2d 858 [1998], citing *People v De Bour*, 40 NY2d 210, 215 [1976]; see generally *People v Sierra*, 83 NY2d 928, 929-930 [1994]; *People v Jordan*, 156 AD3d 1448, 1450 [4th Dept 2017], lv denied 31 NY3d 984 [2018]; *People v Ralston*, 303 AD2d 1014, 1014 [4th Dept 2003], lv denied 100 NY2d 565 [2003]). Inasmuch as defense counsel "merely set forth conclusory allegations of defendant's lawful behavior and of the absence of any justification for the police to stop, pursue, and arrest defendant, the defense failed to raise any factual issue requiring a suppression hearing" (*Davis*, 142 AD3d at 1388; see *Smith*, 207 AD3d at 1067; *People v King*, 137 AD3d 1572, 1573 [4th Dept 2016], lv denied 27 NY3d 1134 [2016]; see generally *Mendoza*, 82 NY2d at 426-434).

Contrary to defendant's further contention in appeal No. 2, we conclude that, notwithstanding the alternative request in defendant's omnibus motion for a *Darden* hearing, the court did not err in ruling that "no hearings w[ould] be required" inasmuch as defendant's motion papers did not set forth a factual basis to warrant a *Darden* hearing (see *People v Seecoomar*, 174 AD3d 1154, 1155 [3d Dept 2019], lv denied 34 NY3d 1019 [2019], reconsideration denied 34 NY3d 1162 [2020]; *People v Brown*, 167 AD3d 1331, 1333 [3d Dept 2018]; see generally *Mendoza*, 82 NY2d at 421-422).

Finally, in view of our determination affirming the judgment in appeal No. 2, we reject defendant's contention that the judgments in appeal Nos. 1 and 3 must be reversed on the ground that he pleaded guilty in those appeals based on the promise that the sentences therein would run concurrently with the sentence in appeal No. 2 (see *People v Roig*, 117 AD3d 1462, 1463 [4th Dept 2014], lv denied 23 NY3d 1042 [2014]; *People v Khammonivang*, 68 AD3d 1727, 1727-1728 [4th Dept

2009], *lv denied* 14 NY3d 889 [2010]; *cf. People v Fuggazzatto*, 62 NY2d 862, 863 [1984])).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

942

KA 14-01488

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT A. FORBES, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ADAM AMIRAULT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered May 30, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree.

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

Same memorandum as in *People v Forbes* ([appeal No. 2] – AD3d – [Dec. 23, 2025] [4th Dept 2025]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

953

KA 24-01592

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

KENNETH JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered August 20, 2024. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the third degree.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

954

KA 24-01196

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DANIEL LAZAREK, DEFENDANT-APPELLANT.

DAVID A. LONGERETTA, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), dated July 1, 2024. The order, insofar as appealed from, denied in part the motion of defendant to modify the conditions of his probation.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Pagan*, 19 NY3d 368, 370-371 [2012]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

967

CA 25-00291

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

RICHARD-LOUIS SPOSATO, PLAINTIFF-APPELLANT,

V

ORDER

VILLAGE OF SOLVAY, TOWN OF SALINA,
MEGAN CAVALIERE AND PAUL G. CAREY,
DEFENDANTS-RESPONDENTS.

RICHARD-LOUIS SPOSATO, PLAINTIFF-APPELLANT PRO SE.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS VILLAGE OF SOLVAY AND MEGAN
CAVALIERE.

FOTI HENRY, PLLC, BUFFALO (DANIEL K. CARTWRIGHT OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS TOWN OF SALINA AND PAUL G. CAREY.

Appeal from an order of the Supreme Court, Onondaga County
(Joseph E. Lamendola, J.), entered August 6, 2024. The order granted
the motions of defendants to dismiss the amended complaint.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

968

CA 25-00323

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

IN THE MATTER OF THE ESTATE OF
HENRY RICHARD SPARKS, DECEASED.

KATHLEEN SPARKS, PETITIONER-RESPONDENT,

V

ORDER

LINDA A. QENDRO, RESPONDENT-APPELLANT.

DAVID G. GOLDBAS, UTICA, FOR RESPONDENT-APPELLANT.

SCHMITT & LASCURETTES, LLC, UTICA (TOD M. LASCURETTES OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Herkimer County
(John H. Crandall, S.), entered August 16, 2024. The order, among
other things, granted petitioner's motion insofar as it sought summary
judgment determining that she is the rightful owner of two Morgan
Stanley Accounts.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

974

KA 24-00903

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DREQUAN A. THOMAS, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 30, 2024. The judgment convicted defendant upon his plea of guilty of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, 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 criminal contempt in the first degree (Penal Law § 215.51 [c]). Defendant contends, and the People correctly concede, that County Court erred in setting the expiration date of the order of protection. Although defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-316 [2004]; *People v Coleman*, 145 AD3d 1641, 1642 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]), we exercise our power to review it as a matter of discretion in the interest of justice (*see CPL* 470.15 [3] [c]; *People v Lopez*, 151 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; *People v Richardson*, 134 AD3d 1566, 1567 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016]). We modify the judgment by amending the order of protection, and we remit the matter to County Court to determine, and to specify in the order of protection, an expiration date that is in accordance with CPL 530.12 (5) (A).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

978

CAF 24-00696

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

IN THE MATTER OF WENDELL MOORE, JR.,
PETITIONER-RESPONDENT,

V

ORDER

CARLA LEPKOWSKI, RESPONDENT-APPELLANT.

THOMAS L. PELYCH, HORNEILL, FOR RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (RYAN M. BERGMAN OF
COUNSEL), FOR PETITIONER-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered March 25, 2024, in a proceeding pursuant to Family Court Act article 6. The order granted petitioner sole legal and physical custody with respect to the subject child.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

982

TP 25-00836

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

IN THE MATTER OF KATHRYN WILLIAMS, PETITIONER,

V

ORDER

JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS, RESPONDENT.

CAYUGA LAW GROUP, P.C., AUBURN (KASSIDI R. STREETER OF COUNSEL), FOR
PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR
RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Jon E. Budelmann, A.J.], entered April 21, 2025) to review a determination of respondent. The determination denied, after a hearing, the request of petitioner to amend and seal a substantiated report.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

990

KA 23-00586

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RYAN BRAUN, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (REZVANEH GANJI OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Meredith A. Vacca, J.), rendered February 28, 2023. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [3]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. We affirm. The record establishes that defendant knowingly, voluntarily and intelligently waived his right to appeal (*see People v Blount*, 239 AD3d 1426, 1427 [4th Dept 2025], *lv denied* 44 NY3d 981 [2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and that waiver encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

992

KA 23-01767

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

COREY FAISON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James E. Walsh, Jr., A.J.), rendered January 12, 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: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant initially contends that his waiver of the right to appeal was not knowingly, voluntarily and intelligently entered due to his mental limitations. We reject that contention. Although the record indicates that defendant had learning disabilities, there was no "indication that defendant was uninformed, confused or incompetent when he waived his right to appeal" (*People v DeFazio*, 105 AD3d 1438, 1439 [4th Dept 2013], *lv denied* 21 NY3d 1015 [2013] [internal quotation marks omitted]; see *People v Nudd*, 53 AD3d 1115, 1115 [4th Dept 2008], *lv denied* 11 NY3d 834 [2008]). Furthermore, the record establishes that defendant's waiver of the right to appeal was otherwise knowing, voluntary, and intelligent (see generally *People v Giles*, 219 AD3d 1706, 1706-1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (see *People v Lopez*, 6 NY3d 248, 255-256 [2006]; see generally *People v Lococo*, 92 NY2d 825, 827 [1998]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

993

KA 24-00897

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAUN H. CLARK, 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 February 15, 2024. The judgment convicted defendant upon his plea of guilty of criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the second degree (Penal Law § 215.50 [3]). Defendant failed to preserve for our review his contention that his *Alford* plea was not knowingly and voluntarily entered inasmuch as he did not move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Rivers*, 145 AD3d 1591, 1592 [4th Dept 2016], *lv denied* 29 NY3d 952 [2017]; *People v Davis*, 37 AD3d 1179, 1179 [4th Dept 2007], *lv denied* 8 NY3d 983 [2007]). This case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). Once defendant made statements that possibly raised a defense to the charge, County Court fulfilled its duty to conduct further inquiry to ensure that the plea was entered knowingly, voluntarily and intelligently" (*People v McGrail*, 42 AD3d 962, 963 [4th Dept 2007], *lv denied* 9 NY3d 878 [2007] [internal quotation marks omitted]; *see People v Zodarecky*, 15 AD3d 861, 862 [4th Dept 2005]). In any event, the record demonstrates that the *Alford* plea "was the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt" (*Rivers*, 145 AD3d at 1592 [internal quotation marks omitted]; *see McGrail*, 42 AD3d at 963).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

995

KA 23-00313

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON WASHINGTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Andrew C. LoTempio, A.J.), rendered January 27, 2023. The judgment convicted defendant upon a jury verdict of manslaughter in the first degree, criminal possession of a weapon in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and assault in the second degree (§ 120.05 [1]). The conviction arises from defendant's shooting of two victims during an altercation, resulting in the killing of one and the injuring of the other. We affirm.

Contrary to defendant's contention, viewing the evidence with respect to the manslaughter and assault counts in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to disprove defendant's justification defense beyond a reasonable doubt (*see People v Williams*, 134 AD3d 1572, 1573 [4th Dept 2015]; *People v Walker*, 168 AD2d 983, 983 [4th Dept 1990], *lv denied* 77 NY2d 883 [1991]). Moreover, viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the jury did not fail to give the evidence the weight it should be accorded when it rejected his justification defense (*see People v Ford*, 114 AD3d 1273, 1275 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that County Court erred in refusing to suppress statements he made to a police officer while the officer was interviewing defendant at the hospital. Contrary to defendant's contention, the police had no obligation to inform him that he was a suspect in a homicide investigation before informing him of his *Miranda* rights and obtaining a waiver thereof (see *People v Schleyer*, 236 AD2d 835, 835-836 [4th Dept 1997], *lv denied* 89 NY2d 1100 [1997]; *People v Hall*, 152 AD2d 948, 949 [4th Dept 1989], *lv denied* 74 NY2d 847 [1989]). Further, defendant failed to establish that any alleged deception was so fundamentally unfair that it deprived him of due process (see *People v Richer*, 168 AD2d 910, 910 [4th Dept 1990], *lv denied* 78 NY2d 957 [1991]). Moreover, there is no indication in the record that defendant's cognitive ability was impaired by his medical condition or medication (see *People v Carbonaro*, 134 AD3d 1543, 1548 [4th Dept 2015], *lv denied* 27 NY3d 994 [2016], *reconsideration denied* 27 NY3d 1149 [2016]; see also *People v Marvin*, 68 AD3d 1729, 1729 [4th Dept 2009], *lv denied* 14 NY3d 842 [2010]).

Finally, the sentence is not unduly harsh or severe. We note that the amended uniform sentence and commitment sheet does not reflect defendant's status as a second felony offender, and it must be amended accordingly (see *People v Southard*, 163 AD3d 1461, 1462 [4th Dept 2018]).

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

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

996

KA 23-00049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH J. CAMPBELL, ALSO KNOWN AS
KENNETH D. CAMPBELL, ALSO KNOWN AS KENNETH CAMPBELL,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON 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 December 13, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a firearm.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of criminal possession of a firearm (Penal Law § 265.01-b [1]). We affirm.

Defendant contends that County Court erred in enhancing his sentence without conducting a sufficient inquiry into his alleged violation of the conditions of the plea agreement. Although defendant's contention would survive even a valid waiver of the right to appeal (*see People v Huggins*, 45 AD3d 1380, 1380 [4th Dept 2007], *lv denied* 9 NY3d 1006 [2007]), that contention is not preserved for our review because defendant "failed to object to the enhanced sentence or to move to withdraw [the] plea or to vacate the judgment of conviction on that ground" (*People v Fumia*, 104 AD3d 1281, 1281 [4th Dept 2013], *lv denied* 21 NY3d 1004 [2013]; *see People v Roberto*, 224 AD3d 1367, 1368 [4th Dept 2024]; *People v Mills*, 90 AD3d 1518, 1518 [4th Dept 2011], *lv denied* 18 NY3d 960 [2012]). Nor are defendant's appellate "arguments regarding the alleged sentencing error . . . readily discernible from the [sentencing] transcript" (*People v Albergetti*, 17 NY3d 748, 750 [2011]; *cf. People v Forest*, 148 AD3d 1585, 1586 [4th Dept 2017], *lv denied* 29 NY3d 1091 [2017]). In any event, inasmuch as defendant "neither raised an issue 'concerning the validity of the postplea charge[s]' nor denied 'any

involvement in the underlying crime[s],' " and defense counsel even conceded that the court could impose an enhanced sentence due to defendant's violation, we conclude that the court had no duty to conduct a further inquiry (*People v Harris*, 197 AD2d 930, 930 [4th Dept 1993], *lv denied* 82 NY2d 850 [1993], quoting *People v Outley*, 80 NY2d 702, 713 [1993]; see *People v Nowlin*, 145 AD3d 1447, 1448 [4th Dept 2016], *lv denied* 29 NY3d 1035 [2017]; *People v Anderson*, 99 AD3d 1239, 1239 [4th Dept 2012], *lv denied* 20 NY3d 1059 [2013]; *Mills*, 90 AD3d at 1518). The record establishes that the court nonetheless conducted a sufficient inquiry inasmuch as "[b]oth defendant and his counsel were given ample opportunity to refute the . . . assertions that defendant had violated the plea terms" (*Albergotti*, 17 NY3d at 750; see *People v Sims*, 41 NY3d 995, 996 [2024]; *People v Scott*, 200 AD3d 1729, 1730 [4th Dept 2021]).

Contrary to defendant's further contention, we conclude that the record establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Brinkman*, 240 AD3d 1431, 1431-1432 [4th Dept 2025], *lv denied* – NY3d – [2025]; see generally *People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). We note at the outset that the 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 Edmonds*, 229 AD3d 1275, 1277 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]). Contrary to defendant's assertion, the court properly explained that defendant retained the right to take an appeal, but that his conviction and sentence would "normally be final" because he was giving up the right to appellate review of "most claims of error," including the severity of the sentence, except for "a limited number of claims" that would survive the appeal waiver, for example the voluntariness of the plea, the validity of the appeal waiver, the legality of the sentence, the jurisdiction of the court, defendant's competency to stand trial, and the constitutional right to a speedy trial (see *Thomas*, 34 NY3d at 567; *Edmonds*, 229 AD3d at 1277).

Additionally, the court's oral colloquy was supplemented by a detailed written waiver that, among other things, accurately explained the rights waived and retained as a result of the waiver and, in doing so, used the phrase "waiver of the right to raise issues on appeal," thereby employing language that "more precisely" reflected that the waiver merely represented "a narrowing of the issues for appellate review" (*Thomas*, 34 NY3d at 559; see *Edmonds*, 229 AD3d at 1277-1278). 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 [his] attorney and understood the appellate rights [he] was giving up [and retaining] as a result of the waiver" (*People v Correia*, 240 AD3d 1440, 1441-1442 [4th Dept 2025], *lv denied* 44 NY3d 992 [2025]; see *Edmonds*, 229 AD3d at 1278; cf. *People v Bradshaw*, 18 NY3d 257, 262 [2011]; *People v Callahan*, 80 NY2d 273, 283 [1992]).

We also reject defendant's remaining challenges to the appeal

waiver. "[A] waiver of the right to appeal is not unconscionable per se" under binding current Court of Appeals precedent (*Brinkman*, 240 AD3d at 1431; see *Thomas*, 34 NY3d at 557-558, 558 n 1; *People v Seaberg*, 74 NY2d 1, 8-9 [1989]), and "it is not improper for the People to demand a waiver of the right to appeal as a condition of a plea bargain" (*Brinkman*, 240 AD3d at 1431-1432). In addition, the record establishes that defendant received consideration in exchange for the waiver inasmuch as the plea agreement resulted in defendant pleading guilty to the lowest felony count in the indictment in full satisfaction of all charges therein, including a higher felony count, and defendant received a sentencing promise (see *People v Allen*, 174 AD3d 1456, 1456 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]; *People v Frank*, 258 AD2d 900, 900 [4th Dept 1999], *lv denied* 93 NY2d 924 [1999]; cf. *People v Gramza*, 140 AD3d 1643, 1643-1644 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]).

We thus conclude that "all the relevant circumstances reveal a knowing and voluntary waiver" (*Thomas*, 34 NY3d at 563; see *Edmonds*, 229 AD3d at 1278) and, because the court advised defendant of the maximum sentence that could be imposed if he violated the plea agreement, that waiver encompasses his further challenge to the severity of the enhanced sentence (see *People v Durinko*, 239 AD3d 1347, 1348 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]; *Roberto*, 224 AD3d at 1368).

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

997

CAF 24-01545

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

IN THE MATTER OF JAE'LISA BARNETTE,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

WILLIE MILLER, JR., RESPONDENT-RESPONDENT.

IN THE MATTER OF WILLIE MILLER, JR.,
PETITIONER-RESPONDENT,

V

JAE'LISA BARNETTE, RESPONDENT-APPELLANT.

IN THE MATTER OF DANELL BARNETTE,
PETITIONER-RESPONDENT,

V

JAE'LISA BARNETTE, RESPONDENT-APPELLANT,
AND WILLIE MILLER, JR., RESPONDENT-RESPONDENT.

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

ELIZABETH C. FRANI, SYRACUSE, FOR RESPONDENT-RESPONDENT AND
PETITIONER-RESPONDENT WILLIE MILLER, JR.

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

Appeal from an order of the Family Court, Onondaga County
(Lourdes P. Rosario, R.), entered July 30, 2024, in proceedings
pursuant to Family Court Act article 6. The order, among other
things, awarded respondent-petitioner Willie Miller, Jr. sole legal
and physical custody of the subject child.

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

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

The mother contends that Family Court, in its decision, erred in considering information contained in records from prior proceedings, of which it had taken judicial notice, 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, the mother's evidentiary contention is not preserved for our review (see *Matter of Ayden G. [Nicky C.]*, 240 AD3d 1389, 1390 [4th Dept 2025]).

We agree with the mother that the court improperly disclosed the child's statements at the *Lincoln* hearing, and we remind the court that the disclosure of any statements made by a child during a confidential *Lincoln* hearing is improper (see *Kaleta v Kaleta*, 225 AD3d 1293, 1295 [4th Dept 2024]). We conclude, however, that the error does not justify disturbing an otherwise valid determination (see generally *Matter of Carter v Work*, 100 AD3d 1557, 1558 [4th Dept 2012]).

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

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

1000

CA 24-02000

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

DONALD MCKEON AND JESSICA MCKEON,
PLAINTIFFS-APPELLANTS,

V

ORDER

JEFFREY J. BLAIR, CAROL A. BLAIR,
AND WOODMERE LANDOWNERS ASSOCIATION,
DEFENDANTS-RESPONDENTS.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFFS-APPELLANTS.

COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 5, 2024. The order and judgment, inter alia, granted the motion of defendants insofar as it sought summary judgment dismissing the amended complaint.

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

1013

CAF 24-01899

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

IN THE MATTER OF AHMAD BASTONI, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

KAWTHER BASTONI, RESPONDENT-RESPONDENT.

ANDREW J. DIPASQUALE, ROCHESTER, FOR PETITIONER-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (RYAN M. BERGMAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Salvatore A. Pavone, R.), entered October 29, 2024, in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent to dismiss the petition seeking to modify a prior order of custody and visitation.

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 father appeals from an order that granted respondent mother's motion to dismiss the father's petition, which sought to modify the parties' prior order of custody and visitation. We affirm.

Contrary to the father's contention, Family Court did not err in granting the motion inasmuch as the petition did not "contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child" (*Matter of Catherine M.C. v Matthew P.C.*, 237 AD3d 1552, 1553 [4th Dept 2025] [internal quotation marks omitted]; see *Matter of Kriegar v McCarthy*, 162 AD3d 1560, 1560 [4th Dept 2018]). To the extent that the father contends that his constitutional right to due process was violated, we note that his contention is not preserved for our review because he failed to make that specific objection during the proceedings (see *Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1756 [4th Dept 2020]).

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

1016

CA 25-00581

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

IN THE MATTER OF ROSS CALARCO, PETITIONER-APPELLANT,

V

ORDER

CITY OF SYRACUSE, RESPONDENT-RESPONDENT.

ROSS CALARCO, PETITIONER-APPELLANT PRO SE.

SUSAN R. KATZOFF, CORPORATION COUNSEL, SYRACUSE (DANIELLE R. SMITH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Rory A. McMahon, J.), entered November 26, 2024. The order, inter alia, dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by petitioner-appellant and the attorney for respondent-respondent on September 25, 2025,

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court

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

1018

CA 24-00977

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

KENNETH MILLER, PLAINTIFF-APPELLANT,

V

ORDER

GRETCHEN BEVARD, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF ERIC BEVARD, DECEASED,
DEFENDANT-RESPONDENT.

PAPPAS, COX, KIMPEL, DODD & LEVINE, P.C., SYRACUSE (THOMAS P. GIVAS OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (ROGER W. BRADLEY OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County
(William F. Ramseier, J.), entered November 29, 2023. The order,
insofar as appealed from, dismissed the complaint "with respect to the
right of way to the water."

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

Entered: December 23, 2025

Ann Dillon Flynn
Clerk of the Court