



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

DECISIONS FILED

MARCH 20, 2026

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. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MARCH 20, 2026

=====

_____	648	CA 23 01878	SENECA MEADOWS, INC. V TOWN OF SENECA FALLS
_____	835	CA 24 01839	DANIEL LOPEZ V MILLARD FILLMORE SUBURBAN HOSPITAL
_____	890	CA 25 00150	JUSTIN K. ASHLEY V UPSTATE EMERGENCY MEDICINE, INC
_____	928	CA 24 01551	CHELSEA PASCUCCI WIECHEC V BRITTANY MILLER
_____	934	CA 24 01866	SYDNEY RAE WATT In the Matter of MELINDA PALMER
_____	952	CA 24 01314	JULIE KELLER RIZZO V BOARD OF EDUCATION OF EAST AU
_____	970	KA 22 00848	PEOPLE V EDWARD ROBINSON
_____	973	KA 23 01803	PEOPLE V DARRYL M. OVERSTREET
_____	975	KA 24 01063	PEOPLE V JEFFREY J. DIBBLE
_____	983	CA 25 00726	ROCHESTER POLICE LOCUST CLUB, INC. V CITY OF ROCHESTER
_____	1008	KA 24 00031	PEOPLE V JASON A. CHABOT
_____	1017	CA 24 01453	FRANCIS L. GUADAGNO V ERIE COUNTY MEDICAL CENTER C
_____	1019	CA 25 00021	PETER LOEHR V DR. BONITA DURAND
_____	4	KA 22 01574	PEOPLE V ANDRELLO BROWN
_____	5	KA 23 00578	PEOPLE V ANTTWAN BROWN
_____	10	CA 25 00541	JAMES PRIOR V LIBERTY RESOURCES, INC.
_____	18	KA 25 00219	PEOPLE V STEVEN R. VANSKIVER
_____	21	KA 24 01865	PEOPLE V NIHEIM MARTIN
_____	23	KA 24 01214	PEOPLE V STEVEN R. VANSKIVER
_____	26	KA 23 00965	PEOPLE V COURTNEY A. BARBER
_____	27	KA 21 01811	PEOPLE V JONATHAN MCENNIS
_____	28	TP 25 01248	JEWISH HOME AND INFIRMARY OF ROCHESTER V NEW YORK STATE DEPARTMENT OF HEALTH
_____	29	CAF 24 00825	JOSHUA IRWIN V SARAH SNYDER
_____	30	CAF 24 01868	Mtr of JAYRON J.

_____	31	CAF 24 02054	Mtr of JAYRON J.
_____	38	CAE 24 01946	JOHN J. MILLS V ERIE COUNTY LEGISLATURE
_____	39	KA 23 00978	PEOPLE V LAWRENCE D. BAKER
_____	44	KA 23 01800	PEOPLE V ERIC OLIVER
_____	48	KA 24 00618	PEOPLE V MICHAEL PROVOST
_____	53	CA 25 01162	BIG MOOSE OPERATIONS, LLC V UNITED FRONTIER MUTUA
_____	56	CA 25 00513	NIAGARA FRONTIER TRANSIT METRO SYST V AMALGAMATED TRANSIT LOCAL UNION 134
_____	59	CA 25 00075	WILLIAM CAPICOTTO, M.D. V WESTERN NEW YORK MEDICAL
_____	60	CA 25 00076	WILLIAM CAPICOTTO, M.D. V WESTERN NEW YORK MEDICAL
_____	62	KA 24 00898	PEOPLE V ADRIAN M. ALEXANDER, JR.
_____	64	KA 24 00666	PEOPLE V LESLIE HENDERSON
_____	70	KA 22 01981	PEOPLE V ANTHONY M. VANDOREN
_____	75	CA 25 00013	JOHN DOE V STATE OF NEW YORK
_____	77	CA 24 01685	CITY OF NORTH TONAWANDA V PENN POWER GROUP, LLC
_____	85	KA 22 01650	PEOPLE V NICHOLAS M. MAHER
_____	94	CA 24 01562	AL ASPHALT CORPORATION V TOWN OF HAMBURG
_____	95	CA 25 00306	AL ASPHALT CORPORATION V TOWN OF HAMBURG
_____	103	KA 24 00819	PEOPLE V CHANDLER DOWDELL
_____	104	KA 25 00540	PEOPLE V LOUIS SERRANO
_____	105	KA 23 01101	PEOPLE V ANDRES SANTIAGO
_____	106	KA 23 01103	PEOPLE V ANDRES SANTIAGO
_____	114	CA 25 00742	SHERRY MCDONALD V STATE OF NEW YORK
_____	115	CA 25 00012	SHERRY MCDONALD V STATE OF NEW YORK
_____	116	CA 24 01429	KATHRYN WILSMAN V BENDERSON DEVELOPMENT COMPANY, L
_____	117	CA 25 00340	KATHRYN WILSMAN V BENDERSON DEVELOPMENT COMPANY, L
_____	118	CA 25 00696	KATHRYN WILSMAN V BENDERSON DEVELOPMENT COMPANY, L
_____	124	KA 23 01416	PEOPLE V VICTOR CRAMER-WILLIAMS
_____	125	KA 24 00458	PEOPLE V JAMES GRACE
_____	128	CA 24 01508	STATE OF NEW YORK V SCOTT P.
_____	130	CA 25 00443	NEW YORK STATE POLICE V DAVID J. KINGSLEY, II

_____	149	CA 25 00072	BANKERS HEALTHCARE GROUP, LLC V MARGARET P. GENEVE
_____	155	KA 24 01475	PEOPLE V BRYAN ROJAS
_____	162	CAF 24 00499	Mtr of DANAYELY P. E.
_____	163	CAF 24 00502	Mtr of KENAY E.
_____	174	KA 24 00630	PEOPLE V CHARLES LEVULIS
_____	187	CAF 24 01634	ANTHONY FAES V STEPHANIE COULSON
_____	192	CAE 25 00268	BERNARD MENT V ONONDAGA COUNTY COMMITTEE OF CONSER
_____	193	CAE 25 00574	BERNARD MENT V ONONDAGA COUNTY COMMITTEE OF CONSER
_____	198	KA 25 00302	PEOPLE V DANA R. GRIMES
_____	202	KA 25 00423	PEOPLE V TAJ R. WILLIAMS
_____	204	KA 25 00209	PEOPLE V RYAN C. CANUTI
_____	206	CAF 24 01783	JESSICA FANNING V JOSEPH CHAPMAN
_____	207	CAF 25 00716	DIMITRI GALITSKY V SVIATLANA GALITSKY
_____	230	CA 25 00355	MASSA CONSTRUCTION, INC. V CLYDE-SAVANNAH CENTRAL
_____	242	KA 24 00883	PEOPLE V SAMANTHA H.
_____	245	CA 25 00960	HOMESTATE ASSET MANAGEMENT, LLC V U.S. BANK NATIONAL ASSOCIATION
_____	248	CA 25 00850	MARK M. V STATE OF NEW YORK
_____	251.1	CA 25 01272	ULISER ROSALIO VASQUEZ JUAREZ In the Matter of ANDERSON ENRIQUE VASQUEZ JUAREZ

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

4

KA 22-01574

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDRELLO BROWN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN E. MARKARIAN 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 (Susan M. Eagan, J.), rendered August 11, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant contends that County Court erred in denying his *Batson* challenge with respect to the prosecutor's exercise of a peremptory strike on a prospective juror. The prospective juror at issue was being examined for a position as an alternate juror, however, and no alternate jurors participated in deliberations. Under these circumstances, defendant's contention is moot (see *People v Pinero*, 143 AD3d 428, 429 [1st Dept 2016], *lv denied* 29 NY3d 1000 [2017]; *People v Stephens*, 255 AD2d 532, 533 [2d Dept 1998], *lv denied* 92 NY2d 1039 [1998]; see generally *People v Everson*, 240 AD3d 1343, 1344-1345 [4th Dept 2025]; *People v Haardt*, 129 AD3d 1322, 1322 [3d Dept 2015]).

Defendant's further contention that the evidence is legally insufficient to establish the elements of both offenses is unpreserved for our review inasmuch as his generic motion for a trial order of dismissal was not "specifically directed at the error[s] alleged on appeal" (*People v Derby*, 242 AD3d 1627, 1629 [4th Dept 2025] [internal quotation marks omitted]). In any event, "we necessarily review the evidence adduced as to each of the elements of [the] crime[s] in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Boyd*, 234 AD3d 1331, 1332 [4th Dept 2025], *lv*

denied 43 NY3d 1044 [2025] [internal quotation marks omitted]). Here, viewing the evidence in light of the elements of murder in the second degree and criminal possession of a weapon in the second degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]), including, contrary to defendant's contention, as to his intent to kill the victim (see *People v Renaldo*, 239 AD3d 1470, 1471 [4th Dept 2025], *lv denied* 44 NY3d 1013 [2025]; *People v Broadnax*, 52 AD3d 1306, 1307 [4th Dept 2008], *lv denied* 11 NY3d 830 [2008]).

Contrary to defendant's further contention, the court correctly denied defendant's request to charge the jury with the lesser included offenses of murder in the second degree on the theory that the jury could have concluded that he acted without the intent to kill. "To establish a charge on a lesser included offense, a defendant must show both that the greater crime cannot be committed without having concomitantly committed the lesser by the same conduct, and that a reasonable view of the evidence supports a finding that [they] committed the lesser, but not the greater, offense" (*People v James*, 11 NY3d 886, 888 [2008]). Under the circumstances of this case, we conclude that no reasonable view of the evidence supported a lesser intent (see *People v Seeler*, 63 AD3d 1595, 1596 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]; see generally *People v Cruz*, 221 AD3d 1423, 1428 [4th Dept 2023], *lv denied* 41 NY3d 1001 [2024]).

By failing to object at trial, defendant failed to preserve his further contention that the prosecutor engaged in misconduct by improperly impeaching the prosecution's own witness or eliciting testimony regarding a precluded exhibit (see generally *People v Settles*, 192 AD3d 1510, 1511 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]; *People v Lewis*, 140 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). By failing to object at the time of the testimony, defendant likewise failed to preserve his contention that the court erred in permitting testimony regarding an allegedly unduly prejudicial statement by defendant (see *People v Jones*, 224 AD3d 1348, 1350 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Turner*, 197 AD3d 997, 998-999 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]).

Contrary to defendant's further contention, he did not receive ineffective assistance of counsel due to defense counsel's failure to move to preclude certain DNA evidence based on its allegedly delayed disclosure by the People because such a motion would have had little to no chance of success (see *People v Raszl*, 108 AD3d 1049, 1050 [4th Dept 2013]; see generally *People v Wills*, 224 AD3d 1329, 1330 [4th Dept 2024], *lv denied* 41 NY3d 1005 [2024]). We likewise reject defendant's contention that he received ineffective assistance of counsel due to defense counsel's allegedly ineffective investigation into a possibly exculpatory witness and the failure to call that witness at trial. The record reflects that defense counsel's investigation of the witness was reasonable (see *People v Young*, 167 AD3d 1448, 1449-1450 [4th Dept 2018], *lv denied* 33 NY3d 1036 [2019]) and that the decision against calling the witness was a strategic

choice arising from risks the witness's testimony posed to the defense (see *People v Morgan*, 77 AD3d 1419, 1420 [4th Dept 2010], *lv denied* 15 NY3d 922 [2010]).

Contrary to defendant's further contention, the court did not err in refusing to suppress statements made to law enforcement after he was advised of his *Miranda* rights. Although the record reflects that defendant claimed to have only "one good ear" at one point during the interview, the record also reflects that defendant understood and acknowledged the *Miranda* warnings provided to him, and indeed "defendant . . . within [seconds] thereafter willingly answer[ed] questions during interrogation" (*People v Rodriguez-Rivera*, 203 AD3d 1624, 1626 [4th Dept 2022], *lv denied* 39 NY3d 942 [2022], *lv denied* 42 NY3d 1037 [2024] [internal quotation marks omitted]). Lastly, we conclude that the sentence is not unduly harsh or severe.

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

5

KA 23-00578

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTTWAN BROWN, DEFENDANT-APPELLANT.

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

PERRY DUCKLES, ACTING DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Barry L. Porsch, A.J), rendered March 17, 2023. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]) arising from an incident in which defendant, while acting alone or in concert with two codefendants, shot the victim. Surveillance video showed defendant and the codefendants together inside a gas station convenience store. The victim entered the store and then immediately left upon seeing defendant and the codefendants. One of the codefendants removed a gun from his waistband and appeared to hand it to defendant as all three exited the store after the victim. Minutes later, a different surveillance video showed a Jeep pull into a residential driveway around the same time as a white SUV pulled into a lot a few houses away. A person wearing clothing generally matching that of defendant exited the SUV, ran to the Jeep, and fired shots into the Jeep before running back to the SUV. The victim, who was seated in the backseat of the Jeep, was killed by the gunshots. A nearby resident identified the SUV as a white Range Rover, and the evidence established that one of the codefendants owned such a vehicle.

Defendant contends that the People failed to comply with their initial disclosure obligations under CPL 245.20 (former [1] [k] [iv]) by turning over only summaries of disciplinary records of potential law enforcement witnesses and not the underlying documentation.

Defendant does not allege a speedy trial violation inasmuch as CPL 30.30 (1) does not apply to this criminal action where defendant was charged with murder in the second degree (see CPL 30.30 [3] [a]), but he contends that the judgment should be reversed and, upon remittal, the records should be disclosed and County Court should impose a remedy or sanction that is appropriate and proportionate to the prejudice suffered by defendant (see CPL 245.80 [1] [a]; [2]). We reject defendant's contention that reversal is required under the circumstances of this case. Defendant sought the underlying documentation regarding officers who had substantiated findings resulting from investigations, but none of those officers testified at trial, and the records thus would not be subject to automatic discovery (see CPL 245.20 [former (1) (k) (iv)]; *People v Cooperman*, 225 AD3d 1216, 1219 [4th Dept 2024]).

We reject defendant's contention that the court abused its discretion in admitting in evidence four photographs found on a codefendant's cellphone that depicted defendant and the other codefendant standing with handguns at their feet. In determining whether evidence of a defendant's uncharged criminal acts should be admitted at trial, the court must first determine "whether the People have identif[ied] some material issue, other than the defendant's criminal propensity, to which the evidence is directly relevant" (*People v Hu Sin*, 44 NY3d 455, 460 [2025] [internal quotation marks omitted]; see *People v Dorm*, 12 NY3d 16, 19 [2009]). The photographs were taken approximately 40 minutes after the murder and were inextricably interwoven with and completed the narrative of events by establishing the association between defendant and the codefendants and the fact that they were together shortly after the murder (see *People v Savery*, 209 AD3d 1268, 1269 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]; *People v Larkins*, 128 AD3d 1436, 1438-1440 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]). Those photographs rebutted the defense theory that defendant and the codefendants separated after leaving the gas station and constituted circumstantial proof that defendant and the codefendants were together during the shooting. We further conclude that the probative value of the photographs outweighed the prejudicial effect (see *Savery*, 209 AD3d at 1269; see generally *People v Leonard*, 29 NY3d 1, 6-7 [2017]). Defendant's further contention that the limiting instruction provided by the court was insufficient to overcome the prejudicial effect of the evidence is not preserved for our review (see *People v Hebert*, 218 AD3d 1003, 1011 [3d Dept 2023], *lv denied* 40 NY3d 1080 [2023]; *People v Hildreth*, 199 AD3d 1366, 1368 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

As defendant correctly concedes, he failed to preserve for our review his contention that the court's statements to a number of prospective jurors had a chilling effect on voir dire, tainted the entire venire, and deprived him of a fair trial (see CPL 470.05 [2]; see generally *People v Singson*, 40 AD3d 1015, 1017 [2d Dept 2007]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (see CPL 470.15 [6]

[a]).

We reject defendant's contention that the court erred in denying his challenge for cause to a prospective juror. The prospective juror's statements did not demonstrate "a state of mind that is likely to preclude" rendering an impartial verdict (CPL 270.20 [1] [b]) or a " 'preexisting opinion[] that might indicate bias' " (*People v Patterson*, 34 NY3d 1112, 1113 [2019], quoting *People v Arnold*, 96 NY2d 358, 363 [2001]). The court was therefore "not required to seek an assurance that [the prospective juror] could decide the case impartially" (*People v Hall*, 169 AD3d 1379, 1380 [4th Dept 2019], *lv denied* 33 NY3d 976 [2019] [internal quotation marks omitted]; see *Patterson*, 34 NY3d at 1113; see also *People v Odum*, 67 AD3d 1465, 1465 [4th Dept 2009], *lv denied* 14 NY3d 804 [2010], *lv denied* 15 NY3d 755 [2010], *cert denied* 562 US 931 [2010]). Moreover, even assuming, arguendo, that the prospective juror's statements " 'cast serious doubt on [her] ability to render an impartial verdict,' " we conclude that the record establishes that she gave an " 'unequivocal assurance that [she could] set aside any bias and render an impartial verdict based on the evidence' " (*People v Wright* [appeal No. 2], 104 AD3d 1327, 1328 [4th Dept 2013], *lv denied* 21 NY3d 1012 [2013]; see *People v Chambers*, 97 NY2d 417, 419 [2002]). Indeed, viewing the prospective juror's statements "in totality and in context . . . , her assurances to the court adequately expressed her ability" to be fair and impartial (*People v Warrington*, 28 NY3d 1116, 1120 [2016]; cf. *People v Johnson*, 94 NY2d 600, 615 [2000]).

Defendant further contends that the court erred in denying his *Batson* claim by finding that he did not meet his step one burden of establishing a *prima facie* case of discrimination. We reject that contention. In order for the moving party to satisfy their burden at step one, they must " 'show[] that the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason' " (*People v Baxter*, 108 AD3d 1158, 1159 [4th Dept 2013], quoting *People v Smocum*, 99 NY2d 418, 421 [2003]; see *People v Bean*, 229 AD3d 1231, 1232 [4th Dept 2024], *lv denied* 42 NY3d 1018 [2024], *reconsideration denied* 44 NY3d 1009 [2025]). "There are no fixed rules for determining what evidence will give rise to an inference sufficient to establish a *prima facie* case" (*People v Bolling*, 79 NY2d 317, 323-324 [1992], *reconsideration denied* 80 NY2d 827 [1992]). A defendant may satisfy their burden under the first step by demonstrating a "pattern of strikes or questions and statements made during the voir dire," or that "members of the cognizable group were excluded while others with the same relevant characteristics were not," or that the People excluded members of the cognizable group "who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution" (*People v Childress*, 81 NY2d 263, 267 [1993]; see *Bean*, 229 AD3d at 1232; *People v Boyd* [appeal No. 2], 184 AD3d 1151, 1152 [4th Dept 2020]).

In support of defendant's *Batson* claim, defense counsel stated that there was a pattern of "removing minority jurors," and the

prospective juror in question "told everyone he could follow the [c]ourt's instructions." Defense counsel's vague and conclusory statements were insufficient to establish a prima facie case of discrimination (see *People v Jones*, 11 NY3d 822, 823 [2008]; *Boyd*, 184 AD3d at 1152-1153), as defendant properly concedes on appeal. Defendant, however, contends that the statements made by one of the codefendants' counsel when joining defendant's *Batson* challenge were sufficient to establish a prima facie case. We disagree. The codefendant's counsel remarked that another prospective juror of color was also removed and "they both gave similar answers," which is insufficient to establish an inference of discrimination (see generally *People v Hecker*, 15 NY3d 625, 652-653 [2010], *cert denied* 563 US 947 [2011]).

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 *People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, the sentence is not unduly harsh or severe, and we decline to vacate the surcharge and fees pursuant to CPL 420.35 (2-a) in the interest of justice (see *People v Mejia*, 243 AD3d 684, 684 [2d Dept 2025]).

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

10

CA 25-00541

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

JAMES PRIOR, AS ADMINISTRATOR OF THE
ESTATE OF KIM PRIOR, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

LIBERTY RESOURCES, INC., LIBERTY RESOURCES
BEHAVIORAL HEALTHCARE, INC., LIBERTY RESOURCES
DISABILITIES SERVICES, INC., AND MESA MANAGEMENT
SERVICES, LLC, DEFENDANTS-APPELLANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (TIMOTHY N. MCMAHON OF
COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court,
Oswego County (Gregory R. Gilbert, J.), entered March 17, 2025. The
order denied plaintiff's motion for summary judgment and denied
defendants' cross-motion for summary judgment dismissing the
complaint.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting defendants' cross-motion
in part and dismissing the complaint against defendants Liberty
Resources Behavioral Healthcare, Inc., Liberty Resources Disabilities
Services, Inc., and Mesa Management Services, LLC, and as modified the
order is affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action
against defendants alleging nonpayment of certain death benefits
allegedly owed to the estate of Kim Prior (decedent) pursuant to an
"Executive Plan Agreement" (agreement). The agreement was entered
into between decedent and "Liberty Resources, Inc., a Corporation
organized and existing under the laws of the State of Delaware." The
agreement provided that, if decedent should die "while actively
employed by the Corporation" before the age of 65, she would receive
180 payments for a sum "more particularly described on Schedule A
attached hereto." Some time after her death, a copy of the agreement,
absent Schedule A, was found that had been signed by decedent and the
CEO of "Liberty Resources, Inc." Plaintiff presented the agreement to
defendant Liberty Resources, Inc. (Liberty) and sought payment of the
death benefits. Liberty, inter alia, responded that there was no

enforceable contract and refused to make payments thereunder. In these consolidated appeals, defendants appeal from that part of an order denying their cross-motion for summary judgment dismissing the complaint. Plaintiff cross-appeals from that part of the same order denying his motion for summary judgment on the complaint.

As an initial matter, we agree with defendants that defendants Liberty Resources Behavioral Healthcare, Inc., Liberty Resources Disabilities Services, Inc., and Mesa Management Services, LLC were not parties to the agreement and thus cannot be sued for its breach (see *Bouley v Bouley*, 19 AD3d 1049, 1050 [4th Dept 2005]). We therefore modify the order by granting defendants' cross-motion in part and dismissing the complaint against the aforementioned defendants, leaving Liberty as the sole remaining defendant.

Contrary to defendants' further contention on their appeal, however, Supreme Court properly denied the cross-motion with respect to Liberty. Initially, we conclude that the agreement is ambiguous as to whether Liberty was a party. Although the agreement stated that it was entered between decedent and an entity incorporated in Delaware, it is undisputed that Liberty is incorporated in New York and that no such Delaware entity ever existed. Despite referencing a Delaware entity at the outset, however, the remainder of the agreement, read in context, referred to the relevant entity as though it was referring to Liberty, i.e., the New York entity. Inasmuch as defendants failed to meet their burden of establishing that the only reasonable interpretation of the agreement is that the parties bound by it are decedent and a Delaware entity, summary judgment is inappropriate because a "determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence" (*Kowalak v Keystone Med. Servs. of N.Y., P.C.*, 197 AD3d 893, 895 [4th Dept 2021] [internal quotation marks omitted]; see *Dunn Auto Parts, Inc. v Wells*, 198 AD3d 1269, 1270 [4th Dept 2021]).

We likewise conclude that questions of fact exist whether the agreement lacks a material term, i.e., the payments due under the agreement as stated within the referenced Schedule A. Assuming, arguendo, that defendants met their initial burden by establishing that the referenced Schedule A had never been created and thus did not exist, we conclude that plaintiff raised a question of fact in opposition with respect to the existence of a written Schedule A and the terms thereof, rendering summary judgment inappropriate (see generally *Preston v Northside Collision-Dewitt, LLC*, 158 AD3d 1127, 1128 [4th Dept 2018]). Specifically, plaintiff submitted the deposition testimony of Liberty's former president of the Board of Directors, who testified, inter alia, that he personally reviewed decedent's Schedule A, and he described its terms. Contrary to defendants' related contention, consideration of Schedule A is not barred by the statute of frauds inasmuch as the written agreement incorporates Schedule A by reference (see generally General Obligations Law § 5-701 [a] [1]) and plaintiff, having "adequately explained" why an original Schedule A could not be produced, is entitled to elicit parol evidence to prove the existence and terms

thereof (*Nicosia v Muller*, 229 AD2d 964, 965 [4th Dept 1996]; see also 61 NY Jur 2d, Statute of Frauds § 162).

Contrary to defendants' further contention, they failed to establish as a matter of law that the signatures of Liberty's "secretary" and a "witness," in addition to the signature of its CEO, were required as a condition precedent to a valid contract (see *Manning v Michaels*, 149 AD2d 897, 898 [3d Dept 1989]; cf. *Ahmed v Jack G. Smith Corp.*, 66 AD3d 1467, 1468 [4th Dept 2009], lv denied 13 NY3d 715 [2010]). Defendants also failed to establish that the agreement's claims procedure constituted a condition precedent that plaintiff failed to fulfill (see generally *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]; *Chrisanntha, Inc. v deBaptiste*, 196 AD3d 1033, 1036 [4th Dept 2021]).

Contrary to plaintiff's contention on his cross-appeal, however, we conclude, for the same reasons discussed above, that he failed to meet his initial burden of establishing the existence of a valid and enforceable contract between decedent and Liberty (see *Preston*, 158 AD3d at 1128; *Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 436 [1st Dept 2012]). Because plaintiff failed to meet his initial burden, the burden never shifted to defendants, and denial of the motion was required regardless of the sufficiency of the opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

18

KA 25-00219

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN R. VANSKIVER, DEFENDANT-APPELLANT.

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

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO, FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered January 23, 2025. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). We affirm. Because defendant does not raise any challenge to the validity of his waiver of the right to appeal (see *People v Seymore*, 188 AD3d 1767, 1768 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Rosado-Thomas*, 181 AD3d 1166, 1166 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]), his challenge to the severity of his sentence "is foreclosed by his unchallenged waiver of the right to appeal" (*Rosado-Thomas*, 181 AD3d at 1167; see *People v Halsey*, 222 AD3d 1409, 1411 [4th Dept 2023], *lv denied* 41 NY3d 943 [2024]; *People v Putman*, 163 AD3d 1461, 1461 [4th Dept 2018]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

21

KA 24-01865

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

NIHEIM MARTIN, DEFENDANT-RESPONDENT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR APPELLANT.

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

Appeal from an order of the Onondaga County Court (Mary Anne Doherty, A.J.), dated November 1, 2024. The order granted that part of defendant's omnibus motion seeking to dismiss the indictment.

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

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the indictment on the ground that the evidence before the grand jury is not legally sufficient to establish the charged offenses of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). This action involves the second indictment procured against defendant following a gang-related shooting that resulted in the death of the victim, a rival gang member. It is undisputed that the victim was shot and killed by a member of the victim's own gang and that the shooter was prosecuted separately.

Contrary to the People's contention, they did not adduce legally sufficient evidence before the grand jury to sustain an indictment on the crimes. " 'To dismiss . . . an indictment on the basis of insufficient evidence before a [g]rand [j]ury, a reviewing court must consider whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury' " (*People v Gaworecki*, 37 NY3d 225, 230 [2021]). " 'In the context of a [g]rand [j]ury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt' " (*People v Grant*, 17 NY3d 613, 616 [2011]; see *Gaworecki*, 37 NY3d at 230). Legally sufficient evidence is defined by the Criminal Procedure Law as "competent evidence which, if accepted as true, would establish every element of an offense charged"

(CPL 70.10 [1]). Our inquiry is limited to determining "whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the [g]rand [j]ury could rationally have drawn the guilty inference" (*Grant*, 17 NY3d at 616 [internal quotation marks omitted]).

The People charged defendant with murder in the second degree as an accomplice and with criminal possession of a weapon in the second degree. "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]). In order to establish accomplice liability with respect to that charge, the People were required to prove that defendant, "acting with the mental culpability required for the commission [of murder in the second degree], . . . solicit[ed], request[ed], command[ed], importune[d], or intentionally aid[ed] [the perpetrator] to engage in [criminal] conduct" (§ 20.00). A person is guilty of criminal possession of a weapon in the second degree, when they "possess[] any loaded firearm . . . [outside their] home or place of business" (§ 265.03 [3]).

The evidence before the grand jury established that a blue Subaru Crosstrek was present at the scene of the shooting, and a police officer testified that it was his "take" that certain video evidence showed "consistencies with *something* sticking out of the passenger side of that vehicle at that time" (emphasis added). He did not testify that this "something" was a person, gun, or anything else, let alone that this "something" was defendant. The evidence is therefore legally insufficient to establish that defendant was in the Crosstrek or that he possessed a loaded firearm.

Even assuming, arguendo, that the People established that defendant was present in the Crosstrek, we conclude that the People failed to present legally sufficient evidence that defendant shared the perpetrator's intent to kill the victim. A "defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability" (*People v Cabey*, 85 NY2d 417, 421 [1995]). "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" (*People v La Belle*, 18 NY2d 405, 412 [1966] [internal quotation marks omitted]). There can be no "community of purpose" where, as here, the evidence establishes that defendant and the perpetrator were members of opposing gangs. Inasmuch as "the People were required to prove that defendant had a shared intent, or community of purpose with the principal actor" (*People v Nelson*, 178 AD3d 1395, 1396 [4th Dept 2019], *lv denied* 35 NY3d 972 [2020] [internal quotation marks omitted]), and they failed to offer any evidence tying defendant to the shooter, the evidence is legally insufficient with respect to intent.

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

23

KA 24-01214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN R. VANSKIVER, DEFENDANT-APPELLANT.

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

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO, FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered July 11, 2024. The judgment convicted defendant upon a plea of guilty of burglary 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 burglary in the third degree (Penal Law § 140.20). We affirm.

Because defendant does not raise any challenge to the validity of his waiver of the right to appeal (*see People v Seymore*, 188 AD3d 1767, 1768 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Rosado-Thomas*, 181 AD3d 1166, 1166 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]), his challenge to the severity of his sentence "is foreclosed by his unchallenged waiver of the right to appeal" (*Rosado-Thomas*, 181 AD3d at 1167; *see People v Halsey*, 222 AD3d 1409, 1411 [4th Dept 2023], *lv denied* 41 NY3d 943 [2024]; *People v Putman*, 163 AD3d 1461, 1461 [4th Dept 2018]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

26

KA 23-00965

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

COURTNEY BARBER, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, 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 March 28, 2023. The judgment convicted defendant, upon a jury verdict, of attempted rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted rape in the first degree (Penal Law §§ 110.00, former 130.35 [1]). We affirm.

Contrary to defendant's contention, the verdict is not against the weight of the evidence. When evaluating the weight of the evidence, we must first determine if "based on all the credible evidence a different finding would not have been unreasonable" (*People v Bleakley*, 69 NY2d 490, 495 [1987]; see *People v Danielson*, 9 NY3d 342, 348 [2007]). Where an acquittal would not have been unreasonable, we must "weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*Danielson*, 9 NY3d at 348).

In order to establish defendant's guilt of attempted rape in the first degree, the People were required to demonstrate that " 'defendant intended to commit rape and that he came dangerously close to doing so' " (*People v Lamagna*, 30 AD3d 1052, 1053 [4th Dept 2006], lv denied 7 NY3d 814 [2006]; see also Penal Law §§ 110.00, former 130.35 [1]). Viewing the evidence in light of the elements of the crime as charged to the jury (see *Danielson*, 9 NY3d at 349; *People v Hendrix*, 132 AD3d 1348, 1349 [4th Dept 2015], lv denied 26 NY3d 1145 [2016]), we conclude that a different verdict would have been unreasonable and thus that the verdict is not against the weight of the evidence (see *People v Herring*, 147 AD3d 1345, 1345 [4th Dept 2017], lv denied 29 NY3d 949 [2017]). Video surveillance captured

defendant following the victim for nearly 10 minutes. The victim testified that, thereafter, defendant ran toward her, pushed her to the ground, placed his hand over her mouth, and told her to "be quiet" while he attempted to vaginally penetrate her. The victim tried to call 911, but defendant grabbed her cell phone from her hand. The victim was eventually able to push defendant off of her, at which time he ran away. At the scene, the police recovered the victim's university identification card, lanyard, earbuds, and one of her sneakers, as well as defendant's iPhone, pack of cigarettes, and lighter. The police also found the victim's cell phone, which had defendant's fingerprint on it, about 40 feet away. A vaginal swab indicated the presence of male DNA on the victim. In short, the evidence that "defendant intended to commit rape and that he came dangerously close to doing so" is overwhelming (*Lamagna*, 30 AD3d at 1053).

Defendant contends that County Court's conduct of allegedly gesturing toward the People to object deprived him of a fair trial. Assuming, arguendo, that his present contention is preserved (see *People v Azaz*, 10 NY3d 873, 874-875 [2008]; cf. *People v Charleston*, 56 NY2d 886, 887 [1982]), we conclude that defendant's contention is without merit. A judge must not "take[] on either the function or appearance of an advocate at trial" (*People v Arnold*, 98 NY2d 63, 67 [2002]). However, "[e]ven if a trial judge makes intrusive remarks that would better have been left unsaid, or questions witnesses extensively, the defendant is not thereby deprived of a fair trial so long as the jury is 'not prevented from arriving at an impartial judgment on the merits' " (*People v Adams*, 117 AD3d 104, 109 [1st Dept 2014], lv denied 24 NY3d 1000 [2014], quoting *People v Moulton*, 43 NY2d 944, 946 [1978]). Here, following defendant's objection, the court agreed to give a curative instruction, which the jury is presumed to have followed (see *People v Baker*, 14 NY3d 266, 274 [2010]), thus eliminating any prejudice to defendant (see *People v Stone*, 29 NY3d 166, 171 [2017]).

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

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

27

KA 21-01811

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONATHAN MCENNIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BRAEDAN M. GILLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered November 16, 2021. The judgment convicted defendant upon a jury verdict of murder in the second degree (two counts), robbery in the first degree (five counts), assault in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of five counts of robbery in the first degree (Penal Law § 160.15 [3], [4]), two counts of murder in the second degree (§ 125.25 [1], [3]), two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]), and one count of assault in the second degree (§ 120.05 [6]). The charges arise from a series of three armed robberies committed by defendant and his codefendant in Niagara Falls on two separate dates, during which two individuals were shot, one fatally. We affirm.

Defendant's contention challenging the applications for the two cell "tower dump" search warrants is not preserved for our review (see CPL 470.05 [2]; *People v Myles*, 216 AD3d 1419, 1421 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]; *People v Navarro*, 158 AD3d 1242, 1243-1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]; *People v Everson*, 240 AD3d 1343, 1345 [4th Dept 2025]; *Myles*, 216 AD3d at 1421-1422). With respect to defendant's contention that his original defense counsel was ineffective in not challenging the applications for those search warrants and that his replacement defense counsel was ineffective in not seeking to reopen the suppression motion, defendant

failed to demonstrate the absence of strategic or other legitimate explanations for defense counsels' decisions not to challenge the search warrant applications (see *People v Dennis*, 192 AD3d 1137, 1137 [2d Dept 2021], *lv denied* 37 NY3d 964 [2021]; *People v Morris*, 117 AD3d 1580, 1580-1581 [4th Dept 2014]).

By failing to renew his motion to dismiss at the close of proof, defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish his identity as a perpetrator of the crimes (see *People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Eckerd*, 161 AD3d 1508, 1508 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). Nonetheless, we "necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Turner*, 197 AD3d 997, 998 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021] [internal quotation marks omitted]; see *People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). Here, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to the issue of identity (see *People v Renaldo*, 239 AD3d 1470, 1471 [4th Dept 2025], *lv denied* 44 NY3d 1013 [2025]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Specifically, cell-site and electronic location data established that defendant's phone was present at the time and place of all three incidents; surveillance videos, license plate reader hits, and Thruway toll hits showed defendant's vehicle being driven in the vicinity of all three crime scenes at the relevant times; and surveillance videos from two of the incidents depicted individuals who, while masked, matched the appearance and the witnesses' descriptions of defendant and the codefendant. Given the overwhelming circumstantial evidence, the assertion that two other unknown persons were at the same location to commit the robberies, shootings, and murder is "so implausible that it could not create a reasonable doubt as to defendant's guilt" (*People v Isaac*, 195 AD3d 1410, 1410 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]; see generally *Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, we conclude that he received effective assistance of counsel. The evidence, the law, and the circumstances of a particular case should be "viewed in totality and as of the time of the representation," and if they reveal "that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]). What constitutes effective assistance of counsel varies according to the unique circumstances of each case (see *id.* at 146). When a defense is based on a "reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance" (*People v Benevento*, 91 NY2d 708, 713 [1998]; see *People v Singleton*, 203 AD3d 1671, 1672-1673 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]). Here, defendant received meaningful representation. The attorneys who represented defendant made appropriate pretrial motions, conducted

suppression and other pretrial hearings, presented opening and closing arguments, raised appropriate objections throughout the trial, effectively cross-examined the prosecution witnesses, and presented a cogent defense challenging defendant's identification as one of the perpetrators. Contrary to defendant's contention, the record reflects that his replacement defense counsel was permitted to explore issues raised by his initial defense counsel during the relevant hearings, that surveillance video was turned over to his initial defense counsel, and that his replacement defense counsel provided him with all discovery and routinely met with him in advance of trial. Defendant further failed to demonstrate the absence of a legitimate or strategic basis for replacement defense counsel's decision "not to call [a] witness[] and has thus failed to establish that he was denied effective assistance of counsel" on that ground (*People v Dombrowski*, 94 AD3d 1416, 1417 [4th Dept 2012], *lv denied* 19 NY3d 959 [2012]). While replacement defense counsel erred when describing part of a witness's testimony during summation, it was not so egregious as to deprive defendant of his constitutional right to meaningful representation (*see generally Benevento*, 91 NY2d at 712).

We agree with defendant that Supreme Court erred in denying his request for a circumstantial evidence instruction. "It is well settled that a trial court must grant a defendant's request for a circumstantial evidence charge when the proof of the defendant's guilt rests solely on circumstantial evidence" (*People v Hardy*, 26 NY3d 245, 249 [2015]; *see People v Exford*, 234 AD3d 1252, 1253-1254 [4th Dept 2025]). Contrary to the People's assertion, this was not a case with both direct and circumstantial evidence of defendant's guilt, which would "negate the need for a circumstantial evidence charge" (*Exford*, 234 AD3d at 1254; *see also People v Lathrop*, 227 AD3d 1503, 1506 [4th Dept 2024], *lv denied* 42 NY3d 939 [2024]). Although surveillance video footage of a crime can constitute direct evidence (*see e.g. Hardy*, 26 NY3d at 250), it did not constitute direct evidence here. Defendant's identity cannot be discerned clearly from the surveillance video footage offered at trial inasmuch as the perpetrators in the videos are masked (*see Exford*, 234 AD3d at 1254). Nonetheless, we conclude that the court's failure to give the charge is harmless error. The circumstantial evidence, which included cell phone and electronic location data placing defendant at all three crime scenes, is overwhelming, and there is no significant probability that defendant would have been acquitted had the circumstantial evidence charge been given (*see People v Brian*, 84 NY2d 887, 889 [1994]; *People v Maddox*, 92 AD3d 696, 697 [2d Dept 2012], *lv denied* 19 NY3d 865 [2012]; *People v Fulton*, 28 AD3d 1180, 1181-1182 [4th Dept 2006], *lv denied* 7 NY3d 756 [2006]).

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during direct examination and summation (*see People v Marra*, 96 AD3d 1623, 1626 [4th Dept 2012], *affd* 21 NY3d 979 [2013]; *People v Smith*, 32 AD3d 1291, 1292 [4th Dept 2006], *lv denied* 8 NY3d 849 [2007]) and, in any event, we conclude that none of the prosecutor's comments was " 'so egregious as to deny defendant a fair trial' " (*People v Rivers*, 82 AD3d 1623,

1624 [4th Dept 2011], *lv denied* 17 NY3d 904 [2011]). Inasmuch as the court ruled the 911 call from the murder scene admissible (see generally *People v Sides*, 215 AD3d 1250, 1250-1251 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]), it was not prosecutorial misconduct for the People to play the entire call for the jury.

Defendant abandoned his contention that certain documents were improperly admitted in evidence during the grand jury proceeding after the People supplemented the appellate record with the CPLR 4518 business record certifications for those documents (see generally *People v Arroyo*, 167 AD3d 1537, 1538 [4th Dept 2018], *lv denied* 33 NY3d 945 [2019]). The remainder of defendant's challenge to the sufficiency of the evidence before the grand jury is not properly before us inasmuch as the ensuing judgment is " 'based upon legally sufficient trial evidence' " (*People v Jackson*, 122 AD3d 1310, 1311 [4th Dept 2014], *lv denied* 24 NY3d 1220 [2015]; see CPL 210.30 [6]; *People v Edgeston*, 90 AD3d 1535, 1535-1536 [4th Dept 2011], *lv denied* 19 NY3d 973 [2012]).

Although defendant contends that the court erred in refusing to suppress statements that he made at the police station, those statements were not used as evidence at trial, and we therefore conclude that any error in refusing to suppress them is harmless (see *People v Thacker*, 156 AD3d 1482, 1483 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]; see generally *People v Crimmins*, 36 NY2d 230, 237 [1975]). Defendant did not preserve a challenge to any reference to those statements made by the People during their opening statement (see CPL 470.05 [2]) and, in any event, attorney statements do not constitute evidence, as the court properly instructed the jury (see *People v Warmley*, 179 AD3d 1537, 1538 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]; see generally *People v Ashwal*, 39 NY2d 105, 109-111 [1976]).

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

28

TP 25-01248

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

IN THE MATTER OF JEWISH HOME AND
INFIRMARY OF ROCHESTER, INC., PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH,
NEW YORK STATE OFFICE OF THE MEDICAID INSPECTOR
GENERAL, JAMES V. MCDONALD, IN HIS CAPACITY
AS COMMISSIONER OF THE NEW YORK STATE
DEPARTMENT OF HEALTH, AND FRANK T. WALSH, JR.,
IN HIS OFFICIAL CAPACITY AS ACTING MEDICAID
INSPECTOR GENERAL, RESPONDENTS.

CROWELL & MORING LLP, WASHINGTON, D.C. (SAMUEL H. RUDDY, ADMITTED PRO
HAC VICE, OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Sam L. Valleriani, J.], dated April 11, 2025) to review a determination of respondents. The determination, inter alia, ordered that respondent New York State Department of Health is entitled to recover from petitioner an overpayment of funds.

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 of the Administrative Law Judge (ALJ), made after a hearing, insofar as it affirmed in part the determination of respondent New York State Office of the Medicaid Inspector General (OMIG) after a final audit of Medicaid claims paid to petitioner. Specifically, the ALJ affirmed, inter alia, OMIG's determination finding that the amount of mortgage forgiveness on a note supported by bonds issued by the Village of East Rochester Housing Authority (VERHA) must be allocated over the remaining life of the mortgage in accordance with 10 NYCRR 86-2.20 (f), and thus respondent New York State Department of Health (DOH) is entitled to recover from petitioner for an overpayment made to petitioner by the DOH. We confirm the determination and dismiss the petition.

Contrary to petitioner's initial contention, "[e]rrors of judgment, which involve an agency's expertise and cannot be corrected upon audit, do not include [errors] 'based upon mathematical miscalculation, computer error, or the submission of false information' " (*Matter of Teresian House Nursing Home Co., Inc. v Commissioner of Health of State of N.Y.*, 70 AD3d 1294, 1295 [3d Dept 2010]; see *Matter of Westledge Nursing Home v Axelrod*, 68 NY2d 862, 864-865 [1986]; *Matter of New York Foundling Hosp., Inc. v Novello*, 47 AD3d 1004, 1005 [3d Dept 2008], lv denied 10 NY3d 708 [2008]). Here, the OMIG audit finding that petitioner's report improperly allocated the entirety of the subject mortgage forgiveness to 2015 in accordance with 10 NYCRR 86-2.20 (c), as opposed to allocating it pro rata over the remaining life of the mortgage in accordance with 10 NYCRR 86-2.20 (f), was based upon the "submission of false information, [and, thus, DOH] may retroactively adjust the rates and recoup overpayments" (*Westledge Nursing Home*, 68 NY2d at 865; see *Matter of County of Monroe v Axelrod*, 163 AD2d 847, 849 [4th Dept 1990], lv denied 76 NY2d 714 [1990]; see also *New York Foundling Hosp., Inc.*, 47 AD3d at 1005-1006).

Similarly, although petitioner is correct that "when an agency determines to alter its prior stated course[,] it must set forth its reasons for doing so" (*Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 520 [1985]) "at the agency level," and not "in response to a CPLR article 78 challenge" (*Matter of Collins v Governor's Off. of Empl. Relations*, 211 AD2d 1001, 1003 [3d Dept 1995]), OMIG does not have a prior stated course for how the forgiveness of a mortgage supported by bonds issued by a public housing agency must be reported and, thus, was not required to set forth any reasoning at the agency level for its determination with respect to the required reporting thereof.

As a general rule, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]) and, thus, an agency's construction of its regulations, "if not irrational or unreasonable, should be upheld" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008] [internal quotation marks omitted]; see *Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 174 [2019]). Here, contrary to petitioner's contention, we conclude that OMIG's "interpretation of its regulation[s] . . . is neither irrational nor unreasonable" (*Axelrod*, 163 AD2d at 848; see generally *Matter of Hurlbut, LLC v New York State Off. of Medicaid Inspector Gen.*, 174 AD3d 1303, 1303-1304 [4th Dept 2019]). Specifically, OMIG's rationale for determining that VERHA was a "public financing authority" whose mortgage forgiveness must be reported in accordance with 10 NYCRR 86-2.20 (f)—the rationale it relied upon in its audit findings and the administrative hearing—was its application of general accounting principles to the nature of the transaction between VERHA and petitioner. We conclude that, "[g]iven the lack of controlling authority dictating otherwise, [OMIG's] determination to apply . . . generally accepted accounting principle[s] . . . was a rational one" (*Teresian House Nursing Home Co., Inc.*, 70 AD3d at 1295).

Finally, we conclude that, contrary to petitioner's contention, the ALJ did not err in rejecting its assertion that it reasonably relied upon a verbal representation from a DOH employee that the entirety of the subject mortgage forgiveness could be reported as allocated to 2015 in accordance with 10 NYCRR 86-2.20 (c).

"[E]stoppel generally cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (*Matter of Hall v Shah*, 100 AD3d 1357, 1360 [4th Dept 2012] [internal quotation marks omitted]; see *Matter of Shelton v Wing*, 256 AD2d 1143, 1144 [4th Dept 1998]), and this is not "one of those unusual circumstances where estoppel against a [government agency] is warranted because doing otherwise would 'result in a manifest injustice' " (*Vassenelli v City of Syracuse*, 174 AD3d 1439, 1441 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]; see *Notaro v Power Auth. of State of N.Y.*, 41 AD3d 1318, 1320 [4th Dept 2007], *lv dismissed* 9 NY3d 935 [2007]; *Matter of Grella v Hevesi*, 38 AD3d 113, 117 [3d Dept 2007]).

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

29

CAF 24-00825

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

IN THE MATTER OF JOSHUA IRWIN, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

SARAH SNYDER, RESPONDENT-RESPONDENT.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR PETITIONER-APPELLANT.

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

SUSAN E. GRAY, CATONSVILLE, ATTORNEY FOR THE CHILD.

Appeal from a second amended order of the Family Court, Ontario County (Frederick G. Reed, J.), entered May 16, 2024, in a proceeding pursuant to Family Court Act article 6. The second amended order, among other things, dismissed the petition with prejudice.

It is hereby ORDERED that the second amended order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: Petitioner father and respondent mother are the parents of the subject child. The parties consented to a custody and visitation order wherein the mother was awarded sole legal and primary physical custody of the child and the father was awarded supervised visitation. The order set forth a schedule of visitation for the father on Tuesday afternoons. The order further provided that upon completion of that visitation schedule, the father was permitted to reapply for additional periods of visitation without a showing of a substantial change in circumstances. After completing the visits set forth in the consent order, the father commenced this proceeding pursuant to Family Court Act article 6 seeking to modify the consent order to award him additional visitation time. After a fact-finding hearing on the father's petition, Family Court dismissed the father's petition with prejudice for failure to state a cause of action. The father appeals.

We agree with the father that the petition stated a cognizable cause of action and, thus, the court erred in dismissing the petition for failure to state a cause of action. Ordinarily, "[t]o survive a motion to dismiss, a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances" to warrant an inquiry into whether a modification of

the prior order is in the best interests of the child (*Matter of Gelling v McNabb*, 126 AD3d 1487, 1487 [4th Dept 2015]). Here, the father alleged in the petition that he complied with the schedule of visitation set forth in the consent order and sought additional visitation with the child. The father further alleged that, pursuant to the terms of the consent order, he did not have to establish a change in circumstances and that it would be in the best interests of the child to have more visitation with him and his family. While the mother and the Attorney for the Child assert that the father failed to comply with the remaining terms of the consent order, they do not dispute that the father complied with the schedule of visitation, which was all that was required by the terms of the consent order to allow the father to petition the court without having to show a change of circumstances. Thus, we conclude that the father stated a cognizable legal theory and that the court erred in dismissing the petition on that ground at the close of the father's proof (see generally *Matter of Curtis D. v Samantha E.*, 182 AD3d 655, 656 [3d Dept 2020]).

We therefore reverse the second amended order, reinstate the petition, and remit the matter to Family Court for a continuation of the hearing and a ruling on the best interests of the child.

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

30

CAF 24-01868

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

IN THE MATTER OF JAYRON J., JAYAIRE J.,
JAYDEN J. AND JAYLEN J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

RONECIA H., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from a decision of the Family Court, Erie County (Shannon E. Filbert, J.), dated October 15, 2024, in a proceeding pursuant to Family Court Act article 10. The decision, among other things, adjudged that respondent had abused her child Jayden J. and had derivatively abused Jayron J., Jaylen J. and Jayaire J.

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

Same memorandum as in *Matter of Jayron J. (Ronecia H.)* ([appeal No. 2] – AD3d – [Mar. 20, 2026] [4th Dept 2026]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

31

CAF 24-02054

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

IN THE MATTER OF JAYRON J., JAYAIRE J., JAYDEN J.,
AND JAYLEN J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

RONECIA H., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Shannon E. Filbert, J.), dated December 6, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject children in the custody of petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 1 from a decision determining, inter alia, that she and the uncle abused one of her twin sons (child) and derivatively abused her other three children. In appeal No. 2, the mother appeals from a dispositional order placing the children in the custody of petitioner.

As a preliminary matter, assuming, arguendo, that the paper appealed from in appeal No. 1 met the essential requirements of an order and we treated it as such (see *Matter of Silas W. [Natasha W.]*, 207 AD3d 1234, 1234 [4th Dept 2022]; *Downstairs Cabaret, Inc. v Wesco Ins. Co.*, 187 AD3d 1642, 1643 [4th Dept 2020]; *Nicol v Nicol*, 179 AD3d 1472, 1473 [4th Dept 2020]; see generally CPLR 2219 [a]), we conclude that the mother's right of direct appeal from the fact-finding order in appeal No. 1 terminated with the subsequent entry of the order of disposition, and we therefore dismiss appeal No. 1 (see *Matter of Mea V. [Brandon V.]*, 210 AD3d 1408, 1408 [4th Dept 2022]).

Family Court Act § 1046 (a) (ii) "provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of [the] respondent[], and (2) that [the] respondent[] was a caretaker[] of the child at the time the injury occurred" (*Matter of*

Philip M., 82 NY2d 238, 243 [1993]; see *Matter of Grayson R.V. [Jessica D.]* [appeal No. 2], 200 AD3d 1646, 1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]). Once the petitioner "establishe[s] a prima facie case, the burden of going forward shifts to respondent[] to rebut the evidence of parental culpability" (*Philip M.*, 82 NY2d at 244; see generally *Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]).

We conclude that petitioner established that the child suffered numerous injuries, including a subdural hematoma, retinal hemorrhaging, and various bruises, that would not ordinarily occur absent an act or omission of the mother (see *Matter of Kevin V. [Sarah L.]*, 229 AD3d 1159, 1160 [4th Dept 2024]; *Grayson R.V.*, 200 AD3d at 1646; see generally *Philip M.*, 82 NY2d at 243). Contrary to the mother's contention, although the mother and the uncle were caregivers for the child during the relevant time frame, petitioner's inability to pinpoint the exact time and date of the child's injuries and to link the cause of those injuries to a specific caregiver, i.e., either the mother or the uncle, is not fatal to the establishment of petitioner's prima facie case of abuse (see *Kevin V.*, 229 AD3d at 1160). We further conclude that the mother failed to rebut the presumption of culpability (see *Grayson R.V.*, 200 AD3d at 1649).

We also conclude that Family Court's finding of derivative abuse of the three other children by the mother is supported by a preponderance of the evidence in the record (see Family Ct Act § 1046 [a] [i]; [b] [i]). The abuse of the child " 'demonstrates such an impaired level of judgment by the [mother] as to create a substantial risk of harm for any child in her care' " (*Matter of Dorian C. [Cyncere G.]*, 233 AD3d 1516, 1519 [4th Dept 2024], *lv denied* 43 NY3d 904 [2025]; see *Matter of Chandler W. [Caitlyn M.]*, 237 AD3d 1564, 1566 [4th Dept 2025], *lv denied* 44 NY3d 905 [2025]).

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

38

CAE 24-01946

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

IN THE MATTER OF JOHN J. MILLS, SCOTT A.
MARCISZEWSKI AND JOETTE A. TRONOLONE,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

JEREMY J. ZELLNER AND RALPH M. MOHR,
COMMISSIONERS CONSTITUTING THE ERIE COUNTY
BOARD OF ELECTIONS, ERIE COUNTY LEGISLATURE,
RESPONDENTS-DEFENDANTS-RESPONDENTS,
RANDALL C. SIFORD, STANLEY SLIWA, WILLIAM F.
SCHMIND, JR., MICHELLE J. SCHOENEMAN, ELIZABETH
A. BRINKWORTH, THOMAS W. PEMBERTON AND MINORITY CAUCUS OF
THE ERIE COUNTY LEGISLATURE, INTERVENORS-RESPONDENTS.

PIGOTT LAW GROUP, WILLIAMSVILLE (DAVID J. PIGOTT OF COUNSEL), FOR
PETITIONERS-PLAINTIFFS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), AND HODGSON
RUSS LLP, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS JEREMY J. ZELLNER,
COMMISSIONER CONSTITUTING THE ERIE COUNTY BOARD OF ELECTIONS, AND ERIE
COUNTY LEGISLATURE.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL),
FOR RESPONDENT-DEFENDANT-RESPONDENT RALPH M. MOHR, COMMISSIONER
CONSTITUTING THE ERIE COUNTY BOARD OF ELECTIONS.

JEROME D. SCHAD, WILLIAMSVILLE, FOR INTERVENORS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme
Court, Erie County (Amy C. Martoche, J.), entered October 17, 2024, in
a proceeding pursuant to CPLR article 78 and declaratory judgment
action. The order and judgment, inter alia, denied the application of
plaintiffs for a declaratory judgment.

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

Memorandum: In 2022, the Erie County Legislature adopted Local
Law No. 2, which established boundaries for county legislative
districts in reliance on the 2020 census results. The district
boundaries were depicted on maps (desk maps) that had been placed on
the legislators' desks by a legislative clerk upon the introduction of
Local Law No. 2, and the districts themselves were more particularly

described within the text of Local Law No. 2 by metes and bounds. The metes and bounds descriptions, however, contained multiple errors, describing districts stretching far beyond Erie County. When the County Legislature declined to pass a law correcting the errors in the metes and bounds descriptions, staff of the Erie County Board of Elections assigned voters to legislative districts using corrected metes and bounds descriptions prepared in reliance on the district boundaries as depicted in the desk maps, with one technical anomaly corrected to reflect the legislative intent not to have election districts cross village boundaries.

Petitioners-plaintiffs (petitioners) thereafter commenced this hybrid CPLR article 78 proceeding and declaratory judgment action claiming, inter alia, that respondents-defendants Jeremy J. Zellner and Ralph M. Mohr, at the relevant time Commissioners constituting the Erie County Board of Elections (Board), acted ultra vires and in violation of the Election Law by unilaterally redrawing and reapportioning the legislative districts, and seeking an order directing, among other things, that the Board publish district boundary maps that accorded with Local Law No. 2. Randall C. Siford, Stanley Sliwa, William F. Schmind, Jr., Michelle J. Schoeneman, Elizabeth A. Brinkworth, and Thomas W. Pemberton (intervenors) moved to intervene, and Supreme Court granted that motion. The intervenors filed a cross-petition, and the court subsequently, inter alia, granted a motion by the intervenors for partial summary judgment on their cross-petition, in part, by "determining and declaring that Local Law 2 . . . is to be construed in accordance with the [d]esk [m]aps." The court thereafter conducted a hearing to determine whether the corrected metes and bounds descriptions prepared by the Board's staff reflected the boundaries depicted in the desk maps. Following the hearing, the court issued an order and judgment that, inter alia, granted the intervenors' cross-petition, in part, by declaring that the Board's actions in updating its database and assigning voters to legislative districts in accordance with the corrected metes and bounds descriptions was proper and lawful, granted the amended petition-complaint, in part, by directing the Board to publish and make available maps of the new legislative districts, and dismissed petitioners' remaining claims. Petitioners appeal from those parts of the order and judgment that are adverse to them. We affirm.

Preliminarily, we agree with petitioners that the court's order on the intervenors' summary judgment motion, to the extent it dismissed petitioners' claim asserting that the Board violated the Municipal Home Rule Law, "necessarily affects the final judgment" (CPLR 5501 [a] [1]) and, thus, is properly before us on their appeal from the final judgment (see *Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1025-1026 [2022], rearg denied 38 NY3d 1170 [2022]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 20 NY3d 37, 41-42 [2012]).

We reject petitioner's contention that the court erred in determining, after the hearing, that the corrected metes and bounds descriptions prepared by the Board's staff effectuated the

Legislature's intent. In reviewing the court's determination, "we weigh the evidence presented and award judgment as warranted by the record, giving due deference to the court's evaluation of the credibility of the witnesses and the quality of proof" (*Capizzi v Brown Chiari LLP*, 194 AD3d 1457, 1458 [4th Dept 2021]; see *Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170 [4th Dept 2005]). Here, the hearing record establishes that the desk maps were before the Legislature for consideration along with proposed Local Law No. 2 and, furthermore, that the corrected metes and bounds descriptions implemented by the Board comported with the boundaries as shown on the desk maps, except for a single de minimis change made to avoid the creation of an invalid election district and effectuate the Legislature's intent not to have the legislative districts cross village boundaries.

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

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

39

KA 23-00978

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAWRENCE D. BAKER, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS, EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered April 5, 2023. The appeal was held by this Court by order entered May 2, 2025, decision was reserved and the matter was remitted to Wayne County Court for further proceedings (238 AD3d 1507 [4th Dept 2025]). The proceedings were held and completed.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]). We previously twice held this case, reserved decision, and remitted the matter to County Court for a determination whether the People were ready for trial within the requisite time period (*People v Baker*, 238 AD3d 1507 [4th Dept 2025]; *People v Baker*, 229 AD3d 1324 [4th Dept 2024]). Upon the most recent remittal, the court determined that the People were not ready for trial within the requisite time period and granted defendant's motion to dismiss the indictment pursuant to CPL 30.30. Defendant subsequently died. Under these circumstances, we dismiss the appeal (see generally *People v Matteson*, 75 NY2d 745, 747 [1989]; *People v Mintz*, 20 NY2d 753, 754 [1967]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

44

KA 23-01800

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERIC OLIVER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered September 27, 2023. 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.

Defendant contends that County Court erred in denying his motion to strike the People's certificate of compliance (COC) and dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30), arguing that the People's failure to timely disclose certain records rendered the COC improper (*see* CPL 30.30 [former (5)]; 245.50 [former (1)]), thereby rendering the statement of readiness illusory and insufficient to stop the running of the speedy trial clock (*see People v Geer*, 224 AD3d 1353, 1354 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024]; *see generally People v Gaskin*, 214 AD3d 1353, 1354 [4th Dept 2023])).

Contrary to defendant's contention, the records in question were not part of the "discovery required" to be automatically disclosed by the People prior to the filing of a proper COC (CPL 245.50 [former (3)]; *see* CPL 245.20 [former (1)]) and, thus, "the People's failure to provide the records at the time they served and filed their original . . . [COC did] not render [the COC] improper" (*People v Walker*, 232 AD3d 1214, 1217 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]). As applicable here, CPL 245.20 (former [1]) required the People to automatically disclose to a defendant certain categories of items and information that relate to the subject matter of the case and are in

the People's possession, custody, or control (see *Walker*, 232 AD3d at 1215; *People v Walker*, 228 AD3d 1318, 1319 [4th Dept 2024]; *People v Johnson*, 218 AD3d 1347, 1350 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024], *cert denied* – US –, 144 S Ct 2696 [2024]). Here, although the records relate to the subject matter of the case, they were not in the possession, custody, or control of the People before the People filed their initial COC inasmuch as the records either did not exist at the time the COC was filed (see CPL 245.20 [1] [j]; see generally *People v Radford*, 237 AD3d 1511, 1512 [4th Dept 2025], *lv denied* 43 NY3d 1048 [2025]; *People v Flowers*, 234 AD3d 1347, 1348 [4th Dept 2025], *lv denied* 43 NY3d 1045 [2025]) or were not "related to the prosecution of a charge" (*Walker*, 232 AD3d at 1216 [internal quotation marks omitted]), and the People established, in opposition to defendant's CPL 30.30 motion, that they had " 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " at that time (*People v Bay*, 41 NY3d 200, 211 [2023]; see *Flowers*, 234 AD3d at 1348).

To the extent that defendant contends that his motion should have been granted because the People failed to meet their continuing obligation to ascertain the existence of discovery material before filing their supplemental COC, we reject that contention. "[T]he remedy of dismissal of the indictment under CPL 30.30 for the violation of a defendant's statutory right to a speedy trial—which is available when, inter alia, the People are deemed not ready for trial due to an invalid certificate of compliance and have exceeded the applicable statutory speedy trial time (see CPL 245.50 [3])—is directly tied, and only directly tied, to the People's failure to comply with their [i]nitial discovery obligations as set forth in CPL 245.20 (1), which include any attendant due diligence obligations with respect to the items and information discoverable under that provision" (*Radford*, 237 AD3d at 1513 [internal quotation marks omitted]). Thus, although a failure by the People to comply with their continuing discovery obligations under CPL 245.60 may warrant the imposition of discovery sanctions under CPL 245.80 (2), such a failure does not implicate speedy trial considerations under CPL 30.30 (see *Radford*, 237 AD3d at 1513; *Flowers*, 234 AD3d at 1348).

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

48

KA 24-00618

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL PROVOST, DEFENDANT-APPELLANT.

ROSENBERG LAW FIRM, BROOKLYN (MORGAN NAMIAN 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 June 16, 2023. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (seven counts), sexual abuse in the first degree (seven counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of seven counts of predatory sexual assault against a child (Penal Law former § 130.96), seven counts of sexual abuse in the first degree (§ 130.65 [4]), and one count of endangering the welfare of a child (§ 260.10 [1]), arising from the repeated sexual abuse, over a period of nearly five years, of four children who were in his care.

Defendant contends that County Court erred in admitting certain *Molineux* evidence. To the extent that defendant's contention is preserved for our review (see CPL 470.05 [2]; *People v Winston*, 220 AD3d 1161, 1161 [4th Dept 2023], *lv denied* 41 NY3d 967 [2024]; *People v Francis*, 206 AD3d 1605, 1606 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]), we reject it. The court properly concluded that the evidence of uncharged acts of sexual abuse against one of the victims, physical abuse of two victims, and threats of harm against those same victims if they disclosed the ongoing sexual abuse was relevant "to complete the narrative and provide proper context for the offenses charged in the indictment and . . . to establish the victim[s'] state of mind, the relationship between defendant and the victim[s], [and] the delay in reporting" (*People v Smith*, 224 AD3d 1221, 1221 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]; see *People v Matthews*, 142 AD3d 1354, 1355 [4th Dept 2016], *lv denied* 28 NY3d 1125 [2016]; see generally *People v*

Morris, 21 NY3d 588, 594 [2013]) and, further, that the probative value of the evidence exceeded the potential for prejudice to defendant (see *People v Alvino*, 71 NY2d 233, 242 [1987]). Moreover, inasmuch as the court gave appropriate limiting instructions as requested by defense counsel, "[a]ny claim of prejudice necessarily relies on the assumption that the jury ignored the court's limiting instructions, and the law does not permit such an assumption" (*Smith*, 224 AD3d at 1222 [internal quotation marks omitted]).

Defendant's contention that he was deprived of a fair trial based on prosecutorial misconduct during summation is not preserved for our review inasmuch as he did not object to any of the comments that he now contends were improper (see CPL 470.05 [2]; *People v Nesmith*, 242 AD3d 1564, 1565 [4th Dept 2025], *lv denied* – NY3d – [2026]; *People v Dozier*, 238 AD3d 1523, 1525 [4th Dept 2025], *lv denied* 44 NY3d 1027 [2025]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, given the heinous nature of defendant's crimes, the relationship between defendant and the victims, and the victims' particular vulnerabilities, we reject defendant's contention that his sentence is unduly harsh and severe (see *People v Russell*, 155 AD3d 1432, 1433-1434 [3d Dept 2017], *lv denied* 30 NY3d 1119 [2018]).

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

53

CA 25-01162

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

BIG MOOSE OPERATIONS, LLC, DOING BUSINESS
AS THE BIG MOOSE INN, AND BMI ENTERPRISES, LLC,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

MEMORANDUM AND ORDER

UNITED FRONTIER MUTUAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT-APPELLANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

RUPP PFALZGRAF LLC, BUFFALO (AUSTIN R. HENDRICKS OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered June 26, 2025. The order, among other things, denied in part the motion of plaintiffs for summary judgment and denied in part the cross-motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking summary judgment on plaintiffs' claim for coverage under the Ordinance and Law provision of the policy, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs maintained an insurance policy with defendant. Following a fire at the insured premises, defendant paid certain amounts under the policy but denied plaintiffs' claims for increased coverage under the policy's Building Inflation Protection provision, for coverage under the Ordinance and Law provision, and for the loss of property under the Refrigerated Foods provision. Plaintiffs commenced this action for breach of contract and thereafter moved for summary judgment on the complaint. Defendant cross-moved for summary judgment dismissing the complaint. Supreme Court granted that part of the motion with respect to the Building Inflation Protection provision and that part of the cross-motion with respect to the Refrigerated Foods provision. The court otherwise denied the motion and cross-motion, concluding with respect to plaintiffs' claim for coverage under the Ordinance and Law provision that plaintiffs established that they incurred costs for, inter alia, demolition and debris removal pursuant to state and local law but that there were questions of fact whether the pollution exclusion applied based on the

presence of asbestos in the debris. Plaintiffs appeal, and defendant cross-appeals.

Plaintiffs contend on their appeal that the court erred in denying that part of the motion with respect to their claim for coverage under the Ordinance and Law provision of the policy on the ground that there was a question of fact whether asbestos constituted a pollutant within the meaning of the provision's pollution exclusion. We agree. In the context of an insurance coverage dispute, "[w]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced" (*Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307 [2009]). If there "is a reasonable basis for a difference of opinion as to the meaning of the policy . . . the language at issue would be deemed to be ambiguous and thus interpreted in favor of the insured" (*Selective Ins. Co. of Am. v County of Rensselaer*, 26 NY3d 649, 655-656 [2016]).

Here, plaintiffs established that, pursuant to the terms of the Ordinance and Law provision of the policy, they sustained a "covered loss in accordance with any ordinance or law which governs repair, restoration or demolition of the building(s)" (see generally *Ewald v Erie Ins. Co. of New York*, 214 AD3d 1382, 1385 [4th Dept 2023]). Specifically, plaintiffs' submissions demonstrated that, following the fire, the town code enforcement officer explicitly directed plaintiffs to demolish the building and remove debris consistent with state and town codes, and plaintiffs did so.

In opposition, defendant failed to establish that plaintiffs' claim was subject to the Ordinance and Law provision's pollution exclusion (see generally *Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 384 [2003]), which excludes from coverage costs incurred in "monitoring, testing for, cleaning up, removing, containing, treating, detoxifying, neutralizing or otherwise responding to or assessing the effects of pollutants." The policy defines a pollutant as "any solid, liquid, gaseous, thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste." The term "asbestos," however, is not specifically included in the policy's definition of a pollutant (see *Great Am. Restoration Servs., Inc. v Scottsdale Ins. Co.*, 78 AD3d 773, 777 [2d Dept 2010]). Defendant's assertion that damages from asbestos are excluded under the pollution exclusion would render the policy's specific asbestos exclusion meaningless, in violation of settled canons of construction (see *id.*). Inasmuch as the pollution exclusion is ambiguous with respect to asbestos, the exclusion must be interpreted in favor of the insured (see *Selective Ins. Co. of Am.*, 26 NY3d at 656). The court thus erred in denying that part of the motion with respect to the claim for coverage under the Ordinance and Law provision, and we therefore modify the order accordingly. In light of our determination, we reject defendant's contention on its cross-appeal that the court erred in denying that part of its cross-motion with respect to plaintiffs' claim for coverage under that provision.

We have reviewed the remaining contentions on the appeal and cross-appeal and conclude that none warrants further modification or reversal of the order.

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

56

CA 25-00513

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

IN THE MATTER OF ARBITRATION BETWEEN
NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.,
PETITIONER-RESPONDENT,

AND

MEMORANDUM AND ORDER

AMALGAMATED TRANSIT LOCAL UNION 1342, AND
JEFFREY B. RICHARDSON, AS PRESIDENT/BUSINESS
AGENT OF AMALGAMATED TRANSIT UNION LOCAL 1342,
RESPONDENTS-APPELLANTS.

BLITMAN & KING LLP, VICTOR (NOLAN J. LAFLER OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

VICKY-MARIE BRUNETTE, GENERAL COUNSEL, BUFFALO (BENJAMIN LEONARD OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered September 13, 2024, in a proceeding pursuant to CPLR article 75. The order granted the petition to permanently stay arbitration and denied the cross-petition insofar as it sought to compel arbitration.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is denied and the cross-petition is granted insofar as it seeks an order compelling arbitration.

Memorandum: In this proceeding pursuant to CPLR article 75, respondents appeal from an order that denied their cross-petition seeking, inter alia, an order compelling arbitration of a grievance arising from petitioner's termination of an employee and granted petitioner's petition seeking, inter alia, to permanently stay arbitration of the grievance. We reverse.

We agree with respondents that Supreme Court erred in concluding that two timing provisions relating to the pre-arbitration grievance process set forth in the parties' collective bargaining agreement constituted conditions precedent to arbitration. "Questions concerning compliance with a contractual step-by-step grievance process have been recognized as matters of procedural arbitrability to be resolved by the arbitrators, except in cases involving a very narrow arbitration clause or a provision expressly making compliance with the time limitations a condition precedent to arbitration"

(*Matter of Village of Manlius [Town of Manlius Professional Firefighters Assn., IAFF Local #3316]*, 185 AD3d 1501, 1503 [4th Dept 2020] [internal quotation marks omitted]; see *Matter of City of Watertown [Watertown Professional Firefighters' Assn. Local 191]*, 152 AD3d 1231, 1233-1234 [4th Dept 2017], lv denied 30 NY3d 908 [2018]; *Matter of Kenmore-Town of Tonawanda Union Free Sch. Dist. [Ken-Ton Sch. Empls. Assn.]*, 110 AD3d 1494, 1496 [4th Dept 2013])). Here, the collective bargaining agreement contains a broad arbitration clause, and the provisions governing the grievance process neither expressly state that they are conditions precedent to arbitration nor explicitly refer to the loss of the right to arbitrate (see *City of Watertown*, 152 AD3d at 1233-1234; *Kenmore-Town of Tonawanda Union Free Sch. Dist.*, 110 AD3d at 1496; *Matter of Kachris [Sterling]*, 239 AD2d 887, 887-888 [4th Dept 1997]; cf. *Village of Manlius*, 185 AD3d at 1503). The effect of any failure to comply with those provisions is thus an issue of "procedural arbitrability" for the arbitrator to resolve (*City of Watertown*, 152 AD3d at 1234 [internal quotation marks omitted]).

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

59

CA 25-00075

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

WILLIAM N. CAPICOTTO, M.D., AND
WILLIAM CAPICOTTO, M.D., P.C., PLAINTIFFS-APPELLANTS,

V

ORDER

WESTERN NEW YORK MEDICAL MANAGEMENT, LLC,
JOSEPH E. SERGHANY, M.D., CAMERON B. HUCKELL, M.D.,
FRANK MASCARO, M.D., AND ROMANTH WAGHMARAE, M.D.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

SCHRODER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HURWITZ FINE P.C., BUFFALO (AMBER E. STORR OF COUNSEL), FOR
DEFENDANT-RESPONDENT WESTERN NEW YORK MEDICAL MANAGEMENT, LLC.

CONNORS LLP, BUFFALO (RANDALL D. WHITE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS JOSEPH E. SERGHANY, M.D., CAMERON B. HUCKELL,
M.D., FRANK MASCARO, M.D., AND ROMANTH WAGHMARAE, M.D..

Appeal from a decision of the Supreme Court, Erie County (Emilio Colaiacovo, J.), dated December 5, 2024. The decision, among other things, denied plaintiffs' cross-motion for leave to file a second amended complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

60

CA 25-00076

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

WILLIAM N. CAPICOTTO, M.D., AND
WILLIAM CAPICOTTO, M.D., P.C., PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

WESTERN NEW YORK MEDICAL MANAGEMENT, LLC,
JOSEPH E. SERGHANY, M.D., CAMERON B. HUCKELL, M.D.,
FRANK MASCARO, M.D., AND ROMANTH WAGHMARAE, M.D.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

SCHRODER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HURWITZ FINE P.C., BUFFALO (AMBER E. STORR OF COUNSEL), FOR
DEFENDANT-RESPONDENT WESTERN NEW YORK MEDICAL MANAGEMENT, LLC.

CONNORS LLP, BUFFALO (RANDALL D. WHITE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS JOSEPH E. SERGHANY, M.D., CAMERON B. HUCKELL,
M.D., FRANK MASCARO, M.D., AND ROMANTH WAGHMARAE, M.D..

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January 2, 2025. The order, among other things, denied plaintiffs' cross-motion for leave to file a second amended complaint.

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

Memorandum: Plaintiffs, William N. Capicotto, M.D. (Capicotto) and his professional corporation, William Capicotto, M.D., P.C. (Capicotto P.C.), commenced this action seeking to recover damages arising from a business dispute among individual members of defendant Western New York Medical Management, LLC (WNYMM), for which Capicotto had been both a board member and managing director. Plaintiffs asserted four causes of action. WNYMM moved pursuant to CPLR 3211 to dismiss the first and fourth causes of action against it and to dismiss the second and third causes of action against it insofar as asserted by Capicotto individually. Defendants Joseph E. Serghany, M.D., Cameron B. Huckell, M.D., Frank Mascaro, M.D., and Romanth Waghmarae, M.D. (collectively, individual defendants) also moved pursuant to CPLR 3211 to dismiss the first and fourth causes of action against them and to dismiss the second and third causes of action against them insofar as asserted by Capicotto individually.

Plaintiffs cross-moved for leave to serve a second amended complaint. Supreme Court granted the WNYMM motion except insofar as it sought dismissal of the first cause of action against WNYMM as asserted by Capicotto, granted the motion of the individual defendants in its entirety, and denied the cross-motion. Plaintiffs appeal, and we affirm.

Initially, we note that in opposition to that part of the individual defendants' motion seeking dismissal of the first cause of action for quantum meruit asserted against them by Capicotto P.C., plaintiffs claimed that the first cause of action was asserted "only against the corporate defendant, WNYMM, and not against the [i]ndividual [d]efendants." Thus, to the extent that plaintiffs now contend that Capicotto P.C. is entitled to reinstatement of its claim against the individual defendants, that contention is not properly before us inasmuch as it is raised for the first time on appeal (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

We reject plaintiffs' contention that the court erred in granting that part of WNYMM's motion with respect to Capicotto P.C.'s quantum meruit claim against it. The elements of a claim for quantum meruit are "the performance of services in good faith, the acceptance of the services by the party for whom they were rendered, the expectation of compensation for those services, and a statement of the reasonable value of the services" (*Pulver Roofing Co., Inc. v SBLM Architects, P.C.*, 65 AD3d 826, 827 [4th Dept 2009]). "Under the theory of quantum meruit, if the services were performed at the behest of someone other than the defendant, the plaintiff must look to that party for recovery" (*TV Tech Mgrs., Inc. v Cohen*, 227 AD3d 838, 841 [2d Dept 2024] [internal quotation marks omitted]; see *Jeffrey's Auto Body, Inc. v Allstate Ins. Co.*, 125 AD3d 1342, 1343 [4th Dept 2015]). Here, plaintiffs did not allege that the WNYMM Board of Managers authorized Capicotto P.C. to perform services for WNYMM as required by the operating agreement, nor did they allege any other basis for Capicotto P.C. to have had an expectation of compensation. Plaintiffs thus failed to state a cause of action for quantum meruit on behalf of Capicotto P.C. (see *Jeffrey's Auto Body, Inc.*, 125 AD3d at 1343).

Contrary to plaintiffs' contention, the court properly granted those parts of the motions with respect to Capicotto's individual claims for breach of fiduciary duty and fraud under the second and third causes of action. Inasmuch as those claims are derivative in nature, they cannot be maintained by Capicotto individually (see *Abrams v Donati*, 66 NY2d 951, 953-954 [1985], *rearg denied* 67 NY2d 758 [1986]).

Contrary to plaintiffs' further contention, the court properly granted those parts of the motions with respect to the fourth cause of action, for breach of fiduciary duty in removing Capicotto from the WNYMM Board of Managers. Limited Liability Company Law § 414 provides that "[e]xcept as provided in the operating agreement, any or all managers of a limited liability company may be removed or replaced with or without cause by a vote of a majority in interest of the members entitled to vote thereon." Section 5.13 of the WNYMM

operating agreement provides that "[a] member of the Board of Managers shall be removed or replaced automatically and without further action in the event the member of the Board of Managers is no longer a Member, or by vote of two-thirds (2/3) of the Board of Managers." We conclude that the removal of Capicotto from the Board of Managers cannot be "deemed a breach of fiduciary duty given a formal written agreement covering the precise subject matter of the alleged fiduciary duty" (*Pane v Citibank, N.A.*, 19 AD3d 278, 279 [1st Dept 2005]; see generally *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

We further conclude that the court did not abuse its discretion in denying plaintiffs' cross-motion. "[T]he decision whether to grant leave to amend pleadings rests within the court's sound discretion and will not be disturbed absent a clear abuse of that discretion" (*Sherman v St. Elizabeth Med. Ctr.*, 145 AD3d 1461, 1462 [4th Dept 2016] [internal quotation marks omitted]; see *Fika Midwifery PLLC v Independent Health Assn., Inc.*, 208 AD3d 1052, 1058 [4th Dept 2022]). "Although leave to amend a pleading should be freely granted (see CPLR 3025 [b]), it may be denied where the proposed amendment is palpably insufficient or patently devoid of merit" (*Christian v Brookdale Senior Living Communities, Inc.*, 199 AD3d 1450, 1451 [4th Dept 2021] [internal quotation marks omitted]).

A proposed amended pleading is palpably insufficient or patently devoid of merit where it "fail[s] to cure any of the defects that warranted dismissal of the amended complaint" (*Singh v T-Mobile*, 232 AD3d 662, 667 [2d Dept 2024]). Here the proposed second amended complaint is virtually identical to the amended complaint. The only substantive addition is a cause of action for unjust enrichment based on the same transactions or occurrences set forth in the amended complaint. However, "unjust enrichment is not a catchall cause of action to be used when others fail" (*Town of Amherst v Brewster Mews Hous. Co., Inc.*, 133 AD3d 1317, 1318-1319 [4th Dept 2015] [internal quotation marks omitted]). Indeed, "[a]n unjust enrichment claim is not available where[, as here,] it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012], *rearg denied* 19 NY3d 937 [2012]), and a plaintiff may not assert an unjust enrichment cause of action as a substitute for other forms of relief (see *Brewster Mews Hous. Co., Inc.*, 133 AD3d at 1319).

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

62

KA 24-00898

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ADRIAN M. ALEXANDER, JR., DEFENDANT-APPELLANT.

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

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO (KAREN F. MCGEE OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered May 28, 2024. The judgment convicted defendant upon a jury verdict of aggravated criminal contempt (four counts), aggravated family offense (four counts), criminal contempt in the first degree (four counts), assault in the second degree (two counts), assault in the third degree (three counts), strangulation in the second degree, menacing in the second degree (two counts) and criminal trespass 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, inter alia, four counts of aggravated criminal contempt (Penal Law § 215.52 [1]), four counts of aggravated family offense (§ 240.75 [1]), and three counts of assault in the third degree (§ 120.00 [1]). Defendant's conviction stems from him beating his girlfriend over a period of days.

Defendant's contention that the evidence is legally insufficient to support the conviction is not preserved for our review because defendant failed to renew his motion for a trial order of dismissal after he presented evidence (see *People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Schrader*, 232 AD3d 1293, 1294 [4th Dept 2024], *lv denied* 43 NY3d 946 [2025]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Viewing the evidence in light of the elements of the crimes of which defendant was convicted as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict with respect to those crimes is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d

490, 495 [1987])). Even assuming, *arguendo*, that an acquittal on those crimes would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (see generally *Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct is unpreserved for our review (see CPL 470.05 [2]; *People v Fick*, 167 AD3d 1484, 1485 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]). We decline to exercise our power to reach that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

The sentence is not unduly harsh or severe. Finally, we have considered defendant's remaining contentions and conclude that they do not warrant reversal or modification of the judgment.

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

64

KA 24-00666

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LESLIE HENDERSON, DEFENDANT-APPELLANT.

ADAM AMIRAUT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Theodore H. Limpert, J.), rendered April 5, 2024. The judgment convicted defendant upon a plea of guilty of attempted murder in the second degree (two counts), kidnapping in the second degree (three counts), criminal possession of a weapon in the second degree and reckless endangerment in the first degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a guilty plea of two counts of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), three counts of kidnapping in the second degree (§ 135.20), one count of criminal possession of a weapon in the second degree (§ 265.03 [3]), and four counts of reckless endangerment in the first degree (§ 120.25).

Initially, we agree with defendant that his waiver of the right to appeal is invalid. County Court's oral colloquy failed to inform defendant that he would ordinarily retain the right to appeal and that the waiver of his right to appeal was separate and distinct from his guilty plea (see *People v Lopez*, 6 NY3d 248, 256 [2006]; see generally *People v Thomas*, 34 NY3d 545, 565-566 [2019], cert denied 589 US 1302 [2020]). Although the written waiver appropriately characterized the scope of the appellate rights waived, "the court failed to confirm that [defendant] understood the contents of the written waiver[]" (*Thomas*, 34 NY3d at 566). We are therefore not precluded from reviewing defendant's challenge to the severity of his sentence.

Nevertheless, we reject defendant's contention that the sentence is unduly harsh and severe.

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

70

KA 22-01981

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY M. VANDOREN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County
(Charles A. Schiano, Jr., J.), rendered January 24, 2022. The
judgment convicted defendant upon a plea of guilty of aggravated
vehicular homicide.

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 one count of aggravated vehicular homicide
(Penal Law § 125.14 [4]). Defendant was originally charged in a 15-
count indictment with various crimes stemming from an incident in
which he drove his pickup truck over a double yellow center line and
crashed head-on into a vehicle, which was occupied by two victims who
died at the scene, while allegedly impaired by the use of various
drugs. After one of the counts of the indictment was dismissed on the
People's motion, defendant agreed to plead guilty to the
abovementioned crime in full satisfaction of the remaining counts of
the indictment. During the plea colloquy, he admitted, inter alia,
that he was impaired by marihuana at the time of the incident.

Defendant contends that Supreme Court erred in refusing to
dismiss the indictment on the ground that, for a number of reasons,
the grand jury proceeding was defective pursuant to CPL 210.35 (5).
A grand jury proceeding is defective when, inter alia, the proceeding
"fails to conform to the requirements of [CPL article 190] to such
degree that the integrity thereof is impaired and prejudice to the
defendant may result" (CPL 210.35 [5]; see *People v Huston*, 88 NY2d
400, 409 [1996]). Dismissal of an indictment under CPL 210.35 (5) is
an "exceptional remedy" that "should . . . be limited to those
instances where prosecutorial wrongdoing, fraudulent conduct or errors
potentially prejudice the ultimate decision reached by the [g]rand

[j]ury" (*Huston*, 88 NY2d at 409; see *People v Simpson*, 231 AD3d 1525, 1526 [4th Dept 2024], *lv denied* 43 NY3d 947 [2025]). " '[T]he statutory test, which does not turn on mere flaw, error or skewing[,] . . . is very precise and very high' " (*People v Thompson*, 22 NY3d 687, 699 [2014], *rearg denied* 23 NY3d 948 [2014], quoting *People v Darby*, 75 NY2d 449, 455 [1990]).

"Although the presence of alleged jurisdictional or constitutional defects in the grand jury proceeding that implicate the integrity of the process may survive a guilty plea and valid waiver of appeal" (*People v Greene*, 171 AD3d 1407, 1408 [3d Dept 2019]; see *People v Hansen*, 95 NY2d 227, 232 [2000]; *People v Oliveri*, 49 AD3d 1208, 1209 [4th Dept 2008]), we conclude that the grand jury minutes in this case do not disclose any such infirmities (see CPL 210.35 [5]; *People v Busreth*, 167 AD3d 1089, 1090 [3d Dept 2018], *lv denied* 33 NY3d 946 [2019]; see generally *People v Sheppard*, 221 AD3d 1513, 1514 [4th Dept 2023], *lv denied* 41 NY3d 985 [2024]).

Initially, defendant's contention that the integrity of the grand jury proceeding was impaired when the People failed to introduce evidence that he had received opiate pain medication while being transported to the hospital and prior to a court-ordered blood draw is actually a contention that the People failed to present exculpatory evidence, which defendant forfeited by pleading guilty (see *People v Wilson*, 197 AD3d 984, 985 [4th Dept 2021], *lv denied* 37 NY3d 1100 [2021]; *People v Davis*, 159 AD3d 1586, 1587 [4th Dept 2018], *lv denied* 31 NY3d 1080 [2018]; *People v Rigby*, 105 AD3d 1383, 1384 [4th Dept 2013], *lv denied* 21 NY3d 1019 [2013]). Additionally, that contention is encompassed by defendant's unchallenged waiver of the right to appeal (see *People v Simmons*, 27 AD3d 786, 787 [3d Dept 2006], *lv denied* 7 NY3d 763 [2006]; see generally *People v Williams*, 228 AD3d 1316, 1316-1317 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024], *reconsideration denied* 42 NY3d 1055 [2024]). Similarly, defendant's contentions that the People improperly relied upon hearsay testimony during the grand jury proceeding and that the evidence before the grand jury was legally insufficient are also forfeited by the guilty plea (see *Hansen*, 95 NY2d at 230-233; *People v Ferreira*, 237 AD3d 479, 479 [1st Dept 2025], *lv denied* 44 NY3d 982 [2025]; *People v Hill*, 188 AD3d 1756, 1757 [4th Dept 2020], *lv dismissed* 37 NY3d 965 [2021], *reconsideration denied* 37 NY3d 1096 [2021]), and encompassed by the unchallenged waiver of the right to appeal (see *Williams*, 228 AD3d at 1316; *People v Frasier*, 105 AD3d 1079, 1080 [3d Dept 2013], *lv denied* 22 NY3d 1088 [2014]).

Finally, defendant contends that the integrity of the grand jury proceeding was impaired by the presentation of testimony that a drug identification field test performed on a substance found on his person was presumptively positive for fentanyl inasmuch as a subsequent laboratory test on that substance was negative for the presence of fentanyl. We reject that contention. Here, "[t]here is no indication that the People knowingly or deliberately presented false [or misleading] testimony before the [g]rand [j]ury, and thus there is no basis for finding that the integrity of the [g]rand [j]ury

proceeding[] was impaired or the indictment rendered defective by the alleged false [or misleading] testimony" (*People v Klosin*, 281 AD2d 951, 951 [4th Dept 2001], *lv denied* 96 NY2d 864 [2001]; *see People v Williams*, 163 AD3d 1422, 1422-1423 [4th Dept 2018]; *cf. People v Alexander*, 136 AD2d 332, 336-337 [1st Dept 1988]; *see generally People v Gaston*, 177 AD2d 364, 364 [1st Dept 1991], *lv denied* 79 NY2d 857 [1992])).

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

75

CA 25-00013

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

JOHN DOE, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

THE STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 141450.)

INCENDII LAW PLLC, BROOKLYN (ANN S. SEIFULLAH OF COUNSEL), FOR
CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Anthony Brindisi, J.), entered May 31, 2024. The order, insofar as appealed from, granted the motion of defendant to dismiss the claim and denied the cross-motion of claimant for leave to file a late claim.

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

Memorandum: Claimant commenced this action pursuant to the Adult Survivors Act (ASA) (see CPLR 214-j) seeking damages for alleged sexual harassment and assault inflicted upon him while incarcerated at the Mid-State and Mohawk Correctional Facilities between 1990 and 1994. The verified claim was filed on November 21, 2023, and served on the Attorney General on December 1, 2023. The Court of Claims granted the motion of defendant, State of New York (State), to dismiss the claim for lack of jurisdiction, and denied claimant's cross-motion for leave pursuant to Court of Claims Act § 10 (6) to file a late claim. Claimant appeals, and we affirm.

Commencement of "litigation before the Court of Claims requires both filing and service" of the claim (*Williams v State of New York*, 238 AD3d 1356, 1358 [3d Dept 2025]; see Court of Claims Act § 11 [a] [i]), and "both [the] filing with the court and service on the Attorney[]General must occur within the applicable limitations period" for the action to be timely commenced (*Dreger v New York State Thruway Auth.*, 81 NY2d 721, 724 [1992]). Failure to timely commence an action against the State "deprives a court of subject matter jurisdiction requiring dismissal of the claim" (*Gang v State of New York*, 177 AD3d 1300, 1301 [4th Dept 2019]; see *Hatzfeld v State of New York*, 104 AD3d 1165, 1166 [4th Dept 2013]). While Court of Claims Act § 10 (6) provides a court with "discretionary power to allow the late

filing of a claim upon consideration of a number of factors, including the merits of the case" (*Lichtenstein v State of New York*, 93 NY2d 911, 912 [1999]; see *Carey v State of New York*, 207 AD3d 1194, 1195-1196 [4th Dept 2022]), the court is without subject matter jurisdiction to entertain an application seeking that relief unless it is "made before the expiration of the applicable statute of limitations under article two of the CPLR" (*Carey*, 207 AD3d at 1196; see *Shah v State of New York*, 178 AD3d 871, 872 [2d Dept 2019], *appeal dismissed* 35 NY3d 982 [2020], *lv dismissed in part & denied in part* 35 NY3d 1107 [2020], *rearg denied* 36 NY3d 1047 [2021]).

The ASA, inter alia, revived the statute of limitations for expired claims involving the sexual abuse of adults, extending the limitations period through November 24, 2023 (see CPLR 214-j; L 2022, ch 203, § 1). Although the claim here was timely filed, a copy was not served on the Attorney General until December 1, 2023, when the certified mailing was received (see Court of Claims Act § 11 [a] [i]). Thus "the statute of limitations ha[d] expired on the . . . claim[], [and the] court [wa]s without discretion to entertain [claimant's] application for leave to file a late claim" (*Carey*, 207 AD3d at 1196; see generally *Ross v State of New York*, 217 AD3d 1225, 1225-1226 [3d Dept 2023]).

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

77

CA 24-01685

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

CITY OF NORTH TONAWANDA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PENN POWER GROUP, LLC, ET AL., DEFENDANTS,
AND DAIMLER TRUCK NORTH AMERICA LLC, FORMERLY KNOWN AS
DAIMLER TRUCKS NORTH AMERICA LLC, DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (TYLER C. GARVEY OF COUNSEL),
FOR DEFENDANT-APPELLANT.

ROACH, LENNON & BROWN, PLLC, BUFFALO (J. MICHAEL LENNON OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered September 26, 2024. The order denied the motion of defendant Daimler Truck North America LLC, formerly known as Daimler Trucks North America LLC, to dismiss the amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the amended complaint against defendant Daimler Truck North America LLC, formerly known as Daimler Trucks North America LLC, is dismissed.

Memorandum: Plaintiff commenced this action against various defendants and asserted in an amended complaint, inter alia, causes of action against Daimler Truck North America LLC, formerly known as Daimler Trucks North America LLC (defendant), for breach of warranty and negligence. In lieu of answering, defendant moved to dismiss the amended complaint against it, asserting among its grounds that the breach of warranty cause of action was time-barred by the applicable four-year statute of limitations (see UCC 2-725) and that the negligence causes of action were barred by the economic loss doctrine. Supreme Court denied the motion, and defendant appeals. We reverse.

We agree with defendant that the court erred in denying that part of its motion seeking dismissal of plaintiff's breach of warranty cause of action against it as untimely. A cause of action alleging breach of warranty is governed by a four-year statute of limitations (see UCC 2-725 [1]), and accrues when tender of delivery is made (see UCC 2-725 [2]; *New York Cent. Mut. Fire Ins. Co. v Glider Oil Co. Inc.*, 90 AD3d 1638, 1640 [4th Dept 2011]). "As an exception to this

general rule, the UCC provides that 'where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance,' then 'the cause of action accrues when the breach is or should have been discovered' " (*Schwatka v Super Millwork, Inc.*, 106 AD3d 897, 899 [2d Dept 2013], quoting UCC 2-725 [2]). "A warranty of future performance is one that guarantees that the product will work for a specified period of time" (*id.* [internal quotation marks omitted]).

Here, defendant had "the initial burden of establishing, *prima facie*, that the time in which to sue ha[d] expired" (*Collins v Davirro*, 160 AD3d 1343, 1344 [4th Dept 2018] [internal quotation marks omitted]; see generally *Baker v Eastern Niagara Hosp., Inc.*, 217 AD3d 1331, 1332 [4th Dept 2023]). Defendant met its initial burden on the motion by submitting evidence that the breach of warranty cause of action against it accrued when defendant delivered the truck in September 2019, more than four years before the amended complaint containing that cause of action was filed in May 2024 (see generally *Board of Educ. of Palmyra-Macedon Cent. Sch. Dist. v Flower City Glass Co., Inc.*, 178 AD3d 1359, 1361 [4th Dept 2019]).

The burden then shifted to plaintiff "to aver evidentiary facts . . . establishing that the statute of limitations ha[d] not expired, that it [wa]s tolled, or that an exception to the statute of limitations applie[d]" (*Baker*, 217 AD3d at 1332 [internal quotation marks omitted]; see *Board of Educ. of Palmyra-Macedon Cent. Sch. Dist.*, 178 AD3d at 1361). In opposition, plaintiff "failed to allege, beyond speculation and conjecture," that an express warranty of future performance was made by defendant and, thus, failed to aver evidentiary facts establishing that this case falls within that exception to the statute of limitations (*Collins-Genova v Louros*, 204 AD3d 748, 749 [2d Dept 2022]; cf. *Imperia v Marvin Windows of N.Y.*, 297 AD2d 621, 623 [2d Dept 2002]; see also *Board of Educ. of Palmyra-Macedon Cent. Sch. Dist.*, 178 AD3d at 1361-1362). Plaintiff's further assertion that the statute of limitations was tolled as a matter of law by a series of executive orders that suspended the running of limitations periods during the COVID-19 pandemic is raised for the first time on appeal and, thus, is not properly before us (see *Michael M. v Cummiskey*, 178 AD3d 1457, 1458 [4th Dept 2019]; see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

We further agree with defendant that the court erred in denying that part of its motion seeking dismissal of plaintiff's negligence causes of action against it based on the economic loss doctrine. Pursuant to the economic loss doctrine, a plaintiff may not recover in tort against a manufacturer for economic loss that is contractually based, "whether due to injury to the product itself or consequential losses flowing therefrom" (*Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.]*, 84 NY2d 685, 693 [1995]; see generally *Hodgson, Russ, Andrews, Woods & Goodyear v Isolatek Intl. Corp.*, 300 AD2d 1051, 1052 [4th Dept 2002]). Here, plaintiff alleged in its negligence causes of action against defendant only economic loss arising out of damage to the product itself and consequential

damages—that is, the damage to the truck and the truck’s replacement cost—and, thus, those causes of action are barred by the economic loss doctrine (see *AKV Auto Transp., Inc. v Syosset Truck Sales, Inc.*, 24 AD3d 833, 835 [3d Dept 2005]; *Atlas Air, Inc. v General Elec. Co.*, 16 AD3d 444, 445 [2d Dept 2005], *lv denied* 6 NY3d 701 [2005]; *cf. Flex-O-Vit USA v Niagara Mohawk Power Corp.*, 292 AD2d 764, 767 [4th Dept 2002], *lv dismissed* 99 NY2d 532 [2002]).

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

85

KA 22-01650

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NICHOLAS M. MAHER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN HUTCHISON 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 (Michael M. Mohun, A.J.), rendered September 9, 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: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [2]), defendant contends that his waiver of the right to appeal is unenforceable and that the sentence is unduly harsh and severe. We affirm.

Contrary to defendant's 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 44 NY3d 1027 [2025]; *People v Barr*, 192 AD3d 1571, 1571 [4th Dept 2021], lv denied 37 NY3d 954 [2021]; see generally *People v Thomas*, 34 NY3d 545, 557-558 [2019], cert denied 589 US 1302 [2020]), and it is not improper for the People to demand a waiver of the right to appeal as a condition of a plea bargain (see *Brinkman*, 240 AD3d at 1431-1432; see e.g. *People v Thomas*, 237 AD3d 1557, 1557-1558 [4th Dept 2025], lv denied 43 NY3d 1059 [2025]; *People v Giles*, 219 AD3d 1706, 1706 [4th Dept 2023], lv denied 40 NY3d 1039 [2023]). Further, the record establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (see *People v Durinko*, 239 AD3d 1347, 1348 [4th Dept 2025], lv denied 44 NY3d 993 [2025]; *People v Brown*, 229 AD3d 1150, 1150-1151 [4th Dept 2024]). 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]).

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

94

CA 24-01562

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

IN THE MATTER OF AL ASPHALT CORPORATION
AND CHEEKTOWAGA CONCRETE, LLC,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOWN OF HAMBURG, TOWN OF HAMBURG TOWN BOARD,
RANDY HOAK, MEGAN COMERFORD, SHAWN CONNOLLY,
ELIZABETH FARRELL LORENTZ AND KAREN HOAK,
CONSTITUTING TOWN OF HAMBURG TOWN BOARD,
TOWN OF HAMBURG PLANNING BOARD,
WILLIAM CLARK, KAITLIN MCCORMICK, DENNIS CHAPMAN,
CYNTHIA GRONACHAN, DAN SZEWC, MARGAUX VALENTI
AND KAITLIN MCGEE-CHMURA, CONSTITUTING
TOWN OF HAMBURG PLANNING BOARD,
RESPONDENTS-DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

PHILLIPS LYTTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR
RESPONDENTS-DEFENDANTS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF
COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 24, 2024, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, among other things, granted in part the relief sought in the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by dismissing the first and second causes of action and vacating the seventh through ninth decretal paragraphs, and as modified the judgment is affirmed without costs.

Memorandum: Petitioners-plaintiffs, AL Asphalt Corporation (AL Asphalt) and Cheektowaga Concrete, LLC (Cheektowaga Concrete) (collectively, petitioners), commenced this hybrid CPLR article 78 proceeding and declaratory judgment action (proceeding) seeking various relief after respondent-defendant Town of Hamburg Planning Board (Planning Board) denied AL Asphalt's application for site plan approval to build and operate a hot mix asphalt facility (project). Respondents-defendants (respondents) answered and moved to dismiss the fourth cause of action. In appeal No. 1, respondents appeal from a

judgment that, in effect, granted the motion and granted the relief sought by petitioners in the first through third causes of action of their petition-complaint (petition). In appeal No. 2, respondents appeal from an order denying their subsequent motion seeking, *inter alia*, leave to renew their opposition to the petition.

We agree with respondents in appeal No. 1 that Supreme Court erred in granting the petition with respect to the first and second causes of action, and we therefore modify the judgment by dismissing those causes of action. Petitioners' first cause of action pursuant to CPLR article 78 sought to annul the Planning Board's September 2019 decision classifying the project as an Unlisted action and further sought to compel the Planning Board to reclassify the project as a Type II action under SEQRA, grant the application, and issue any necessary building permits. Petitioners asserted that the project is a Type II action exempt from SEQRA review pursuant to 6 NYCRR 617.5 (c) (9), which applies to "construction or expansion of a primary or accessory/appurtenant, non-residential structure or facility involving less than 4,000 square feet of gross floor area and not involving a change in zoning or a use variance and consistent with local land use controls." We conclude that the Planning Board rationally determined that the project did not fall within that exemption and properly classified the project as an Unlisted action (*see generally Matter of Sierra Club v Village of Painted Post*, 134 AD3d 1475, 1477-1478 [4th Dept 2015]).

Petitioners' second cause of action pursuant to CPLR article 78 sought to annul the Planning Board's November 2023 decision issuing negative findings under SEQRA and denying the application. "A court's authority to examine a SEQRA review conducted by an entity that was required to do so is limited to reviewing whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688 [1996]; *see Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363 [1986]). "The agency's substantive obligations under SEQRA must be viewed in light of a rule of reason and agencies have considerable latitude in evaluating environmental effects and choosing among alternatives" (*Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 318 [2006] [internal quotation marks omitted]). "[W]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or [to] choose among alternatives" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007] [internal quotation marks omitted]).

We conclude that the Planning Board took a hard look at the areas of environmental concern and rationally concluded that, in light of the cited deficiencies in petitioners' draft environmental impact statement, it could not approve the project (*see Matter of Laidlaw Energy & Envtl., Inc. v Town of Ellicottville*, 59 AD3d 1084, 1085-1086 [4th Dept 2009]). There was a record basis for the Planning Board's determinations, and the Planning Board was entitled to rely on the opinions of its retained consultants (*see Matter of Friends of P.S.*

163, Inc. v Jewish Home Lifecare, Manhattan, 146 AD3d 576, 580 [1st Dept 2017], *affd* 30 NY3d 416 [2017], *rearg denied* 31 NY3d 929 [2018]).

We reject respondents' further contention in appeal No. 1 that the third cause of action, which sought a declaration that certain local laws and a rezoning decision were invalid because they were enacted with an exclusionary purpose, is time-barred. "In order to determine the [s]tatute of [l]imitations applicable to a particular declaratory judgment action, the court must 'examine the substance of that action to identify the relationship out of which the claim arises and the relief sought' " (*Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202 [1987]). "A declaratory judgment, not a CPLR article 78 proceeding, is the proper vehicle to challenge the validity of a legislative enactment" (*Janiak v Town of Greenville*, 203 AD2d 329, 331 [2d Dept 1994]; *see Matter of Sack v City of Buffalo Common Council*, 204 AD3d 1399, 1399-1400 [4th Dept 2022]). We therefore reject respondents' contention that the four-month statute of limitations applicable to CPLR article 78 proceedings applies to petitioners' third cause of action (*see South Liberty Partners, L.P. v Town of Haverstraw*, 82 AD3d 956, 957-958 [2d Dept 2011]).

We agree with respondents in appeal No. 1, however, that the court applied an incorrect standard in addressing the third cause of action. " 'In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand' " (*Matter of Greenberg v Assessor of Town of Scarsdale*, 121 AD3d 986, 989 [2d Dept 2014]; *see Parker v Town of Alexandria*, 138 AD3d 1467, 1468 [4th Dept 2016]). A court " 'may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment' " (*Greenberg*, 121 AD3d at 989; *see Parker*, 138 AD3d at 1468). We therefore further modify the judgment by vacating the seventh through ninth decretal paragraphs.

In light of our determination, we do not address respondents' remaining contentions in appeal No. 1.

Contrary to respondents' contention in appeal No. 2, the court did not abuse its discretion in denying that part of their motion seeking leave to renew (*see CPLR 2221 [e] [2], [3]; Ives Hill Country Club, Inc. v City of Watertown*, 185 AD3d 1494, 1497 [4th Dept 2020]; *see generally Matter of Vega v Fischer*, 108 AD3d 955, 955-956 [3d Dept 2013], *lv dismissed* 22 NY3d 953 [2013]). Respondents contend that Rosanne DiPizio, who verified the petition on behalf of Cheektowaga Concrete, lacked the capacity to bring this proceeding. Respondents do not contend, however, that the president of AL Asphalt lacked capacity to bring the proceeding on behalf of AL Asphalt. Even assuming, arguendo, that DiPizio lacked capacity and that Cheektowaga Concrete was a necessary party to the proceeding (*see CPLR 1001 [a]*), the remedy would be for the court to order Cheektowaga Concrete summoned and to be made a respondent if it refused to join as a

petitioner (see CPLR 1001 [a], [b]; *Matter of Mulford Bay, LLC v Rocco*, 186 AD3d 1520, 1520-1521 [2d Dept 2020]). The new information submitted by respondents would not have resulted in the dismissal of the proceeding for failure to join a necessary party and therefore would not have "change[d] the prior determination" (CPLR 2221 [e] [2]; see *Maurer v Colton* [appeal No. 3], 180 AD3d 1371, 1374 [4th Dept 2020]).

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

95

CA 25-00306

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

IN THE MATTER OF AL ASPHALT CORPORATION
AND CHEEKTOWAGA CONCRETE, LLC,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOWN OF HAMBURG, TOWN OF HAMBURG TOWN BOARD,
RANDY HOAK, MEGAN COMERFORD, SHAWN CONNOLLY,
ELIZABETH FARRELL LORENTZ AND KAREN HOAK,
CONSTITUTING TOWN OF HAMBURG TOWN BOARD,
TOWN OF HAMBURG PLANNING BOARD, WILLIAM CLARK,
KAITLIN MCCORMICK, DENNIS CHAPMAN, CYNTHIA
GRONACHAN, DAN SZEWC, MARGAUX VALENTI AND KAITLIN
MCGEE-CHMURA, CONSTITUTING TOWN OF HAMBURG
PLANNING BOARD, RESPONDENTS-DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

PHILLIPS LYTTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR
RESPONDENTS-DEFENDANTS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF
COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January 14, 2025, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The order, among other things, denied respondents-defendants' motion insofar as it sought leave to renew.

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

Same memorandum as in *Matter of AL Asphalt Corp. v Town of Hamburg* ([appeal No. 1] – AD3d – [Mar. 20, 2026] [4th Dept 2026]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

103

KA 24-00819

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

CHANDLER DOWDELL, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), dated May 14, 2024. The order granted that part of the omnibus motion of defendant seeking suppression of certain physical evidence and statements.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: The People appeal from an order that granted that part of defendant's omnibus motion seeking suppression of certain physical evidence and statements. "[N]o appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute" (*People v Dunn*, 4 NY3d 495, 497 [2005] [internal quotation marks omitted]; see *People v Pagan*, 19 NY3d 368, 370 [2012]). As applicable here, "[a]n appeal to an intermediate appellate court may be taken as of right by the people from . . . [a]n order suppressing evidence, entered before trial pursuant to [CPL] 710.20; provided that the people file a statement in the appellate court pursuant to [CPL] 450.50" (CPL 450.20 [8]) "asserting that the deprivation of the use of the evidence ordered suppressed has rendered the sum of the proof available to the people with respect to a criminal charge . . . either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed" (CPL 450.50 [1]). In essence, the People may "appeal as of right from an order suppressing evidence, but only in those cases in which the effect of the order sought to be appealed from, if not overturned, would be to destroy the People's case altogether" (*Matter of Forte v Supreme Ct. of State of N.Y.*, 48 NY2d 179, 186-187 [1979]). Although the filing of a CPL 450.50 statement is unnecessary where the indictment is dismissed simultaneously with the suppression of evidence inasmuch as the dismissal of the indictment itself guarantees finality (see *People v Townsend*, 127 AD2d 505, 507 [1st Dept 1987], lv

denied 69 NY2d 1011 [1987]; *People v Brooks*, 54 AD2d 333, 337 [4th Dept 1976]), Supreme Court did not dismiss the indictment in this case. Thus, inasmuch as the People did not file the requisite statement pursuant to CPL 450.50 (1), their appeal does not meet the statutory requirements (see CPL 450.20 [8]; 450.50 [1]; *Forte*, 48 NY2d at 181-182; *People v Robinson*, 171 AD2d 475, 479 [1st Dept 1991], *lv denied* 78 NY2d 973 [1991]) and must be dismissed (see *People v Dunn*, 2 AD3d 747, 748 [2d Dept 2003], *affd* 4 NY3d 495 [2005]; *cf. People v Kumar*, 262 AD2d 501, 501 [2d Dept 1999], *lv denied* 93 NY2d 1021 [1999]; see generally *People v Tan*, 148 AD3d 1759, 1760 [4th Dept 2017]).

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

104

KA 25-00540

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LOUIS SERRANO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered June 25, 2024. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree (three counts) and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of three counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [8]), defendant contends that Supreme Court should have granted that part of his omnibus motion seeking dismissal of the indictment on speedy trial grounds pursuant to CPL 30.30 (1) (a). At the time that defendant entered his plea, however, the court had not expressly decided his statutory speedy trial claim. We therefore conclude that he abandoned that claim and is "foreclosed from pursuing the merits of [it] on appeal" (*People v Goodison*, 196 AD3d 1049, 1049 [4th Dept 2021], lv denied 37 NY3d 1096 [2021] [internal quotation marks omitted]; see also *People v Alexander*, 82 AD3d 619, 623-624 [1st Dept 2011], affd 19 NY3d 203 [2012]; *People v Hardy*, 173 AD3d 1649, 1649-1650 [4th Dept 2019], lv denied 34 NY3d 932 [2019]; cf. *People v Williams*, 228 AD3d 1314, 1315 [4th Dept 2024]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

105

KA 23-01101

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDRES SANTIAGO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 May 31, 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: In appeal No. 1, defendant appeals from a judgment that, upon his admission that he violated the terms and conditions of probation, revoked the sentence of probation previously imposed upon his conviction of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]) and sentenced him to a determinate term of imprisonment, followed by a period of postrelease supervision. In appeal No. 2, 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 sentencing him to a determinate term of imprisonment, followed by a period of postrelease supervision. Defendant admitted the violation of probation and pleaded guilty in a single proceeding.

Defendant contends in each appeal that his limited educational background and his family's history of mental health issues, coupled with his purported monosyllabic responses to County Court's inquiries during the plea and admission proceeding and a statement he later made to a probation officer during the presentence investigation, demonstrate that his plea and his admission were not voluntarily, knowingly, and intelligently entered. Although defendant retains the right to appellate review of his challenges to the voluntariness of his plea and his admission regardless of the validity of any waiver of the right to appeal (see *People v Thomas*, 34 NY3d 545, 566 [2019], cert denied 589 US 1302 [2020]; *People v Fairman*, 38 AD3d 1346, 1347 [4th Dept 2007], lv denied 9 NY3d 865 [2007]), defendant correctly

concedes that his challenges are not preserved for our review because he did not move to withdraw his plea or his admission or to vacate the judgments (see *People v Boyde*, 224 AD3d 1306, 1306-1307 [4th Dept 2024], *lv denied* 41 NY3d 1017 [2024]; *People v Eppolito*, 126 AD3d 1536, 1536 [4th Dept 2015]; see generally *People v Rios*, – NY3d –, –, 2026 NY Slip Op 00963, *1-3 [2026]; *People v Lopez*, 71 NY2d 662, 665 [1988]). Contrary to defendant's contention, the narrow exception to the preservation rule set forth in *Lopez* (71 NY2d at 666) does not apply in this case. Defendant said "[n]othing . . . during the plea [and admission] colloquy itself" that negated an element of the pleaded-to crime or the violation of probation or otherwise called into doubt the voluntariness of his plea or his admission (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; see *People v Edmonds*, 229 AD3d 1275, 1276 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]; *People v Schmiede*, 173 AD3d 1685, 1686 [4th Dept 2019], *lv denied* 34 NY3d 937 [2019]), and the court therefore had no duty to further inquire prior to accepting the plea and the admission (see *Rios*, – NY3d at –, 2026 NY Slip Op 00963, *1-3; *Lopez*, 71 NY2d at 666). Moreover, contrary to defendant's assertion, "a trial court has no duty, in the absence of a motion to withdraw a guilty plea [or admission], to conduct a further inquiry concerning the . . . voluntariness [of a plea or admission] . . . based on information in a presentence report" (*People v Harper*, 229 AD3d 1146, 1147 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024] [internal quotation marks omitted]; see *People v Brown*, 204 AD3d 1519, 1519-1520 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *Mobayed*, 158 AD3d at 1222-1223; see generally *Rios*, – NY3d at –, 2026 NY Slip Op 00963, *1-3). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]; *Boyde*, 224 AD3d at 1307).

We reject defendant's further contention in each appeal that he did not validly waive his right to appeal during the plea and admission proceeding. Here, the oral waiver colloquy, which followed the appropriate model colloquy, establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Greenfield*, 239 AD3d 1467, 1467 [4th Dept 2025], *lv denied* 44 NY3d 982 [2025]; see generally *Thomas*, 34 NY3d at 559-564). Contrary to defendant's assertion, " '[t]he fact that the appeal waiver was not reduced to writing is of no moment where, as here, the oral waiver was adequate' " (*People v Rohadfox*, 175 AD3d 1813, 1814 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; see *People v Lopez*, 6 NY3d 248, 257 [2006]; *People v Thomas*, 237 AD3d 1557, 1558 [4th Dept 2025], *lv denied* 43 NY3d 1059 [2025]).

We conclude that defendant's valid waiver of the right to appeal forecloses our review of his challenge to the severity of the sentence imposed on the conviction upon his guilty plea in appeal No. 2 (see *Lopez*, 6 NY3d at 255-256; *People v Seaberg*, 74 NY2d 1, 9-10 [1989]). We further conclude, however, that the waiver does not foreclose our review of defendant's challenge to the severity of the sentence imposed in appeal No. 1 because the record fails to establish that the waiver applied to defendant's admission that he violated the

terms and conditions of probation (*see People v Turner*, 174 AD3d 1123, 1125 [3d Dept 2019], *lv denied* 34 NY3d 985 [2019]; *People v Jones*, 118 AD3d 1361, 1362 [4th Dept 2014])). Although the waiver was discussed at the outset of the proceeding as a condition of the global agreement under which defendant would both plead guilty to the new charge and admit his violation of probation, the court did not elicit the waiver during the admission colloquy and then explained the waiver during the plea colloquy exclusively as a condition of the plea (*see Turner*, 174 AD3d at 1125 n 3). Nonetheless, the sentence imposed in appeal No. 1 is not unduly harsh or severe.

Finally, with respect to appeal No. 2, we note that the plea and admission proceeding and the sentence reflect defendant's status as a second felony drug offender (Penal Law § 70.70 [1] [b]), and the record thus confirms that the court merely misstated during sentencing that defendant was a second felony offender rather than a second felony drug offender (*see People v Williams*, 235 AD3d 1250, 1250 [4th Dept 2025], *lv denied* 43 NY3d 1012 [2025]; *People v Giles*, 219 AD3d 1706, 1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023])). Inasmuch as the uniform sentence and commitment form incorrectly states that defendant was sentenced as a second felony offender, it must be amended to reflect that he was sentenced as a second felony drug offender (*see Williams*, 235 AD3d at 1250; *Giles*, 219 AD3d at 1707)).

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

106

KA 23-01103

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDRES SANTIAGO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 May 31, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Santiago* ([appeal No. 1] – AD3d – [Mar. 20, 2026] [4th Dept 2026]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

114

CA 25-00742

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

SHERRY MCDONALD, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

THE STATE OF NEW YORK, DEFENDANT-RESPONDENT.

(APPEAL NO. 1.)

(CLAIM NO. 136311.)

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

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

Appeal from a judgment of the Court of Claims (J. Scott Odorisi, J.), entered July 3, 2024, in a claim for unjust conviction and imprisonment. The judgment dismissed the claim.

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

Memorandum: Claimant commenced this action pursuant to Court of Claims Act § 8-b seeking damages based on allegations that she was wrongfully convicted in 2016 of murder in the second degree (Penal Law §§ 20.00, 125.25 [1]) and imprisoned by defendant, the State of New York. Claimant was convicted as an accomplice to her boyfriend following their joint jury trial, where the People argued that the boyfriend shot and killed the victim in a parking lot of a bar and that claimant drove her boyfriend to the scene, picked him up after the murder, and then drove him to his residence. In 2019, we reversed the judgment of conviction on sufficiency and weight grounds (*People v McDonald*, 172 AD3d 1900, 1901-1904 [4th Dept 2019]), given the lack of evidence that claimant shared her boyfriend's intent to kill. After a bench trial on claimant's section 8-b claim, the Court of Claims dismissed the claim, reasoning that claimant failed to prove by clear and convincing evidence that she did not commit any of the acts charged (see Court of Claims Act § 8-b [5] [c]), or, in the alternative, that she failed to prove by clear and convincing evidence that her own conduct did not cause or bring about her conviction (see § 8-b [5] [d]). Claimant appeals in appeal No. 1 from the judgment dismissing her claim; in appeal No. 2, she appeals from a corrected judgment of the same court.

As a preliminary matter, inasmuch as the corrected judgment in appeal No. 2 made no substantive change to the judgment in appeal No.

1, we dismiss the appeal from the corrected judgment in appeal No. 2 (see *Schachtler Stone Prods., LLC v Town of Marshall*, 209 AD3d 1316, 1318 [4th Dept 2022]). We affirm the judgment in appeal No. 1.

A determination of the Court of Claims will not be set aside unless the court's conclusions could not have been reached upon any fair interpretation of the evidence (see *Gristwood v State of New York*, 119 AD3d 1414, 1416 [4th Dept 2014]). Contrary to claimant's contention, a fair interpretation of the evidence supports the court's conclusion that claimant failed to prove by clear and convincing evidence that she did not commit any of the acts charged (see Court of Claims Act § 8-b [5] [c]). We further conclude that claimant's contention that the court erred with respect to her motion in limine to preclude admission of the transcript of the prosecution's closing statement in evidence is without merit. At the bench trial, the transcript was never entered in evidence, and, therefore, the prosecution's summation was outside the record and there is no indication it was considered by the court in dismissing the petition (see *Matter of Grybosky v Riordan*, 87 AD3d 1339, 1341-1342 [4th Dept 2011]).

In light of the foregoing, we need not address claimant's contentions concerning the court's conclusion that she failed to prove that her own conduct did not cause or bring about her conviction (see Court of Claims Act § 8-b [5] [d]).

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

115

CA 25-00012

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

SHERRY MCDONALD, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

THE STATE OF NEW YORK, DEFENDANT-RESPONDENT.

(APPEAL NO. 2.)

(CLAIM NO. 136311.)

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

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

Appeal from a corrected judgment of the Court of Claims (J. Scott Odorisi, J.), entered July 30, 2024, in a claim for unjust conviction and imprisonment. The corrected judgment dismissed the claim.

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

Same memorandum as in *McDonald v State of New York* ([appeal No. 1] – AD3d – [Mar. 20, 2026] [4th Dept 2026]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

116

CA 24-01429

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

KATHRYN WILSMAN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BENDERSON DEVELOPMENT COMPANY, LLC,
TRANCOM LLC, TRANCOM-A, LLC, TRANCOM-B, LLC,
DEFENDANTS-RESPONDENTS,
ACCADIA SITE CONTRACTING, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MICHAEL F. HIGGINS OF COUNSEL), FOR
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), dated August 27, 2024, in a personal injury action. The order, among other things, denied the motion of defendant Accadia Site Contracting, Inc. for summary judgment.

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

Same memorandum as in *Wilsman v Benderson Dev. Co., LLC* ([appeal No. 2] – AD3d – [Mar. 20, 2026] [4th Dept 2026]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

117

CA 25-00340

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

KATHRYN WILSMAN, PLAINTIFF,

V

MEMORANDUM AND ORDER

BENDERSON DEVELOPMENT COMPANY, LLC,
TRANCOM, LLC, TRANCOM-A, LLC, TRANCOM-B, LLC,
DEFENDANTS-RESPONDENTS,
AND ACCADIA SITE CONTRACTING, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MICHAEL F. HIGGINS OF COUNSEL), FOR
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County
(Catherine R. Nugent Panepinto, J.), entered February 6, 2025, in a
personal injury action. The judgment, among other things, awarded
defendants Benderson Development Company, LLC, Trancom, LLC,
Trancom-A, LLC, and Trancom-B, LLC, the sum of \$4,480,258.40 against
defendant Accadia Site Contracting, Inc.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs, the post-verdict motion
of Benderson Development Company, LLC, Trancom, LLC, Trancom-A, LLC,
and Trancom-B, LLC, is denied to the extent that it seeks to enforce
that part of a prior order granting them summary judgment on their
cross-claim for contractual indemnification, and the matter is
remitted to Supreme Court, Erie County, for further proceedings in
accordance with the following memorandum: Plaintiff commenced this
action seeking damages for injuries she sustained when she pushed a
shopping cart into a pothole in a parking lot on property owned by
defendants Benderson Development Company, LLC, Trancom, LLC, Trancom-
A, LLC, and Trancom-B, LLC (collectively, Benderson defendants).
Prior to plaintiff's accident, the Benderson defendants had entered
into a snow removal contract with defendant Accadia Site Contracting,
Inc. (Accadia). In their answer, the Benderson defendants asserted,
inter alia, a cross-claim for contractual indemnification against
Accadia based on the provision in the contract requiring Accadia to
defend and indemnify them from any claims "arising out of or resulting
from performance of services under this Contract." Accadia
subsequently moved for summary judgment dismissing the complaint and
all cross-claims against it, including the cross-claim for contractual

indemnification, and the Benderson defendants cross-moved for partial summary judgment on, inter alia, the issue of contractual indemnification.

In its written decision, Supreme Court concluded that the Benderson defendants "established . . . entitlement to summary judgment on [their cross-claim against Accadia] insofar as [they] can establish at trial that plaintiff's action against [the Benderson defendants] arises out of or results from the performance of the work by Accadia" (emphasis added). The corresponding order, however, states that Accadia's motion for summary judgment was denied and that the Benderson defendants' cross-motion was granted unconditionally "as to Accadia . . . on [the Benderson's defendants'] cross-claim for contractual indemnification." Accadia thereafter moved for leave to reargue its summary judgment motion and its opposition to the cross-motion based on the apparent conflict between the language in the decision and the order. However, the court did not issue a decision or order on Accadia's motion to reargue.

The action proceeded to trial, and the jury determined, inter alia, that Accadia was not negligent, that the Benderson defendants were negligent, and that the Benderson defendants were 100 percent at fault and their negligence was a substantial factor in causing plaintiff to sustain an injury, after which it awarded damages. Accadia then moved for, inter alia, leave to renew its summary judgment motion based on the jury's verdict, and the Benderson defendants moved for, inter alia, an order enforcing the prior order granting them summary judgment on the cross-claim for contractual indemnification with respect to Accadia. In an order, the court, inter alia, denied Accadia leave to renew and granted the Benderson defendants' motion to the extent that it sought to enforce the prior order. The court then issued a judgment in favor of the Benderson defendants and against Accadia for the entire amount of the damages awarded to plaintiff. Accadia now appeals from the orders and judgment.

Preliminarily, we note that Accadia's appeal from the order in appeal No. 1, i.e., the order denying Accadia's motion for summary judgment and granting in part the Benderson defendants' cross-motion for summary judgment, and Accadia's appeal from the order in appeal No. 3, i.e., the order denying Accadia's motion for leave to renew and granting that part of the Benderson defendants' motion seeking enforcement, must be dismissed inasmuch as those orders are interlocutory orders subsumed in the final judgment in appeal No. 2 (see *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; see generally CPLR 5501 [a] [1]). The appeal from the judgment in appeal No. 2 brings up for review the propriety of those prior orders (see CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d 241, 248 [1976]).

In appeal No. 2, contrary to Accadia's contention, the indemnification provision in the parties' snow removal service contract is not subject to General Obligations Law § 5-322.1 (1) inasmuch as it was "not a contract for 'the construction, alteration,

repair or maintenance of a building, structure, appurtenances and appliances' " (*ZRAJ Olean, LLC v Erie Ins. Co. of N.Y.*, 134 AD3d 1557, 1560 [4th Dept 2015], *lv denied* 29 NY3d 915 [2017], quoting General Obligations Law § 5-322.1 [1]; see *Emerson v KPH Healthcare Servs., Inc.*, 203 AD3d 1272, 1274 [3d Dept 2022]).

We agree with Accadia, however, that there is a triable issue of fact whether the Benderson defendants are entitled to contractual indemnification. "It is axiomatic that, where a decision and an order or judgment conflict, the decision controls" (*Matter of 1640 State Rte. 104, LLC v Town of Ontario Planning Bd.*, 207 AD3d 1101, 1103 [4th Dept 2022]; see *Austin Harvard LLC v City of Canandaigua*, 141 AD3d 1158, 1159 [4th Dept 2016]; *Matter of Benderson Dev. Co., LLC v Zoning Bd. of Appeals of City of Utica*, 68 AD3d 1814, 1815 [4th Dept 2009]). Thus, despite the conflicting language between the decision and the order, the controlling determination concerning the cross-claim for contractual indemnification with respect to Accadia is the part of the decision wherein the court concluded that the Benderson defendants' cross-claim for indemnification against Accadia would depend on whether they could "establish at trial that plaintiff's action against [the Benderson defendants] arises out of or results from the performance of the work by Accadia" (see *Stevenson v Red Roof Inns, Inc.*, 213 AD3d 1228, 1229 [4th Dept 2023]; see generally *Magrath v Migliore Constr. Co.*, 139 AD2d 893, 894 [4th Dept 1988]).

Although the action proceeded to trial, the jury was not asked to determine whether plaintiff's injuries arose out of or resulted from Accadia's performance of its work under the snow removal contract, and neither party moved for a directed verdict (*cf. Knight v Holland*, 148 AD3d 1726, 1727-1728 [4th Dept 2017]). Thus, the triable issue of fact upon which Accadia's liability for contractual indemnification turns remains unanswered, and the court erred in granting the Benderson defendants' post-verdict motion inasmuch as it sought to enforce the prior order granting them summary judgment on their cross-claim for contractual indemnification with respect to Accadia.

We therefore reverse the judgment in appeal No. 2, deny the Benderson defendants' post-verdict motion to the extent that it seeks to enforce the order granting them summary judgment on their cross-claim for contractual indemnification, and we remit the matter to Supreme Court for trial, during the course of which the court is free to entertain any proper motions made by the parties—including any motion seeking judgment as a matter of law (see *Wallace v Kinney*, 239 AD3d 1396, 1398 [4th Dept 2025]; see generally CPLR 4401).

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

118

CA 25-00696

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

KATHRYN WILSMAN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BENDERSON DEVELOPMENT COMPANY, LLC, TRANCOM, LLC,
TRANCOM-A, LLC, TRANCOM-B, LLC,
DEFENDANTS-RESPONDENTS,
AND ACCADIA SITE CONTRACTING, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MICHAEL F. HIGGINS OF COUNSEL), FOR
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 4, 2025, in a personal injury action. The order, among other things, denied the motion of defendant Accadia Site Contracting, Inc. for leave to renew its prior motion for summary judgment and granted in part the post-verdict motion of defendants Benderson Development Company, LLC, Trancom, LLC, Trancom-A, LLC, and Trancom-B, LLC.

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

Same memorandum as in *Wilsman v Benderson Dev. Co., LLC* ([appeal No. 2] – AD3d – [Mar. 20, 2026] [4th Dept 2026]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

124

KA 23-01416

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VICTOR CRAMER-WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered July 24, 2023. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Harrison*, 242 AD3d 1540, 1541 [4th Dept 2025]; *People v Swiderski*, 217 AD3d 1416, 1417 [4th Dept 2023]), we conclude that the sentence is not unduly harsh or severe. As the People correctly concede, however, both the certificate of conviction and the uniform sentence and commitment form must be corrected to reflect defendant's status as a second felony offender rather than a second violent felony offender (*see People v Portis*, 224 AD3d 1317, 1318-1319 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

125

KA 24-00458

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES GRACE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered February 1, 2024. 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 guilty plea of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Although defendant was initially placed on interim probation, County Court sentenced him to a determinate term of incarceration and postrelease supervision following repeated violations of the terms of his interim probation. We now affirm.

Defendant contends that his plea was involuntary because the court failed to advise him of the terms and conditions of interim probation at the time of his plea. By failing to move to withdraw his plea or vacate the judgment of conviction, however, defendant failed to preserve his contention for our review (*see People v Waite*, 119 AD3d 1086, 1087 [3d Dept 2014]; *see generally People v Romanchik*, 242 AD3d 1624, 1626 [4th Dept 2025]). We decline to exercise our power to review his unpreserved contention as a matter of discretion in the interest of justice (*see CPL 470.15 [3] [c]*).

Defendant further contends that his sentence is illegal because it was not imposed within one year of "the date the conviction [was] entered," as required by CPL 390.30 (6) (a). Although that contention survives even a valid waiver of the right to appeal (*see generally People v Thomas*, 34 NY3d 545, 558 [2019], *cert denied* 589 US 1302 [2020]), it lacks merit. Defendant's sentencing was scheduled for one

day before the one-year period set forth in CPL 390.30 (6) (a) expired, but the People requested an adjournment to prepare an order of protection. Over defendant's objection, the court granted the adjournment. Contrary to defendant's contention, a court's failure to comply with the one-year deadline set forth in CPL 390.30 (6) (a) is not a jurisdictional defect, and a court may legally impose a sentence more than a year after the defendant was placed on interim probation (see *People v Biles*, 237 AD3d 1521, 1522-1523 [4th Dept 2025]; *People v Bryant*, 219 AD3d 1677, 1678 [4th Dept 2023], *lv denied* 41 NY3d 1017 [2024]). We therefore decline to vacate the sentence.

Even assuming, *arguendo*, that defendant did not validly waive his right to appeal (see *People v Ortega*, 227 AD3d 1493, 1493 [4th Dept 2024], *lv denied* 42 NY3d 929 [2024]), we conclude that the sentence is not unduly harsh or severe.

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

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

128

CA 24-01508

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

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

V

MEMORANDUM AND ORDER

SCOTT P., RESPONDENT-APPELLANT,

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

Appeal from an order of the Supreme Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered March 8, 2024, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order revoking his regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility (see Mental Hygiene Law § 10.01 et seq.). We affirm.

Contrary to respondent's contention, petitioner established by clear and convincing evidence (see Mental Hygiene Law § 10.11 [d] [4]) that respondent is a dangerous sex offender requiring confinement (see § 10.03 [e]; see generally *Matter of State of New York v George N.*, 160 AD3d 28, 30 [4th Dept 2018]). The evidence at the SIST revocation hearing established that respondent had scored "[w]ell [a]bove [a]verage" for risk of sexual recidivism based on the Static-99R assessment tool; that he failed to fully engage in sex offender treatment; that he demonstrated increased sexual preoccupation as well as ongoing deceptive behavior; that he committed multiple SIST violations that bore on his risk of sexually reoffending, including possession of a smartphone containing, among other things, extensive pornography; and that he had violated other conditions of SIST that, although not sexual in nature, nevertheless also bore on his risk of recidivism (see *Matter of State of New York v Steven A.*, 193 AD3d 1344, 1345 [4th Dept 2021], lv denied 37 NY3d 911 [2021]; *Matter of State of New York v Jedediah H.*, 184 AD3d 1132, 1132-1133 [4th Dept 2020], lv denied 35 NY3d 918 [2020]; see generally *Matter of State of New York v Jamaal A.*, 167 AD3d 1526, 1527 [4th Dept 2018], lv denied 33 NY3d 902 [2019]).

We also reject respondent's contention that Supreme Court improperly credited the testimony of petitioner's expert. It is well established that the court, "as the trier of fact, was in the best position to evaluate the weight and credibility of the conflicting [psychological] testimony presented" and we see no reason to disturb its decision to credit the testimony of petitioner's expert over that of respondent's expert (*Matter of State of New York v Connor*, 134 AD3d 1577, 1578 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]; see *Matter of State of New York v Motzer*, 79 AD3d 1687, 1688 [4th Dept 2010]; see also *Matter of State of New York v Smith*, 145 AD3d 1445, 1446 [4th Dept 2016]).

Finally, respondent failed to preserve for our review his contention that the court erred when it considered certain opinion and hearsay testimony (see *Matter of State of New York v Nervina*, 120 AD3d 941, 942 [4th Dept 2014], *affd* 27 NY3d 718 [2016], *cert denied* 580 US 1023 [2016]; see generally *Horton v Smith*, 51 NY2d 798, 799 [1980]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]) and we decline to exercise our power to review that contention in the interest of justice (see *Nervina*, 120 AD3d at 942).

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

130

CA 25-00443

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

IN THE MATTER OF NEW YORK STATE POLICE,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DAVID J. KINGSLEY, II, RESPONDENT-RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH COCO OF COUNSEL), FOR
PETITIONER-APPELLANT.

FRESHFIELDS US LLP, WASHINGTON, DC (JENNIFER B. LOEB OF COUNSEL), FOR
BRADY CENTER TO PREVENT GUN VIOLENCE AND GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE, AMICI CURIAE.

Appeal from an order of the Supreme Court, Jefferson County
(William F. Ramseier, J.), entered February 6, 2025. The order denied
petitioner's application for a final extreme risk protection order.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs and the order is vacated.

Memorandum: In this proceeding pursuant to the Extreme Risk
Protection Act (see CPLR article 63-A), petitioner appeals from an
order denying its application for a final extreme risk protection
order (ERPO) against respondent, a former correction officer who
participated in the fatal beating of an incarcerated individual at
Marcy Correctional Facility. According to petitioner, Supreme Court
erred in determining that petitioner failed to prove by clear and
convincing evidence that respondent was "likely to engage in conduct
that would result in serious harm to [respondent] or others, as
defined in [Mental Hygiene Law § 9.39 (a) (1) or (2)]" (CPLR 6343
[2]), a prerequisite for the granting of an ERPO. If granted, the
ERPO would have required respondent to surrender all firearms, rifles,
and shotguns in his possession for a maximum of one year (see CPLR
6343 [3] [b], [c]).

While this appeal was pending, respondent was convicted of murder
in the second degree and another felony for the fatal beating of the
incarcerated individual. Respondent was later sentenced to an
aggregate term of 25 years to life in prison. As a convicted felon,
respondent is prohibited from possessing any firearms, rifles, and
shotguns regardless of whether we reverse or affirm the order from
which petitioner appeals (see Penal Law § 400.00 [1] [c]). Under the
circumstances, we conclude that this appeal is moot and no exception

to the mootness doctrine applies (see generally *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Finally, to prevent the unreviewable order " 'from spawning any legal consequences or precedent,' " we vacate the order (*Matter of Thrall v CNY Centro, Inc.*, 89 AD3d 1449, 1451 [4th Dept 2011], lv dismissed 19 NY3d 898 [2012], quoting *Hearst Corp.*, 50 NY2d at 718; see *Matter of Hensley v Williamsville Cent. Sch. Dist.*, 206 AD3d 1655, 1657 [4th Dept 2022]).

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

149

CA 25-00072

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

BANKERS HEALTHCARE GROUP, LLC,
PLAINTIFF-RESPONDENT,

V

ORDER

DINA M. GENEVE, DOING BUSINESS AS
MARGARET P. GENEVE, NP, AND MARGARET P. GENEVE,
DEFENDANT-APPELLANT.

ANTHONY J. PIETRAFESA, SYRACUSE, FOR DEFENDANT-APPELLANT.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County
(Robert E. Antonacci, II, J.), entered December 23, 2024. The order,
insofar as appealed from, denied the motion of defendant to dismiss
the complaint.

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

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

155

KA 24-01475

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

BRYAN ROJAS, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered July 15, 2024. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

162

CAF 24-00499

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

IN THE MATTER OF DANAYELY P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.C., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO
(NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered March 20, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights to the subject child.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order terminating her parental rights to the subject child (older child) pursuant to Social Services Law § 384-b on the ground of permanent neglect. In appeal No. 2, the mother appeals from an order determining pursuant to Family Court Act article 10 that she derivatively neglected the subject child (younger child). We affirm in each appeal.

Preliminarily, as the mother correctly contends and both petitioner and the Attorney for the Children correctly concede in each appeal, Family Court erred in its determination that the mother was in default because, while she did not appear at the combined fact-finding and dispositional hearing, she was "represented by counsel who appeared and actively participated in the hearing, rather than electing to stand mute" (*Matter of Fenton v Smith*, 240 AD3d 1242, 1243 [4th Dept 2025]; see generally *Matter of Jayden M. [Carlos M.]*, 237 AD3d 1560, 1561-1562 [4th Dept 2025], *lv denied* 44 NY3d 902 [2025]). Further, as the mother correctly contends and both petitioner and the Attorney for the Children correctly concede, inasmuch as the omission of certain documents from the record does not inhibit our ability to render an informed decision on the issues raised by the mother, there

is no basis upon which to conclude that the appeals should be dismissed on the ground that the record is incomplete (see *Matter of Omariana A. [Omar A.]*, 242 AD3d 1529, 1530 [4th Dept 2025]; cf. *Matter of Charlie C. [Thomas C.]*, 178 AD3d 1450, 1450-1451 [4th Dept 2019]).

Contrary to the mother's contention in appeal No. 2, however, we conclude that there is a sound and substantial basis in the record supporting the court's determination that petitioner met its burden of establishing, by a preponderance of the evidence, the mother's derivative neglect of the younger child (see Family Ct Act § 1046 [a] [i]; [b] [i]; *Matter of Juliet W. [Amy W.]*, 216 AD3d 1424, 1425 [4th Dept 2023], lv denied 40 NY3d 1059 [2023]). The court took judicial notice of orders entered within six weeks of the younger child's birth terminating the mother's parental rights over six of her other children on the basis of, inter alia, permanent neglect (see *Matter of Dariell P.E. [Dannysha E.-C.]*, 242 AD3d 1505, 1505 [4th Dept 2025]), and thus "the prior finding[s] were] so proximate in time to the derivative proceeding[] that it can reasonably be concluded that the condition[s] still exist[ed]" (*Matter of Sasha M.*, 43 AD3d 1401, 1402 [4th Dept 2007] [internal quotation marks omitted]; see *Juliet W.*, 216 AD3d at 1425). Moreover, the evidence established that the mother had failed to address the problems that led to the permanent neglect findings with respect to the other six children (see *Juliet W.*, 216 AD3d at 1425; *Matter of Carmela H. [Danielle F.]*, 164 AD3d 1607, 1607 [4th Dept 2018], lv dismissed in part & denied in part 32 NY3d 1190 [2019]).

Contrary to the mother's contention in appeal No. 1, we conclude that there is a sound and substantial basis in the record supporting the court's determination that petitioner met its burden of establishing by clear and convincing evidence that the mother permanently neglected the older child (see Social Services Law § 384-b [3] [g] [i]; [4] [d]; [7] [a]; *Dariell P.E.*, 242 AD3d at 1506). Here, "[p]etitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and [the older child] by providing services and other assistance aimed at ameliorating or resolving the problems preventing [the older child's] return to [the mother's] care . . . , and that the mother failed substantially and continuously to plan for the future of the [older] child although physically and financially able to do so" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], lv denied 12 NY3d 715 [2009] [internal quotation marks omitted]; see § 384-b [7] [a]; *Matter of Jemma M. [Ashley M.]*, 237 AD3d 1569, 1570 [4th Dept 2025], lv denied 44 NY3d 908 [2025]; *Matter of D'Angel M.-B. [Donell M.-B.]*, 173 AD3d 1764, 1765 [4th Dept 2019], lv denied 34 NY3d 911 [2020]).

To the extent that the mother contends otherwise in appeal No. 1, we conclude that the court did not abuse its discretion in denying her attorney's request for an adjournment of the dispositional hearing (see *Matter of Brandon I.J. [Daisy D.]*, 198 AD3d 1310, 1310 [4th Dept 2021], lv denied 38 NY3d 901 [2022]; *Matter of Jazmine M. [Willie R.]*, 185 AD3d 1457, 1458 [4th Dept 2020], lv denied 36 NY3d 902 [2020]).

Finally, contrary to the mother's contention in appeal No. 1, the court did not abuse its discretion in denying her attorney's request for a suspended judgment (see *Brandon I.J.*, 198 AD3d at 1311).

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

163

CAF 24-00502

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

IN THE MATTER OF KENAY E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO
(NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered March 20, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent derivatively neglected the subject child.

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

Same memorandum as in *Matter of Danayely P.E. (Dannysa E.C.)*
([appeal No. 1] – AD3d – [Mar. 20, 2026] [4th Dept 2026]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

174

KA 24-00630

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES LEVULIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (AXELLE LECOMTE MATHEWSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered September 19, 2023. The judgment convicted defendant upon his plea of guilty of assault in the first degree and 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 his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Zukic*, 240 AD3d 1192, 1193 [4th Dept 2025], *lv denied* 44 NY3d 995 [2025]; *People v Vandusen*, 235 AD3d 1254, 1254-1255 [4th Dept 2025], *lv denied* 43 NY3d 966 [2025]; *see generally People v Thomas*, 34 NY3d 545, 563 [2019], *cert denied* 589 US 1302 [2020]), and the valid waiver forecloses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

187

CAF 24-01634

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

IN THE MATTER OF ANTHONY FAES,
PETITIONER-RESPONDENT-RESPONDENT,

V

MEMORANDUM AND ORDER

STEPHANIE COULSON, RESPONDENT-PETITIONER-APPELLANT.

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

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (RYAN M. BERGMAN OF
COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered May 6, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner-respondent sole legal custody of the subject child with supervised parenting time for respondent-petitioner "as the parties mutually agree."

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts of the third and fourth ordering paragraphs directing that supervised parenting time and supervised parenting time in a therapeutic setting are awarded to respondent-petitioner "as the parties mutually agree" and as modified the order is affirmed without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner mother appeals from an order that, inter alia, awarded petitioner-respondent father sole custody of the subject child, with supervised parenting time, and supervised parenting time in a therapeutic setting, to the mother "as the parties mutually agree."

Initially, the mother contends that Family Court erred in disclosing information that the child shared during the *Lincoln* hearing. To the extent that the court improperly disclosed some of the child's statements at the *Lincoln* hearing (see *Kaleta v Kaleta*, 225 AD3d 1293, 1295 [4th Dept 2024]; *Matter of Carter v Work*, 100 AD3d 1557, 1558 [4th Dept 2012]), we conclude that the error does not justify disturbing the court's determination here (see *Carter*, 100 AD3d at 1558; see also *Matter of John M. v Tashina N.*, 218 AD3d 935,

938-939 [3d Dept 2023])).

We further reject the mother's contention that the court erred in requiring that her parenting time be supervised. "Courts have broad discretion in determining whether visits should be supervised" (*Matter of Muriel v Muriel*, 228 AD3d 1345, 1347 [4th Dept 2024] [internal quotation marks omitted]; see *Matter of Campbell v January*, 114 AD3d 1176, 1177 [4th Dept 2014], lv denied 23 NY3d 902 [2014]), and that determination "will not be disturbed as long as there is a sound and substantial basis in the record to support it" (*Matter of Procopio v Procopio*, 132 AD3d 1243, 1244 [4th Dept 2015], lv denied 26 NY3d 915 [2015] [internal quotation marks omitted]). Here, the court's determination to impose supervised parenting time is supported by a sound and substantial basis in the record. Indeed, the record establishes that "unsupervised [parenting time] would be detrimental to the child's safety because the [mother] is either unable or unwilling to discharge . . . her parental responsibility properly" (*Matter of Tara DD. v Seth CC.*, 214 AD3d 1031, 1034 [3d Dept 2023] [internal quotation marks omitted]). Specifically, among other things, we note that the mother made numerous unfounded reports to child protective services, refused to cooperate in the ensuing investigations, behaved aggressively toward the child on occasion, tried to control and interfere with the child's communications with both the father and the Attorney for the Child who represented the child at trial, and refused to cooperate with the father when concerns arose over the child's mental health and potential expression of suicidal ideation. In other words, supervised parenting time was warranted here, inasmuch as the foregoing established that the mother lacked insight into how her behavior harmed the child (see *Matter of Watson v Maragh*, 156 AD3d 801, 802-803 [2d Dept 2017]; *Matter of Opalka v Skinner*, 81 AD3d 1005, 1008 [3d Dept 2011]).

Finally, we agree with the mother that the court should have set a schedule for the mother's parenting time rather than ordering parenting time as agreed upon by the parties "inasmuch as the record demonstrates that an order directing supervised [parenting time] as mutually agreed by the parties would be untenable under the circumstances" (*Matter of Edmonds v Lewis*, 175 AD3d 1040, 1043 [4th Dept 2019], lv denied 34 NY3d 909 [2020]; see *Matter of D.T. v C.T.*, 215 AD3d 1232, 1234 [4th Dept 2023]; see generally *Matter of Kelley v Fifield*, 159 AD3d 1612, 1613-1614 [4th Dept 2018]). We therefore modify the order accordingly and remit the matter to Family Court to fashion an appropriate schedule for the mother's supervised parenting time and supervised parenting time in a therapeutic setting in accordance with the best interests of the child.

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

192

CAE 25-00268

PRESENT: CURRAN, J.P., MONTOUR, SMITH, AND OGDEN, JJ.

IN THE MATTER OF BERNARD MENT, INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS CHAIRPERSON OF ONONDAGA
COUNTY COMMITTEE OF THE CONSERVATIVE PARTY OF NEW
YORK STATE AND COMMITTEE MEMBER DEWITT DISTRICT 9,
JOHN A. MULHALL, INDIVIDUALLY AND AS A FORMER
CHAIRPERSON OF ONONDAGA COUNTY COMMITTEE OF THE
CONSERVATIVE PARTY OF NEW YORK STATE AND COMMITTEE
MEMBER VANBUREN DISTRICT 9, THOMAS V. DADEY, JR.,
INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS VICE
CHAIR AT LARGE PERSON OF ONONDAGA COUNTY COMMITTEE
OF CONSERVATIVE PARTY OF NEW YORK STATE AND COMMITTEE MEMBER
DEWITT DISTRICT 3, PAUL F. BECALLO, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS CICERO TOWN
CHAIR OF ONONDAGA COUNTY COMMITTEE OF THE CONSERVATIVE
PARTY OF NEW YORK STATE AND COMMITTEE MEMBER CICERO
DISTRICT 22 AND SUSAN T. VICKERS, INDIVIDUALLY AND
IN HER OFFICIAL CAPACITY AS CAMILLUS TOWN CHAIR
OF ONONDAGA COUNTY COMMITTEE OF THE CONSERVATIVE
PARTY OF NEW YORK STATE AND COMMITTEE MEMBER
CAMILLUS DISTRICT 11, PETITIONERS-PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ONONDAGA COUNTY COMMITTEE OF CONSERVATIVE PARTY
OF NEW YORK STATE, ROBERT GRAHAM, IN HIS CAPACITY
AS EXECUTIVE VICE-CHAIR AND VICE-CHAIR-AT-LARGE OF
ONONDAGA COUNTY COMMITTEE OF THE CONSERVATIVE PARTY
OF NEW YORK STATE, NANCY ROBERTS, IN HER CAPACITY AS
SECRETARY OF ONONDAGA COUNTY COMMITTEE OF THE CONSERVATIVE
PARTY OF NEW YORK STATE, CHRISTINE VARGA, IN HER
CAPACITY AS PUTATIVE CHAIR OF ORGANIZATION MEETING
OF OCTOBER 6, 2024 OF ONONDAGA COUNTY COMMITTEE OF
THE CONSERVATIVE PARTY OF NEW YORK STATE, NEW YORK
STATE BOARD OF ELECTIONS AND ONONDAGA COUNTY BOARD OF ELECTIONS,
RESPONDENTS-DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

AARON MARK ZIMMERMAN, ESQ., P.C., SYRACUSE (AARON M. ZIMMERMAN OF
COUNSEL), AND GARY J. LAVINE, FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

ROBERT F. JULIAN, UTICA, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court,
Onondaga County (William F. Ramseier, J.), entered February 6, 2025,

in a proceeding pursuant to Election Law article 16 and CPLR article 78 and declaratory judgment action. The judgment, inter alia, granted the motion of certain respondents-defendants to dismiss and dismissed the petition.

It is hereby ORDERED that said appeal from the judgment insofar as taken by petitioner-plaintiff Bernard Ment, individually and as Chairperson of Onondaga County Committee of the Conservative Party of New York State and Committee Member Dewitt District 9, is unanimously dismissed and the judgment is modified on the law by denying the cross-motion in part, reinstating the amended petition-complaint to the extent that it seeks declaratory relief, and granting judgment in favor of respondents-defendants as follows:

It is ADJUDGED AND DECLARED that the organizational meeting of respondent-defendant Onondaga County Committee of Conservative Party of New York State was properly held on October 6, 2024, that a quorum at that meeting was properly established, and that the resulting certificates of election filed with respondents-defendants Onondaga County Board of Elections and New York State Board of Elections certifying the election of officers at that meeting were properly filed, and as modified the judgment is affirmed without costs.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid proceeding-action (proceeding) pursuant to CPLR article 78, CPLR 3001, and Election Law article 16 seeking, inter alia, to invalidate certificates of election filed with respondents-defendants Onondaga County Board of Elections and New York State Board of Elections (collectively, Boards of Elections), which certified the election of officers of respondent-defendant Onondaga County Committee of Conservative Party of New York (OCCP) following an organizational meeting held on October 6, 2024 (October meeting). Thereafter, petitioners moved by order to show cause seeking relief on their amended petition-complaint (petition), and OCCP and respondents-defendants Robert Graham, in his capacity as executive vice-chair and vice-chair-at-large of OCCP, Nancy Roberts, in her capacity as secretary of OCCP, and Christine Varga, in her capacity as putative chair of Organization Meeting of October 6, 2024 of OCCP (collectively, respondents), answered and cross-moved to dismiss the petition in its entirety pursuant to, inter alia, CPLR 3211 (a) (7). Petitioners now appeal, in appeal No. 1, from a judgment that denied their motion by order to show cause and granted respondents' cross-motion. In appeal No. 2, petitioners appeal from an order that denied their motion for leave to reargue and renew their opposition to the cross-motion.

This proceeding arises out of an internecine conflict between two factions concerning the leadership of OCCP that started in 2023. Among the petitioners is the late Bernard Ment, who is named individually and as chairperson of OCCP and Committee Member Dewitt District 9. One of the competing factions is represented by petitioners, including Ment, who served as the chairperson of OCCP

until the October meeting. The other faction is represented by, inter alia, Varga, who was elected chairperson of OCCP at that contested October meeting.

By way of background, pursuant to the Election Law and its own bylaws, OCCP elects members every two years following a primary election (see generally Election Law §§ 2-104, 2-106 [1], [3]). Following the biennial election of its members, OCCP is required to hold an organizational meeting within a certain time following the primary for the purpose of electing officers for the committee, including, inter alia, the chairperson and the executive vice-chairperson (see § 2-112 [1]). According to OCCP's bylaws, it is the duty of the chairperson to call for and preside at the organizational meeting. The officers elected at the organizational meeting become members of OCCP's executive committee, which, according to the bylaws, possesses and exercises "all the rights, privileges, powers and duties which [OCCP] may have, possess, and exercise," while OCCP is not in session.

Here, following the 2024 primary election, the faction associated with Varga was poised to take control of OCCP and elect its own slate of officers. According to respondents, petitioners' faction sought to disenfranchise the competing faction by preventing them from electing new officers. Specifically, it is alleged that Ment, as chairperson, refused to fulfill his duty to call for the organizational meeting, which would result in the disintegration of OCCP, allowing leadership of the committee to devolve to nonparty State Committee of the Conservative Party of New York State, which would, in turn, purportedly appoint a temporary executive committee of OCCP friendly to petitioners' faction. Indeed, during the relevant time frame, Ment did not call for any meeting, and—by his own admission—stopped responding to all calls, texts, and emails from members of OCCP.

In light of Ment's absence, and pursuant to the bylaws, Graham, OCCP's executive vice-chairperson, acted to ensure that the organizational meeting was held during the relevant time frame. To that end, he called for a monthly meeting of OCCP to be held on September 17, 2024 (September meeting), at which time OCCP's executive committee approved proxy forms to be used at the upcoming October meeting, i.e., the organizational meeting that was scheduled for October 6, 2024. To further ensure that the organizational meeting was held on October 6, 2024, some members of OCCP circulated a petition for members to sign, which called for an organizational meeting to be held on that day. Ultimately, compliant with the relevant provision of the bylaws, those calling for an organizational meeting obtained the necessary signatures of 20% of OCCP membership on the petition.

At the October meeting, signed proxy forms—which had been approved at the September meeting—were used to establish a quorum. Subsequently, OCCP membership elected a new executive committee, replacing Ment and petitioners' faction. Within three days of the October meeting, signed certificates of election of the new leadership were submitted to the Boards of Election, as required by statute

(see Election Law § 2-112 [1] [d]).

Thereafter, as noted above, petitioners commenced this proceeding seeking, inter alia, to invalidate the September and October meetings, contending that they were unlawfully held, and to invalidate the election of the new OCCP officers and the resulting certificates of election. In seeking to invalidate the foregoing, petitioners requested, inter alia, declaratory relief to that effect.

Initially, we dismiss both appeals insofar as taken by Ment inasmuch as he is deceased, his death does not affect the merits of the case, and there is no need for strict adherence to the requirement that the proceeding be stayed pending substitution (see CPLR 1015 [b]; *DiMarco Constructors, LLC v Top Capital of N.Y. Brockport, LLC*, 236 AD3d 1342, 1343 [4th Dept 2025]; *Matter of London*, 200 AD3d 493, 493-494 [1st Dept 2021]).

With respect to appeal No. 1, petitioners contend that, for a number of reasons, Supreme Court erred in granting the cross-motion and in denying the relief requested in the petition under Election Law § 16-102. To establish their entitlement to relief under Election Law § 16-102, petitioners were required to "make a clear showing that the notice for and conduct of the . . . organizational meeting violated the Election Law, or involved such fraud or irregularities as would render it impossible to determine who was rightfully nominated or elected at the meeting" (*Matter of Lehrer v Cavallo*, 43 AD3d 1059, 1061 [2d Dept 2007], *lv dismissed in part & denied in part* 9 NY3d 1001 [2007]; see Election Law § 16-102 [3]). We note at the outset that "internal issues arising within political parties are best resolved within the party organization itself and judicial involvement should only be undertaken as a last resort" (*Matter of Bachmann v Coyne*, 99 AD2d 742, 742 [2d Dept 1984], *lv denied* 61 NY2d 607 [1984]). Indeed, "[j]udicial intervention is warranted only upon a clear showing that a party or its leaders have violated th[e] [Election Law] or the party's own rules adopted in accordance with law, or otherwise violat[ed] the rights of party members or the electorate" (*Matter of Nitti v Reilich*, 153 AD3d 1131, 1132 [4th Dept 2017], *lv denied* 29 NY3d 915 [2017] [internal quotation marks omitted]).

Petitioners contend, specifically, that the court erred in determining that proxy forms submitted at the October meeting were properly approved pursuant to OCCP bylaws, and therefore no quorum was established for the October meeting. We reject that contention. Petitioners' assertion that the proxies were invalid is based, in part, on their argument that the September meeting, where the proxies were purportedly approved, was not validly called, and therefore the certificates of election were "null and void" (*Matter of Firestone v MacKay*, 306 AD2d 346, 347 [2d Dept 2003], *lv denied* 100 NY2d 508 [2003]). We conclude that the court properly determined that, under the circumstances, the September meeting was validly called. Pursuant to OCCP's bylaws, the executive vice-chairperson of the committee "shall" fulfill the chairperson's duties—which include the authority to call and preside over meetings—when the chairperson is "absen[t]."

Here, it is undisputed that Ment-OCCP's chairperson at the time of the September meeting--had intentionally absented himself by remaining incommunicado with OCCP members, not attending the September meeting, and affirmatively stating that he was intentionally forgoing his duty and obligation to call for an organizational meeting. Under those circumstances, the executive vice-chairperson was empowered to call for the meeting. Indeed, we note that OCCP was required, by law and its own bylaws, to hold an organizational meeting (see Election Law § 2-112 [1] [b]), and that the executive vice-chairperson was acting in accordance with that requirement. We further note that, contrary to petitioners' assertion, there is nothing in the bylaws that requires the executive vice-chairperson to make a formal finding that the chairperson is absent before exercising the duties of the chairperson.

Additionally, petitioners contend that the proxies used at the October meeting were invalid because the OCCP executive committee did not properly approve them with respect to their form and content at the September meeting and, therefore, the proxies were unable to establish a quorum at the October meeting. We reject that contention as well. OCCP bylaws provide, in relevant part, that a "proxy must designate another member of [OCCP] as proxy of the member," and that "[t]he proxy shall be confined to a specific meeting of [OCCP], and must be evidenced by an authorization in writing, and fully filed with the Secretary of the meeting for which the proxy is given." Further, "[t]o be valid a proxy signature must be witnessed by a member of the Conservative Party." "The form and content of proxies shall be as approved by the County Executive Committee." Here, the record establishes that the OCCP executive committee approved the form and content of the proxies at the September meeting, which we note was done using the same proxy form that had been used by OCCP in the past.

We reject petitioners' argument that the proxies were not properly approved with respect to form and content insofar as the proxies did not include the specific time, date, and location of the organizational meeting. That information is only relevant to establishing that the proxies were "confined to a specific meeting," which was already established by the forms to the extent that they specifically delineated that the proxies were to be used at the *organizational* meeting. The proxy forms approved at the September meeting otherwise complied with the bylaws.

Petitioners also contend, with respect to appeal No. 1, that the court erred inasmuch as it treated the parties unequally--i.e., that it held petitioners to strict compliance with OCCP's bylaws, while excusing defects in respondents' compliance therewith. We reject that contention inasmuch as, for the reasons explained above, we conclude that the record shows that petitioners--and, in particular, Ment--did not comply with the bylaws by intentionally declining to call the statutorily required organization meeting and that, in contrast, respondents--and, in particular, Graham--complied with the bylaws in taking steps, in Ment's absence, to ensure that the organizational meeting was conducted. We conclude, on the record before us, that there is no evidence establishing that the court treated the parties unequally or that it applied different standards to different parties

in evaluating their conduct.

However, while we conclude that petitioners' contentions in appeal No. 1 lack merit, we further conclude under the circumstances here that the court should have issued a declaration of the parties' rights rather than dismissing the petition in its entirety (see generally *Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]). We note that a declaration is appropriate in the context of the cross-motion to dismiss pursuant to CPLR 3211 (a) (7) in the absence of any issues of fact (see *Plaza Dr. Group of CNY, LLC v Town of Sennett*, 115 AD3d 1165, 1166 [4th Dept 2014]; *Matter of Max v Ward*, 107 AD3d 1597, 1601 [4th Dept 2013]; see generally David D. Siegel & Patrick M. Connors, *New York Practice* § 440 at 848 [6th ed 2018]). We therefore modify the order in appeal No. 1 by denying the cross-motion in part, reinstating the petition to the extent that it seeks declaratory relief, and declaring that the October meeting was properly held, that a quorum at that meeting was properly established, and that the resulting certificates of election certifying the election of OCCP officers at the October meeting were properly filed.

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

Petitioners are permitted to appeal as of right, however, from the order insofar as it denied that part of the motion seeking leave to renew (see CPLR 5701 [a] [2] [viii]). Nonetheless, we conclude that the court did not abuse its discretion in denying that part of petitioners' motion. "[A] motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion" (2006905 *Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 206 AD3d 1607, 1607-1608 [4th Dept 2022] [internal quotation marks omitted]; see CPLR 2221 [e] [2], [3]). Here, we conclude that the court did not err in denying that part of petitioners' motion seeking leave to renew because all the facts relied upon by petitioners in support thereof had been brought to the court's attention previously—i.e., the motion did not allege any new facts not previously offered (see *Jones v City of Buffalo School Dist.*, 94 AD3d 1479, 1479 [4th Dept 2012]; *Carroway Luxury Homes, LLC v Integra Supply Corp.*, 57 AD3d 1448, 1449 [4th Dept 2008]; cf. *Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376-377 [1st Dept 2001]).

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

193

CAE 25-00574

PRESENT: CURRAN, J.P., MONTOUR, SMITH, AND OGDEN, JJ.

IN THE MATTER OF BERNARD MENT, INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS CHAIRPERSON OF ONONDAGA
COUNTY COMMITTEE OF THE CONSERVATIVE PARTY OF NEW
YORK STATE AND COMMITTEE MEMBER DEWITT DISTRICT 9,
JOHN A. MULHALL, INDIVIDUALLY AND AS A FORMER
CHAIRPERSON OF ONONDAGA COUNTY COMMITTEE OF THE CONSERVATIVE
PARTY OF NEW YORK STATE AND COMMITTEE MEMBER VANBUREN
DISTRICT 9, THOMAS V. DADEY, JR., INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS VICE CHAIR AT LARGE
PERSON OF ONONDAGA COUNTY COMMITTEE OF CONSERVATIVE
PARTY OF NEW YORK STATE AND COMMITTEE MEMBER
DEWITT DISTRICT 3, PAUL F. BECALLO, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS CICERO TOWN
CHAIR OF ONONDAGA COUNTY COMMITTEE OF THE CONSERVATIVE
PARTY OF NEW YORK STATE AND COMMITTEE MEMBER CICERO
DISTRICT 22 AND SUSAN T. VICKERS, INDIVIDUALLY AND
IN HER OFFICIAL CAPACITY AS CAMILLUS TOWN CHAIR
OF ONONDAGA COUNTY COMMITTEE OF THE CONSERVATIVE
PARTY OF NEW YORK STATE AND COMMITTEE MEMBER
CAMILLUS DISTRICT 11, PETITIONERS-PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ONONDAGA COUNTY COMMITTEE OF CONSERVATIVE PARTY
OF NEW YORK STATE, ROBERT GRAHAM, IN HIS CAPACITY
AS EXECUTIVE VICE-CHAIR AND VICE-CHAIR-AT-LARGE OF
ONONDAGA COUNTY COMMITTEE OF THE CONSERVATIVE PARTY
OF NEW YORK STATE, NANCY ROBERTS, IN HER CAPACITY AS
SECRETARY OF ONONDAGA COUNTY COMMITTEE OF THE CONSERVATIVE
PARTY OF NEW YORK STATE, CHRISTINE VARGA, IN HER
CAPACITY AS PUTATIVE CHAIR OF ORGANIZATION MEETING OF
OCTOBER 6, 2024 OF ONONDAGA COUNTY COMMITTEE OF THE
CONSERVATIVE PARTY OF NEW YORK STATE, NEW YORK STATE
BOARD OF ELECTIONS AND ONONDAGA COUNTY BOARD OF ELECTIONS,
RESPONDENTS-DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

AARON MARK ZIMMERMAN, ESQ., P.C., SYRACUSE (AARON M. ZIMMERMAN OF
COUNSEL), AND GARY J. LAVINE, FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

ROBERT F. JULIAN, UTICA, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County
(William F. Ramseier, J.), entered March 21, 2025, in a proceeding

pursuant to Election Law article 16 and CPLR article 78 and declaratory judgment action. The order denied the motion of petitioners seeking leave to reargue and renew.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue, and insofar as taken by petitioner-plaintiff Bernard Ment, individually and as Chairperson of Onondaga County Committee of the Conservative Party of New York State and Committee Member Dewitt District 9, is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Matter of Ment v Onondaga County Comm. of Conservative Party of N.Y. State* ([appeal No. 1] – AD3d – [Mar. 20, 2026] [4th Dept 2026]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

198

KA 25-00302

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DANA R. GRIMES, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 21, 2024. The judgment convicted defendant upon a plea of guilty of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

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

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

202

KA 25-00423

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TAJ R. WILLIAMS, 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 December 20, 2024. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that his waiver of the right to appeal is not valid and that his plea was not voluntarily, knowingly, and intelligently entered because County Court did not ensure that defendant, who alleges that he suffers from mental health conditions, was competent to enter the plea. Preliminarily, because defendant's substantive contention would survive even a valid waiver of the right to appeal (*see People v Padilla*, 151 AD3d 1700, 1700 [4th Dept 2017], *lv denied* 31 NY3d 1016 [2018]; *People v Davis*, 129 AD3d 1613, 1613-1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]; *People v Hawkins*, 70 AD3d 1389, 1389 [4th Dept 2010], *lv denied* 14 NY3d 888 [2010]), we need not consider his challenge to the validity of the waiver. Defendant failed to preserve his substantive contention for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Rossborough*, 227 AD3d 1502, 1502 [4th Dept 2024], *lv denied* 42 NY3d 929 [2024]; *People v Cato*, 199 AD3d 1388, 1389 [4th Dept 2021]; *People v Jones*, 175 AD3d 1845, 1845-1846 [4th Dept 2019], *lv denied* 34 NY3d 1078 [2019]), and this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]).

In any event, defendant's challenge to the plea is without merit. " 'A history of prior mental illness or treatment does not itself call into question [a] defendant's competence' " and, here, we conclude

that "[t]here is no indication in the record that defendant was unable to understand the proceedings or that he was mentally incompetent at the time he entered his guilty plea" (*People v Williams*, 35 AD3d 1273, 1275 [4th Dept 2006], *lv denied* 8 NY3d 928 [2007]; see *People v Williams*, 124 AD3d 1285, 1286 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]). Indeed, we note that the court made inquiries to ensure that defendant "was lucid and understood the proceedings" (*People v Russell*, 133 AD3d 1199, 1200 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]; see *Padilla*, 151 AD3d at 1701), and "[t]here was not the slightest indication that defendant was uninformed, confused or incompetent" at the time he entered the plea (*People v Alexander*, 97 NY2d 482, 486 [2002]; see *People v Stehm*, 227 AD3d 1463, 1464 [4th Dept 2024]).

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

204

KA 25-00209

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RYAN C. CANUTI, DEFENDANT-APPELLANT.

HAYDEN M. DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO (GLENN GREEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered October 24, 2024. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first 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 sexual abuse in the first degree (Penal Law § 130.65 [3]). We affirm.

Defendant contends that County Court abused its discretion in its *Sandoval* ruling. Defendant failed to preserve his contention for our review (see *People v Major*, 61 AD3d 1417, 1417 [4th Dept 2009], *lv denied* 12 NY3d 927 [2009]) and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Defendant's further contention that he was denied effective assistance of counsel "is based, in part, on matter appearing on the record and, in part, on matter outside the record and, thus, constitutes a 'mixed claim of ineffective assistance' " (*People v Johnson*, 195 AD3d 1420, 1421 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]; see *People v Evans*, 16 NY3d 571, 575 n 2 [2011], *cert denied* 565 US 912 [2011]; *People v Streeter*, 194 AD3d 1407, 1408 [4th Dept 2021], *lv denied* 37 NY3d 974 [2021], *reconsideration denied* 37 NY3d 1029 [2021]). Because defendant's "claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety" (*People v Franklin*, 206 AD3d 1610, 1611-1612 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022] [internal

quotation marks and emphasis omitted]; see *People v Wilson*, 162 AD3d 1591, 1592 [4th Dept 2018]).

We reject defendant's contention that the verdict is against the weight of the evidence. " 'Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor' " (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], lv denied 31 NY3d 1011 [2018]). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

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

206

CAF 24-01783

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

IN THE MATTER OF JESSICA FANNING,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH CHAPMAN, RESPONDENT-APPELLANT.

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

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered September 4, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner's request for permission to relocate with the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that granted petitioner mother's petition seeking permission to relocate with the subject children. While this appeal was pending, Family Court entered an order upon consent of the parties that modified the custody and visitation arrangement (*see Matter of Shilo v Shilo*, 177 AD3d 1315, 1316 [4th Dept 2019]). That order renders the appeal moot, "and the exception to the mootness doctrine does not apply" (*Matter of Thomas v Thomas*, 151 AD3d 1919, 1920 [4th Dept 2017]).

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

207

CAF 25-00716

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

IN THE MATTER OF DMITRI GALITSKY,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

SVIATLANA GALITSKY, RESPONDENT-APPELLANT.

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

DMITRI GALITSKY, PETITIONER-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Monroe County (Darius K. Lind, R.), entered March 13, 2025, in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection.

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

Memorandum: Respondent appeals from an order of protection issued in a proceeding pursuant to Family Court Act article 8 upon a finding that she committed acts constituting the family offense of harassment in the second degree against petitioner (*see* Penal Law § 240.26 [3]; *see also* Family Ct Act § 812 [1]). Initially, we agree with respondent that, while the order on appeal has expired, the appeal is not moot “because the order still imposes significant enduring consequences upon respondent, who may receive relief from those consequences upon a favorable appellate decision” (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015]; *see Matter of Geremski v Berardi*, 219 AD3d 1713, 1714 [4th Dept 2023]; *Matter of Shephard v Ray*, 137 AD3d 1715, 1716 [4th Dept 2016]).

With respect to the merits, we agree with respondent that the evidence is not legally sufficient to establish that she 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 Reader v Reader*, 244 AD3d 1729, 1730 [4th Dept 2025]; *Geremski*, 219 AD3d at 1714; *Shephard*, 137 AD3d at 1716).

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

230

CA 25-00355

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

MASSA CONSTRUCTION, INC., PLAINTIFF-APPELLANT,

V

ORDER

CLYDE-SAVANNAH CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.

SHEATS & BAILEY, PLLC, LIVERPOOL (EDWARD J. SHEATS, JR., OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

FERRARA FIORENZA PC, EAST SYRACUSE (RYAN L. MCCARTHY OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Wayne County (Daniel J. Doyle, J.), entered February 10, 2025, in a breach of contract action. The order and judgment granted the motion of defendant for summary judgment.

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: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

242

KA 24-00883

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SAMANTHA H., DEFENDANT-APPELLANT.

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

PERRY DUCKLES, ACTING DISTRICT ATTORNEY, ROCHESTER (MARTIN P.
MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), dated August 29, 2024. The order denied the motion of defendant for resentencing pursuant to CPL 440.47.

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

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

245

CA 25-00960

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

HOMESTATE ASSET MANAGEMENT, LLC,
PLAINTIFF-RESPONDENT,

V

ORDER

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR REGISTERED HOLDINGS OF BANK OF AMERICA
MERRILL LYNCH COMMERCIAL MORTGAGE, INC.,
MULTIFAMILY MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2016-KX02, DEFENDANT,
AND ARBOR AGENCY LENDING, LLC, DEFENDANT-APPELLANT.

WESTERMAN BALL EDERER MILLER ZUCKER & SHARFSTEIN LLP, UNIONDALE
(JEFFREY A. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County
(Joseph E. Lamendola, J.), entered May 7, 2025. The order denied the
motion of defendant Arbor Agency Lending, LLC, to dismiss the
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: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

248

CA 25-00850

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

IN THE MATTER OF MARK M., PETITIONER-APPELLANT,

V

ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

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

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

Appeal from an amended order of the Supreme Court, Oneida County (Rory A. McMahon, J.), entered November 15, 2024, in a proceeding pursuant to Mental Hygiene Law article 10. The amended order determined that petitioner is a dangerous sex offender requiring confinement to a secure treatment facility.

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

Entered: March 20, 2026

Ann Dillon Flynn
Clerk of the Court

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

251.1

CA 25-01272

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

IN THE MATTER OF ANDERSON ENRIQUE VASQUEZ
JUAREZ, APPELLANT.

MEMORANDUM AND ORDER

SELENDY GAY PLLC, NEW YORK CITY (SYLVIA WOODMANSEE OF COUNSEL), AND CORNELL FARMWORKER LEGAL ASSISTANCE CLINIC, CORNELL LAW SCHOOL, ITHACA, FOR APPELLANT.

Appeal from an order of the Surrogate's Court, Herkimer County (John H. Crandall, S.), entered June 2, 2025. The order denied the motion of appellant for special findings.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the facts without costs, the motion is granted, and it is found that the subject child has been legally committed to, or placed under the custody of, an individual appointed by a juvenile court located in the United States, is physically present in the United States, is under 21 years of age, and is unmarried; that the subject child's reunification with his parents is not viable due to parental neglect; and that it would not be in the subject child's best interests to return to Guatemala, his previous country of nationality and last habitual residence.

Memorandum: In January 2025, the subject child filed a petition pursuant to Surrogate's Court Procedure Act article 17 to appoint his older brother as his guardian for the purpose of, inter alia, obtaining an order making special findings to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (SIJS) pursuant to 8 USC § 1101 (a) (27) (J). The child simultaneously moved for the issuance of an order making special findings that, among other things, the child's reunification with his parents is not viable due to parental neglect, abandonment, or abuse, and it would not be in his best interests to be returned to Guatemala, his previous country of nationality and last habitual residence. Although Surrogate's Court granted the guardianship petition, following a subsequent hearing, the Surrogate issued the order on appeal denying the child's motion for an order making the requisite declaration and special findings on the basis that the child presented "no credible testimony . . . of abuse, abandonment or neglect or that reunification with one or both of his parents is not viable." The child appeals, and we reverse.

As relevant here, pursuant to 8 USC § 1101 (a) (27) (J) and 8 CFR 204.11, a "special immigrant" is "a resident alien who is, inter alia, under 21 years of age, unmarried, and dependent upon a juvenile court

or legally committed to an individual appointed by a state or juvenile court" (*Matter of Briceyda M.A.X. [Hugo R.A.O.]*, 190 AD3d 752, 753 [2d Dept 2021] [internal quotation marks omitted]; see *Matter of Trudy-Ann W. v Joan W.*, 73 AD3d 793, 795 [2d Dept 2010]). "Additionally, for a juvenile to qualify for [SIJS], a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under State law, and that it would not be in the juvenile's best interest to be returned to [their] native country or country of last habitual residence" (*Briceyda M.A.X.*, 190 AD3d at 753 [internal quotation marks omitted]; see 8 USC § 1101 [a] [27] [J] [i], [ii]; 8 CFR 204.11 [c]; *Matter of Eddy A.P.C. [Maria G.C.S.]*, 226 AD3d 1005, 1006 [2d Dept 2024]).

"While the credibility assessment of a hearing court is accorded considerable deference on appeal, where, as here, the . . . [c]ourt's credibility determination is not supported by the record, this Court is free to make its own credibility assessments and overturn the determination of the hearing court" (*Eddy A.P.C.*, 226 AD3d at 1006-1007 [internal quotation marks omitted]; see *Matter of Norma U. v Herman T.R.F.*, 169 AD3d 1055, 1056-1057 [2d Dept 2019]). Here, the evidence established that the child is under the age of 21, unmarried, and a resident alien physically present in the United States and, inasmuch as the Surrogate appointed the child's brother as his guardian, the child has been legally committed to or placed under the custody of an individual appointed by a juvenile court located in the United States within the meaning of 8 USC § 1101 (a) (27) (J) (i) (see *Matter of Fatima J.A.J. [Ana A.J.S.-Carlos E.A.F.]*, 137 AD3d 912, 913-914 [2d Dept 2016]; see also *Eddy A.P.C.*, 226 AD3d at 1007; *Matter of Jose E.S.G. [Meija-Salguero]*, 193 AD3d 856, 858 [2d Dept 2021]; *Matter of Jose YY.*, 158 AD3d 200, 201 [3d Dept 2018]).

We further find, contrary to the Surrogate's conclusion, that the testimony at the hearing was credible and persuasive with respect to the viability of the child's reunification with his parents and whether his best interests would be served by returning to Guatemala. Specifically, based upon our independent review of the record, we conclude that reunification of the child with his parents is not viable due to parental neglect (see generally Family Ct Act § 1012 [f] [i]). The record demonstrates that the child's parents did not provide the child with medical care, even after he sustained a serious injury (see *Matter of Sara D. v Lassina D.*, 206 AD3d 553, 553-554 [1st Dept 2022]; *Matter of Victor R.C.O. [Canales]*, 172 AD3d 1071, 1072 [2d Dept 2019]), encouraged the child to drop out of school and work on the family farm at the age of 15 (see *Matter of Gurwinder S.*, 155 AD3d 959, 961 [2d Dept 2017]; *Matter of Palwinder K. v Kuldeep K.*, 148 AD3d 1149, 1151 [2d Dept 2017]), failed to protect the child from gang violence in Guatemala (see *Eddy A.P.C.*, 226 AD3d at 1007; *Victor R.C.O.*, 172 AD3d at 1072; *Matter of Nelson A. G.-L. [Maria Y.G.S.]*, 157 AD3d 789, 791 [2d Dept 2018]), and failed to provide financial support for the child following his arrival in the United States (see *Sara D.*, 206 AD3d at 553-554). Further, the foregoing facts support a finding that it would not be in the best interests of the child to

return to Guatemala, his previous country of nationality and country of last habitual residence (see *Eddy A.P.C.*, 226 AD3d at 1007; *Briceyda M.A.X.*, 190 AD3d at 754; *Victor R.C.O.*, 172 AD3d at 1072).

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

648/24

CA 23-01878

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

IN THE MATTER OF SENECA MEADOWS, INC.,
PETITIONER-PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF SENECA FALLS, TOWN OF SENECA FALLS
TOWN BOARD, RESPONDENTS-DEFENDANTS,
DIXIE C. LEMMON AND CONCERNED CITIZENS OF
SENECA COUNTY, INC.,
RESPONDENTS-DEFENDANTS-APPELLANTS.

LAW OFFICE OF DOUGLAS H. ZAMELIS, COOPERSTOWN (DOUGLAS H. ZAMELIS OF
COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (ERIC M. FERRANTE OF COUNSEL), FOR
PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Seneca County (Daniel J. Doyle, J.), dated June 8, 2023, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The order and judgment granted the motion of petitioner-plaintiff for partial summary judgment on its first cause of action and declared Town of Seneca Falls Local Law No. 3 of 2016 invalid. The order and judgment was reversed by order of this Court entered December 20, 2024 in a memorandum decision (233 AD3d 1430), and the Court of Appeals on December 16, 2025 reversed the order of this Court and remitted the case to this Court (- NY3d -, 2025 NY Slip Op 06961 [2025]).

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

Memorandum: Petitioner-plaintiff, Seneca Meadows, Inc. (SMI), owns and operates the only solid waste management facility, i.e., landfill, situated within respondent-defendant Town of Seneca Falls (Town). Respondent-defendant Town of Seneca Falls Town Board (Board), in response to the concerns expressed by certain residents about SMI's landfill, began considering whether to pass a local law to close the facility upon the expiration of SMI's existing permits. At a public hearing in late November 2016, the Town Attorney advised the Board that, before passing the law, it was "required to take a hard look at the action and determine its environmental significance" under the State Environmental Quality Review Act (SEQRA), but that such a SEQRA

review was not before the Board that evening and would be conducted at a later date. A member of the Board who had introduced the proposed local law then submitted for consideration two documents drafted by her attorney: a short SEQRA Environmental Assessment Form (EAF) and a negative declaration to be issued by the Board that the proposed local law would not have a significant adverse environmental impact. The other Board members had not seen those documents prior to the hearing, but the Board nonetheless voted to adopt both documents at the same hearing. One week later, the Board enacted the Town of Seneca Falls Local Law No. 3 of 2016, which would have prohibited the continued operation of solid waste disposal facilities in the Town beyond December 31, 2025, i.e., upon expiration of SMI's current permits.

SMI commenced the instant hybrid proceeding and action asserting various causes of action, including the first cause of action, for failure of the Board to comply with the requirements of SEQRA. SMI subsequently moved for partial summary judgment on its first cause of action. Respondents-defendants Dixie C. Lemmon and Concerned Citizens of Seneca County, Inc. (collectively, respondents) opposed the motion, contending, inter alia, that SMI lacked standing to assert a cause of action under SEQRA. Supreme Court, after concluding that SMI had standing to challenge the Board's compliance with SEQRA, determined that the Board failed to identify the relevant areas of environmental concern, failed to take a hard look at them, and failed to provide a reasoned elaboration of the basis for its determination. The court thus granted SMI's motion and declared the local law invalid.

When the appeal was previously before us, a three-judge majority concluded that SMI lacked standing to challenge the Board's compliance with SEQRA because SMI "failed to establish, or even allege, that it had suffered or would suffer an environmental injury" (*Matter of Seneca Meadows, Inc. v Town of Seneca Falls*, 233 AD3d 1430, 1431 [4th Dept 2024], revd – NY3d –, 2025 NY Slip Op 06961 [2025]). The majority therefore reversed the order and judgment, denied SMI's motion for partial summary judgment, and vacated the declaration (*id.* at 1430). The two-judge dissent would have affirmed the order and judgment because, under applicable Court of Appeals precedent (see *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668 [1996] [*Gernatt*]; *Matter of Har Enters. v Town of Brookhaven*, 74 NY2d 524 [1989] [*Har*]), SMI had standing to assert a SEQRA claim by virtue of its status as owner of the property subject to the proposed governmental action without the need to allege an environmental injury, and because the court properly determined that the Board failed to comply with SEQRA (*Seneca Meadows, Inc.*, 233 AD3d at 1432-1438 [Smith, J.P., & Bannister, J., dissenting]).

The Court of Appeals unanimously reversed our majority decision and endorsed the position that had been taken by the dissent with respect to standing (*Seneca Meadows, Inc.*, – NY3d at –, 2025 NY Slip Op 06961, *1-2). Specifically, the Court of Appeals held that, "in accordance with . . . clearly established precedent, . . . SMI has standing as an affected property owner to challenge the Board's compliance with SEQRA" (*id.* at –, 2025 NY Slip Op 06961, *1). The Court of Appeals noted that its case law had "established that 'no

such specific allegation [of environmental harm] is necessary' when the petitioner's property is 'the very subject' of the government's action" (*id.* at —, 2025 NY Slip Op 06961, *2, quoting *Har*, 74 NY2d at 526). Applying its precedent, the Court of Appeals concluded that "SMI 'has a legally cognizable interest in being assured that the [T]own satisfied SEQRA before taking action to' prohibit the operation of SMI's waste facility" (*id.* at —, 2025 NY Slip Op 06961, *2). The Court of Appeals remitted the matter to us to consider the merits of SMI's SEQRA claim (*id.* at —, 2025 NY Slip Op 06961, *1).

Upon remittal, we now affirm the order and judgment on the ground that the court properly determined that the Board failed to comply with its substantive obligations under SEQRA.

SEQRA "is a legislative attempt to ensure that state and local agencies consider the environmental impact of their proposed actions" (*Matter of Spitzer v Farrell*, 100 NY2d 186, 190 [2003]). "By requiring strict adherence to review procedures, the act forces agencies to 'strike a balance between social and economic goals and concerns about the environment' " (*id.*, quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 414 [1986]). "All 'actions' subject to SEQRA (i.e., Type I and unlisted actions) initially require the preparation of an EAF, whose purpose is to aid an agency 'in determining the environmental significance or nonsignificance of actions' " (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 519 [2004] [*Watervliet*], quoting 6 NYCRR 617.2 [m]). "[A]n agency is required to prepare an environmental impact statement (EIS) if it determines that a proposed action 'may have a significant effect on the environment' " (*Spitzer*, 100 NY2d at 190, quoting ECL 8-0109 [2]). "Conversely, an EIS will not be required and the agency may issue a negative declaration where it concludes 'that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant' " (*Watervliet*, 3 NY3d at 520, quoting 6 NYCRR 617.7 [a] [2]; see *Spitzer*, 100 NY2d at 190). "In making its initial determination, the agency will study many of the same concerns that must be assessed in an EIS, including both long- and short-term environmental effects" (*Spitzer*, 100 NY2d at 190). "Although the threshold triggering an EIS is relatively low, a 'negative declaration is properly issued when the agenc[y] ha[s] made a thorough investigation of the problems involved and reasonably exercised [its] discretion' " (*id.*, quoting *Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 364 [1986]; see *Matter of Chinese Staff & Workers' Assn. v Burden*, 19 NY3d 922, 923-924 [2012]).

"Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion' " (*Akpan v Koch*, 75 NY2d 561, 570 [1990], quoting CPLR 7803 [3]). "In assessing an agency's compliance with the substantive mandates of the statute, the courts must review the record to determine whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned

elaboration of the basis for its determination" (*id.* [internal quotation marks omitted]). "An agency's compliance with its substantive SEQRA obligations is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals" (*id.*). Similarly, an agency has "considerable latitude evaluating environmental effects and choosing between alternative measures" (*id.*). "While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives' " (*id.*). "Nevertheless, an agency, acting as a rational decision maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on a particular environmental concern" (*id.* at 571). "Thus, while a court is not free to substitute its judgment for that of the agency on substantive matters, the court must ensure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors" (*id.*).

Here, we conclude that the court properly determined that the Board issued the negative declaration in violation of its substantive obligations under SEQRA inasmuch as the Board failed to "identif[y] the relevant areas of environmental concern, [failed to take] a 'hard look' at them, and [failed to provide] a 'reasoned elaboration' of the basis for its determination" (*Jackson*, 67 NY2d at 417; see *Matter of Kahn v Pasnik*, 90 NY2d 569, 574 [1997]; *Matter of Frank J. Ludovico Sculpture Trail Corp. v Town of Seneca Falls*, 173 AD3d 1718, 1718-1720 [4th Dept 2019] [*Ludovico Sculpture Trail*]; *Matter of Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*, 24 AD3d 1312, 1313-1314 [4th Dept 2005], *lv dismissed* 7 NY3d 803 [2006]).

Respondents contend that the Board was not obligated to identify and consider that closure of the landfill could result in negative environmental impacts given that the extensive amount of waste disposed of at SMI's facility would need to be rerouted to other locations, thereby increasing greenhouse gas emissions generated by hauling vehicles, because SMI never raised that concern and such a potential environmental consequence was speculative in any event. We agree with SMI that respondents' contention is both legally and factually flawed. Under SEQRA, it was the obligation of the Board—not SMI—to "identif[y] the relevant areas of environmental concern" (*Jackson*, 67 NY2d at 417; see e.g. *Matter of Town of Waterford v New York State Dept. of Env'tl. Conservation*, 187 AD3d 1437, 1442 [3d Dept 2020]; *Ludovico Sculpture Trail*, 173 AD3d at 1718; *Matter of Modern Landfill v Jorling*, 161 AD2d 1112, 1114 [4th Dept 1990], *lv denied* 76 NY2d 715 [1990]). In any event, as SMI correctly notes, its air quality expert specifically warned during the late November 2016 hearing that closure of the landfill "could likely result in an increase in greenhouse gas emissions, as waste may have to be transported a greater distance."

It is true, as respondents point out, that "[a]n agency complying with SEQRA need not investigate every conceivable environmental

problem; it may, within reasonable limits, use its discretion in selecting which ones are relevant" (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 307 [2009]). Nonetheless, "in making determinations of significance, the reviewing agenc[y] must look at impacts which may be reasonably expected to result from the proposed action and compare them against an illustrative list of criteria" that are considered indicators of significant adverse impacts on the environment (*Matter of Farrington Close Condominium Bd. of Mgrs. v Incorporated Vil. of Southampton*, 205 AD2d 623, 625 [2d Dept 1994]; see 6 NYCRR 617.7 [c] [1]). Here, as the court appropriately noted in determining that the Board had erred in simply assuming that closure of the landfill would have no environmental impacts, the transportation of waste to other locations and the concomitant increase in greenhouse gas emissions by hauling vehicles constituted a nonspeculative impact that could be reasonably expected to result from the proposed closure of the landfill, particularly considering the size of SMI's operation (see *Spitzer*, 100 NY2d at 189-191; *Waterford*, 187 AD3d at 1443).

Contrary to respondents' further suggestion, the court expressly declined to reason that the Board's SEQRA review was conducted too quickly to be valid (*cf. Gernatt*, 87 NY2d at 689-690); instead, the court properly determined that the Board "did not take a hard look at the relevant areas of environmental concern before issuing the negative declaration" (*Kahn*, 90 NY2d at 574). Specifically, as the court concluded, the record establishes that the Board members, other than the Board member who submitted the EAF and the negative declaration, had not seen the EAF or the negative declaration prepared by that Board member's attorney prior to the circulation of copies thereof near the end of the late November 2016 hearing. Although the Board member who submitted the EAF and negative declaration read aloud from those documents at the Board meeting, the Board engaged in no discussion of the contents of those documents before voting to adopt them, and there is no indication whatsoever that the Board fulfilled its obligation to "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment" (6 NYCRR 617.7 [b] [3]). Thus, notwithstanding respondents' attempt to divert attention to the longer time period over which the Board had considered whether to adopt the local law itself, the record establishes that, with respect to its substantive obligations under SEQRA to consider the *environmental significance* of that law, the "mere ' cursory examination' such as that performed [by the Board] here[] is insufficient" to demonstrate that it took the requisite hard look at the relevant areas of environmental concern (*Pyramid Co. of Watertown*, 24 AD3d at 1315; *cf. Gernatt*, 87 NY2d at 688-689).

Furthermore, contrary to respondents' contention, we conclude that the court properly determined that the Board "failed to make a reasoned elaboration of the basis for its determination" (*Ludovico Sculpture Trail*, 173 AD3d at 1719; see *Tupper v City of Syracuse*, 71 AD3d 1460, 1462 [4th Dept 2010]; *Matter of Tonery v Planning Bd. of Town of Hamlin*, 256 AD2d 1097, 1098 [4th Dept 1998]).

In light of our determination that the court properly granted SMI's motion and declared the local law invalid on the ground that the Board failed to comply with its substantive obligations under SEQRA, we need not address the alternative ground for affirmance advanced by SMI that the Board committed procedural violations of SEQRA.

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

835

CA 24-01839

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

DANIEL LOPEZ, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MILLARD FILLMORE SUBURBAN HOSPITAL,
ET AL., DEFENDANTS,
TIMOTHY M. ADAMS, M.D., AND DELAWARE SURGICAL ASSOCIATES,
DEFENDANTS-APPELLANTS.

RICOTTA, MATTREY, CALLOCCHIA, MARKEL & CASSERT, BUFFALO (COLLEEN K.
MATTREY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LOTEMPPIO P.C. LAW GROUP, BUFFALO (JAMES J. CASSAR OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (J. David Sampson, A.J.), entered August 23, 2024. The order denied the motion of defendants Timothy M. Adams, M.D., and Delaware Surgical Associates for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries he allegedly sustained in his lower left leg after undergoing gastrointestinal surgery performed by Timothy M. Adams, M.D. (defendant). According to plaintiff's complaint, bill of particulars, and supplemental bill of particulars, defendant and Delaware Surgical Associates (collectively, defendants) failed "to properly monitor the [p]laintiff during the surgical procedure" and failed "to properly reposition the [p]laintiff during the surgery[and] take precautions or actions to maintain circulation," and as a result plaintiff sustained compartment syndrome of his left leg. Defendants moved for summary judgment dismissing the complaint against them. Supreme Court denied the motion, and defendants appeal. We affirm.

"[A] defendant moving for summary judgment in a medical malpractice action has the [initial] burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; see *Campbell v Bell-Thomson*, 189 AD3d 2149, 2150 [4th Dept 2020]).

" "[T]he burden shifts to the plaintiff to demonstrate the existence

of a triable issue of fact only after the defendant . . . meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden' " (*Bubar*, 177 AD3d at 1359).

We agree with defendants that they met their initial burden with respect to establishing the absence of any deviation from the accepted standard of care regarding defendant's performance of the surgery. In support of the motion, defendants submitted an expert's affidavit, which was "detailed, specific and factual in nature and addresse[d] plaintiff's specific . . . claim[s] of negligence" (*Carroll v Niagara Falls Mem. Med. Ctr.*, 218 AD3d 1373, 1374 [4th Dept 2023] [internal quotation marks omitted]; see *Campbell*, 189 AD3d at 2150).

Thus, the burden shifted to plaintiff to demonstrate the existence of a triable issue of fact with respect to the element of defendant's alleged deviation from the appropriate standard of care, "on which . . . defendant met the prima facie burden" (*Carroll*, 218 AD3d at 1374 [internal quotation marks omitted]; see *Bubar*, 177 AD3d at 1359). In opposition to the motion, plaintiff submitted the affidavit of an expert, who opined that defendant departed from the appropriate standard of care in the manner that defendant initially positioned and repositioned plaintiff prior to surgery. Plaintiff's expert concluded that defendant did not properly position plaintiff's left leg at the outset of the surgery, that he did not monitor the circulation of the left leg by palpation during the surgery and, that because of the length of the surgery, compartment syndrome resulted. Thus, plaintiff raised a triable issue of fact through the affidavit of his expert, which "squarely oppose[d]" the affidavit of defendants' expert, resulting in "a classic battle of the experts that [was] properly left to a jury for resolution" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]).

We reject defendants' contention that plaintiff improperly raised a new theory of liability for the first time in opposition to defendants' motion for summary judgment. The theory of liability asserted by plaintiff against defendants in the pleadings and in opposition to the motion remained predicated at all times on allegations of undue pressure on plaintiff's left leg due to improper positioning in conjunction with the gastrointestinal surgery performed by defendant. Thus, the underlying theory of liability against defendants remained unchanged (see *Hart v City of Buffalo*, 218 AD3d 1140, 1149 [4th Dept 2023]; *Jeannette S. v Williot*, 179 AD3d 1479, 1481 [4th Dept 2020]). The duty to position plaintiff's leg properly to avoid damage was not outside the scope of plaintiff's pleadings, regardless of whether the offending positioning occurred just before the start of the surgery or during the surgery, when it became apparent that plaintiff's left lower limb was experiencing significant issues with its blood flow. Thus, the assertions of defendant's deviation from the standard of care made by plaintiff's expert with respect to the pre-surgical time frame are discernible from the pleadings and cannot be said to take defendants by surprise (see *Valenti v Camins*, 95 AD3d 519, 522 [1st Dept 2012]; see generally

Alvord & Swift v Muller Constr. Co., 46 NY2d 276, 280-281 [1978]).

All concur except CURRAN, J., who concurs in the result in the following memorandum: Although I fully agree with the majority's determination to affirm the order denying the motion of Timothy M. Adams, M.D. and Delaware Surgical Associates (defendants) for summary judgment, I write separately to highlight two additional points. First, I want to emphasize why plaintiff did not assert a new theory of liability in opposition to defendants' motion for summary judgment. As we recently explained in *Hart v City of Buffalo* (218 AD3d 1140, 1149 [4th Dept 2023]), an "underlying theory of liability" is grounded in the duty allegedly breached by a defendant (*id.*; see *Jeannette S. v Williot*, 179 AD3d 1479, 1481 [4th Dept 2020]). In *Hart*, the duty allegedly breached was a municipality's "duty to maintain the subject premises in a reasonably safe condition" (218 AD3d at 1149). Thus, the theory of liability based on an alleged breach of that duty remained the same even after one of the defendants moved for summary judgment premised on the absence of prior written notice and the plaintiff opposed that motion by asserting exceptions to the written notice requirement. Similarly, in *Jeannette S.*, the "theory of liability" was that a certain defendant was "negligent in failing to properly and timely" treat the subject patient, and that "the change in the precise nature of the harm actually suffered by [the subject patient did] not change the underlying theory of liability" (179 AD3d at 1481). There too, because the plaintiff's theory of liability was always rooted in the duty established by the underlying allegations of negligence and malpractice, the "theory of liability" did not change when, in opposition to the defendant's summary judgment motion, the plaintiff asserted a different form of harm stemming from those allegations. In both of those cases, we rejected arguments that the respective plaintiffs raised new theories of liability under those circumstances, and we determined that the courts erred in granting the defendants' respective motions for summary judgment (see *Hart*, 218 AD3d at 1149; *Jeannette S.*, 179 AD3d at 1481).

The focus on the duty involved, and the alleged breach thereof, as the essential ground for identifying a "theory of liability" is borne out by the requirement that, "[i]n determining whether a new theory of liability has been alleged by a plaintiff in opposition to a defendant's motion for summary judgment, we must initially focus on the allegations in the complaint" (*Braxton v Erie County Med. Ctr. Corp.*, 208 AD3d 1038, 1041 [4th Dept 2022]). Thus, a focus on the cause of action and the underlying facts alleged in the complaint and the duty upon which it is based is the guiding principle in evaluating whether a theory of liability is new or already existent in the case (see generally *Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]).

Through the above analysis, I agree with the majority that, in this case, the underlying theory of liability has at all times been predicated on the alleged breach of the duty by a medical professional—here Timothy M. Adams, M.D. (defendant), a surgeon—to render a medical service to plaintiff with that reasonable degree of knowledge and skill that is expected of an average specialist who

performs an operation in the medical community in which the doctor practices (see PJI 2:150). Thus, when, in opposing defendants' motion, plaintiff relies on an evidentiary theory that defendant failed to properly position him at the time of the surgery, that allegation is not a "new theory of liability" because the duty allegedly breached remains the same and is at all times attributed to the same actor. As a result, the situation in this case may be distinguished from those cases where summary judgment dismissing a cause of action was properly granted inasmuch as, in opposition to a summary judgment motion, the plaintiff relied on the breach of a new and different duty (see e.g. *Hewitt v Palmer Veterinary Clinic, PC*, 35 NY3d 541, 549 [2020]; *Guyett v Kaleida Health*, 229 AD3d 1101, 1103-1104 [4th Dept 2024]; *Walker v Caruana*, 175 AD3d 1807, 1807-1808 [4th Dept 2019]), or the breach of a duty by different actors (see e.g. *DeMartino v Kronhaus*, 158 AD3d 1286, 1287 [4th Dept 2018]). Thus, I, like the majority, reject defendants' contention that plaintiff improperly raised a "new theory of liability" for the first time in opposition to the motion.

Second, in concurring with the majority's determination to affirm the order denying the motion, I highlight that defendants' parsing of the precise words used in the verified bill of particulars and supplemental bill of particulars that plaintiff submitted to defendants, the precise sequence of those words, and defendants' word-for-word comparison of those documents to the bills of particulars that plaintiff furnished to other defendants involved in this case, reveals a misapprehension of the purpose of bills of particulars in negligence actions in general, and more specifically, in medical malpractice actions such as this one. It also is inconsistent with the proper analysis described above for evaluating whether a new theory of liability has been advanced in opposition to summary judgment.

Specifically, in parsing the bills of particulars to such a degree, defendants overlook the clear language of CPLR 3043, which governs bills of particulars in personal injury actions, and which requires only a "[g]eneral statement of the acts or omissions constituting the negligence claimed" (CPLR 3043 [a] [3]). Indeed, it is well settled that a bill of particulars is not a disclosure device (see *Northway Eng'g v Felix Indus.*, 77 NY2d 332, 336 [1991]; *Stern v Golub Corp.*, 207 AD3d 1068, 1069 [4th Dept 2022]), and "[a] bill of particulars may not be used to obtain evidentiary material" (*Nuss v Pettibone Mercury Corp.*, 112 AD2d 744, 744 [4th Dept 1985]; see *Stern*, 207 AD3d at 1069; *Khoury v Chouchani*, 27 AD3d 1071, 1072 [4th Dept 2006]). As a result, a party is not required "to hire an expert to respond to a demand for a bill of particulars" (*Nuss*, 112 AD2d at 745). Thus, a plaintiff need not supply in a bill of particulars "a statement of each and every way the defendants breached their duty of reasonable care" inasmuch as a demand for that information would be "beyond the scope of a bill of particulars . . . [because] to answer [such a demand], plaintiff would have to provide evidentiary material in the form of, or gleaned from, expert testimony" (*Sonnenberg Gardens v Eldredge, Fox & Porretti, LLP*, 52 AD3d 1211, 1212 [4th Dept 2008] [internal quotation marks omitted]; see *Heyward v Ellenville Community*

Hosp., 215 AD2d 967, 968 [3d Dept 1995]).

I further note that CPLR 3043 also applies in the specific context of medical malpractice actions (see generally *Chiple v Stephenson*, 72 AD3d 1548, 1549 [4th Dept 2010]; *Stidham v Clerk*, 57 AD3d 1369, 1369 [4th Dept 2008]; *Garrett v Community Gen. Hosp. of Greater Syracuse*, 288 AD2d 928, 929 [4th Dept 2001]). It is improper in a medical malpractice action for a demand for a bill of particulars to "seek particularization of usual and accepted standards" of what "advice, diagnosis or treatment should have been made or given" because such demands "call for expert testimony and are purely evidentiary" (*McKenzie v St. Elizabeth Hosp.*, 81 AD2d 1003, 1004 [4th Dept 1981]; see *Stidham*, 57 AD3d at 1370; *Khoury*, 27 AD3d at 1072-1073). A plaintiff in a medical malpractice action, "who most often is less likely than the defendant[s] to have knowledge of proper surgical procedures and medical treatment, [should not be held] to a greater burden than plaintiffs in other types of personal injury actions" (*Grcic v Peninsula Hosp. Ctr.*, 110 AD2d 625, 626 [2d Dept 1985]; see *Khoury*, 27 AD3d at 1072; *Garrett*, 288 AD2d at 929; *Randall v Pech*, 51 AD2d 864, 865 [4th Dept 1976]).

With those basic principles in mind, I cannot agree with defendants that plaintiff here was required to describe in his bill of particulars and supplemental bill of particulars every time and manner at and by which defendant allegedly deviated from the standard of care when he allegedly failed to properly position plaintiff or detect improper positioning of plaintiff for the surgery. Rather, I agree with Supreme Court that this action "is and always has been about positioning." To that end, plaintiff's bill of particulars and supplemental bill of particulars refer specifically to defendant's alleged failure to re-position plaintiff during the surgery and that defendant failed to take *precautions* to maintain circulation. Thus, plaintiff fulfilled his obligation under CPLR 3043 (a) (3) with respect to the relevant bill of particulars, and defendants cannot claim to be unfairly surprised by the theory advanced by plaintiff in opposition to the summary judgment motion. That is particularly so in light of the fact that plaintiff clearly made defendants aware that he was alleging that defendant was negligent in the initial positioning for the surgery through the parties' deposition testimonies, and inasmuch as defendants' expert affidavit submitted in support of the motion directly addressed plaintiff's positioning during the surgery.

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

890

CA 25-00150

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

JUSTIN K. ASHLEY, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

UPSTATE EMERGENCY MEDICINE, INC.,
ANTHONY J. KLIMEK, III, M.D., AND
DIANE B. TSCHUDI, P.A., DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

DEFRANCISCO & FALGIATANO, LLP, SYRACUSE, D.J. & J.A. CIRANDO, PLLC
(JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County
(Robert E. Antonacci, II, J.), entered October 28, 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 medical malpractice action
seeking damages for injuries that he allegedly sustained as a result
of negligent treatment provided to him by defendant Diane B. Tschudi,
P.A., and Tschudi's supervising physician, defendant Anthony J.
Klimek, III, M.D. Plaintiff also seeks damages for alleged vicarious
liability on the part of defendant Upstate Emergency Medicine, Inc.
(UEM), which employed Klimek. Plaintiff's complaint, as amplified by
the bill of particulars, alleges that when he presented to the
emergency room at a nonparty hospital with severe upper back pain,
defendants failed to timely and properly diagnose and treat his spinal
abscess, which resulted in his injuries. Defendants moved for summary
judgment dismissing the complaint, and they now appeal from an order
denying their motion. We affirm.

On their motion, defendants had "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 . . . plaintiff's injuries" (*Zielinski v Blessios*,
227 AD3d 1385, 1386 [4th Dept 2024] [internal quotation marks
omitted]). Defendants met that burden through the submission of the
affirmation of an expert physician which was "detailed, specific and
factual in nature and addressed each negligence claim raised in

[plaintiff's] bill of particulars" (*Kristie M. v Mercy Hosp. of Buffalo*, 240 AD3d 1228, 1229 [4th Dept 2025]).

Inasmuch as defendants met their initial burden on the motion by establishing that they did not deviate from the accepted standard of care, the burden shifted to plaintiff to raise a triable issue of fact by submitting an expert's affidavit attesting to a departure from the accepted standard of care (see generally *Kristie M.*, 240 AD3d at 1229; *Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). Plaintiff met that burden with respect to his claims against Tschudi through the submission of expert affidavits from a board-certified emergency room physician licensed to practice medicine in New Jersey opining that Tschudi deviated from the applicable standard of care in her treatment of plaintiff.

Defendants contend that the opinion of plaintiff's expert was insufficient to raise an issue of fact with respect to deviation from the applicable standard of care because the expert was not familiar with the standard of care applicable in New York. We reject that contention inasmuch as the expert stated that he was familiar with the standard of care in New York because the expert had worked in emergency rooms in New York and with physicians from New York and New York has the same emergency room standard of care as in New Jersey and nationally (see *M.C. v Huntington Hosp.*, 175 AD3d 578, 580-581 [2d Dept 2019]; see generally *Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002]; *Sanchez v VanRiper*, 217 AD3d 1358, 1359 [4th Dept 2023]).

We also reject defendants' contention that plaintiff's expert's opinion was conclusory and speculative. Instead, the opinions present "a classic battle of the experts that is properly left to a jury for resolution" (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018] [internal quotation marks omitted]; see *Clark v Rachfal*, 207 AD3d 1173, 1176 [4th Dept 2022], amended on rearg 210 AD3d 1456 [4th Dept 2022]; *Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020]). We therefore conclude that Supreme Court properly denied defendants' motion insofar as it sought to dismiss plaintiff's claims against Tschudi.

We further conclude that Klimek failed to demonstrate as a matter of law that he appropriately supervised Tschudi (see Education Law § 6542 [1]) and was otherwise not "medically responsible" for her alleged malpractice (10 NYCRR 94.2 [f]; see *Kubera v Bartholomew*, 167 AD3d 1477, 1481 [4th Dept 2018]). Thus, we conclude that the court properly denied defendants' motion insofar as it sought to dismiss the claims against Klimek. Moreover, in light of our determination, we also conclude with respect to plaintiff's claims against UEM based on the doctrine of respondeat superior (see *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]), that the court properly denied the motion insofar as it sought to dismiss the claims against

UEM, inasmuch as it is undisputed that Klimek was employed by UEM.

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

928

CA 24-01551

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

CHELSEA PASCUCCI WIECHEC, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BRITTANY MILLER, DEFENDANT-RESPONDENT.

PENBERTHY LAW GROUP, LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JENNIFER S. ADAMS, WILLIAMSVILLE (KEVIN J. GRAFF OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered September 12, 2024, in a personal injury action. The order granted the motion of defendant for summary judgment, denied the cross-motion of plaintiff for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the significant limitation of use category of serious injury within the meaning of Insurance Law § 5102 (d) insofar as it relates to plaintiff's cervical spine and right shoulder and granting that part of the cross-motion for summary judgment on the issue of negligence, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained in a motor vehicle accident. In her bill of particulars, plaintiff alleged, inter alia, that she sustained serious injuries to her cervical spine and right shoulder under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories set forth in Insurance Law § 5102 (d). Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury. Plaintiff cross-moved for summary judgment on the issues of serious injury and negligence. Supreme Court denied plaintiff's cross-motion, granted defendant's motion, and dismissed plaintiff's complaint. Plaintiff now appeals.

We note at the outset that plaintiff contends on appeal that she sustained serious injuries only to her cervical spine and right shoulder, and only under the significant limitation of use and 90/180-day categories of serious injury, and therefore she has

abandoned her other particularized claims of serious injury (see *Koneski v Seppala*, 158 AD3d 1211, 1212 [4th Dept 2018]; *Barron v Northtown World Auto*, 137 AD3d 1708, 1708-1709 [4th Dept 2016]). Furthermore, plaintiff's contention that the affirmed report of defendant's expert physician, submitted in support of the motion, lacked a proper foundation and thus should not have been considered by the court is improperly raised for the first time on appeal and is thus not properly before us (see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]; see *Cohen v Broten*, 197 AD3d 949, 950 [4th Dept 2021]; *Lamar v Anastasi*, 188 AD3d 1637, 1637 [4th Dept 2020]).

With respect to the 90/180-day category of serious injury, we conclude that defendant met her initial burden on her motion. "To qualify as a serious injury under the 90/180-day category, there must be objective evidence of a medically determined injury or impairment of a non-permanent nature . . . as well as evidence that plaintiff's activities were curtailed to a great extent" (*Zeigler v Ramadhan*, 5 AD3d 1080, 1081 [4th Dept 2004] [internal quotation marks omitted]; see *Licari v Elliott*, 57 NY2d 230, 236 [1982]). Here, defendant submitted, inter alia, plaintiff's deposition testimony, which established that plaintiff's daily activities were not significantly curtailed during the relevant time frame. Indeed, plaintiff testified that she did not miss any work due to the accident and that her employment was unaffected by the accident (see *Licari*, 57 NY2d at 233-234; *Kracker v O'Connor*, 158 AD3d 1324, 1325 [4th Dept 2018]; *Ehlers v Byrnes*, 147 AD3d 1465, 1466 [4th Dept 2017]). In response, plaintiff did not raise a triable issue of fact (see *Pastuszynski v Lofaso*, 140 AD3d 1710, 1711 [4th Dept 2016]).

We agree with plaintiff, however, that the court erred in granting the motion with respect to the significant limitation of use category insofar as it concerns plaintiff's cervical spine and right shoulder, and we therefore modify the order accordingly. "[W]hether a limitation of use . . . is significant or consequential . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002] [internal quotation marks omitted]; see *Wright v Wilson*, 211 AD3d 1621, 1623 [4th Dept 2022]). Moreover, "[a] significant limitation of use of a body function or member does not require a showing of permanency, and any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well" (*Gates v Longden*, 120 AD3d 980, 981 [4th Dept 2014] [internal quotation marks

omitted]; see generally *Campo v Neary*, 52 AD3d 1194, 1197 [4th Dept 2008]). Here, we conclude that the opinion of defendant's expert, rendered more than two years after the accident, "fails to demonstrate that plaintiff suffered only a mild, minor or slight limitation of use" (*Chaney v Malone*, 5 AD3d 1062, 1063 [4th Dept 2004]; cf. *Koneski*, 158 AD3d at 1213). Additionally, contrary to defendant's assertion, she failed to establish her entitlement to summary judgment as a result of any gap in treatment regarding plaintiff's injuries (see *Cook v Peterson*, 137 AD3d 1594, 1597-1598 [4th Dept 2016]; see generally *Pommells v Perez*, 4 NY3d 566, 574 [2005]).

Contrary to plaintiff's further contention, she failed to meet her initial burden on her cross-motion of establishing that she sustained a serious injury under the significant limitation of use category with respect to her cervical spine and shoulder injuries. Plaintiff submitted no evidence that her range of motion limitations concerning her cervical spine were causally related to the accident (see *Smith v Hamasaki*, 173 AD3d 1816, 1817 [4th Dept 2019]), and her treating physician did not provide any assessment of the significance of her shoulder limitations (see *Habir v Wilczak*, 191 AD3d 1320, 1322 [4th Dept 2021]; cf. *Casinella v Dill*, 5 AD3d 1047, 1048 [4th Dept 2004]).

We agree with plaintiff, however, that she is entitled to summary judgment on the issue of negligence, and we therefore further modify the order accordingly. "It is well settled that a driver who has the right[-]of[-]way is entitled to anticipate that [the drivers of] other vehicles will obey the traffic laws that require them to yield . . . Because [defendant] was entering the roadway from a parking lot, she was required to yield the right-of-way to [plaintiff's] vehicle" (*Rose v Leberth*, 128 AD3d 1492, 1493 [4th Dept 2015] [internal quotation marks omitted]; see Vehicle and Traffic Law § 1143). Here, plaintiff met her initial burden with respect to defendant's negligence by submitting, inter alia, plaintiff's deposition testimony recounting the circumstances of the accident and the corroborating police report, which established as a matter of law that defendant violated Vehicle and Traffic Law § 1143 and breached her duty to operate her vehicle with due care (see *Garza v Taravella*, 74 AD3d 1802, 1804 [4th Dept 2010]; see also *Sheets v Kilbury*, 196 AD3d 1096, 1097-1098 [4th Dept 2021]). In opposition, defendant failed to submit the requisite nonnegligent explanation for the collision (see *Rodriguez v First Student, Inc.*, 163 AD3d 1425, 1427 [4th Dept 2018]).

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

934

CA 24-01866

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

IN THE MATTER OF THE ESTATE OF MERLE S. WATT, SR.,
DECEASED.

SYDNEY RAE WATT, PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

MELINDA PALMER, OBJECTANT-APPELLANT.

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (DANIEL J. BOBBETT OF
COUNSEL), FOR OBJECTANT-APPELLANT.

HURWITZ FINE, P.C., BUFFALO (MELISSA A. PEZZINO OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Cattaraugus County
(Moses M. Howden, S.), entered June 7, 2024, in a probate proceeding.
The order, among other things, granted petitioner's motion for summary
judgment and dismissed the objections filed by the objectants.

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

Memorandum: In this probate proceeding, objectant appeals from
an order that, inter alia, granted petitioner's motion insofar as it
sought summary judgment dismissing her objections to the probate of
decedent's will, and admitted the will to probate. We affirm.

Objectant, decedent's daughter, asserted, inter alia, that
decedent lacked testamentary capacity and that the will was procured
by undue influence. With regard to testamentary capacity, "[i]t is
the indisputable rule in a will contest that '[t]he proponent has the
burden of proving that the testator possessed testamentary capacity
and [Surrogate's Court] must look to the following factors: (1)
whether [the testator] understood the nature and consequences of
executing a will; (2) whether [he] knew the nature and extent of the
property [he] was disposing of; and (3) whether [he] knew those who
would be considered the natural objects of [his] bounty and [his]
relations with them' " (*Matter of Kumstar*, 66 NY2d 691, 692 [1985],
rearg denied 67 NY2d 647 [1986]; see *Matter of Bodkin* [appeal No. 3],
128 AD3d 1526, 1528 [4th Dept 2015]; *Matter of Alibrandi*, 104 AD3d
1175, 1175 [4th Dept 2013]). "Old age and bad health . . . when a
will is executed are 'not necessarily inconsistent with testamentary
capacity . . . as the appropriate inquiry is whether the decedent was
lucid and rational at the time the will was made' " (*Matter of*
Makitra, 101 AD3d 1579, 1580 [4th Dept 2012]; see *Alibrandi*, 104 AD3d

at 1175-1176). Here, as objectant correctly concedes, petitioner met her initial burden on the motion with respect to testamentary capacity. Petitioner submitted, inter alia, the SCPA 1404 hearing testimony of decedent's estate attorney, who drafted the will and witnessed its execution (*see Matter of Burrows*, 203 AD3d 1699, 1700 [4th Dept 2022], *lv denied* 39 NY3d 903 [2022]; *Alibrandi*, 104 AD3d at 1176). The testimony established that decedent appeared to be in good health, that he was sharp mentally, that he clearly stated his intentions, and that he understood the consequences of the different estate plans discussed.

In opposition, objectant failed to raise a triable issue of fact with respect to decedent's testamentary capacity (*see generally Bodkin*, 128 AD3d at 1528). Objectant primarily relied on the affirmation of a licensed psychologist. We conclude, however, that there is nothing in the psychologist's affirmation that establishes that decedent was not rational, lucid, or competent when he executed the will and, instead, we conclude that the psychologist relied upon speculation to conclude that decedent was not capable of fully understanding the implications of the will (*see id.*). Moreover, such "medical opinion evidence assumes a relatively minor importance where, as here, there is direct evidence that . . . decedent possessed the understanding to make a testamentary disposition" (*Burrows*, 203 AD3d at 1701 [internal quotation marks omitted]). Thus, inasmuch as objectant failed to submit evidence to support the allegation that decedent was incompetent when he executed the will, the Surrogate properly granted summary judgment on that issue in petitioner's favor (*see Alibrandi*, 104 AD3d at 1177).

We further conclude that the Surrogate properly granted that part of petitioner's motion for summary judgment dismissing the undue influence objection. "A will contestant seeking to prove undue influence must show the exercise of 'a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the [decedent] to do that which was against [his] free will' " (*Makitra*, 101 AD3d at 1581, quoting *Kumstar*, 66 NY2d at 693). "Undue influence must be proved by evidence of a substantial nature . . . , e.g., by evidence identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred" (*id.* [internal quotation marks omitted]). Here, petitioner met her initial burden on the motion with respect to undue influence by submitting, inter alia, the testimony of decedent's estate attorney, which established that decedent was alone during the drafting of the will and, thus, that petitioner did not directly influence decedent (*see generally Matter of Rodriguez*, 239 AD3d 1270, 1271 [4th Dept 2025]; *Matter of Dubin*, 54 AD3d 945, 946-947 [2d Dept 2008]). In opposition, objectant failed to raise a triable issue of fact in that regard. "Mere speculation and conclusory allegations, without specificity as to precisely where and when the influence was actually exerted, are insufficient to raise an issue of fact" (*Matter of Walker*, 80 AD3d 865, 867 [3d Dept 2011], *lv denied* 16 NY3d 711 [2011]; *see Matter of Capuano*, 93 AD3d 666, 668 [2d Dept 2012]; *Matter of Coniglio*, 242 AD2d 901, 902 [4th Dept 1997]). Here, even assuming, arguendo, that

objectant identified a motive and opportunity for petitioner to exert influence upon decedent, we conclude that "there is no direct evidence that petitioner did anything to actually influence decedent's distribution of [his] assets" (*Walker*, 80 AD3d at 868). Indeed, objectant relied upon speculation and conclusory allegations that petitioner influenced decedent, which is insufficient to raise a triable issue of fact (*see id.* at 867; *Coniglio*, 242 AD2d at 902).

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

952

CA 24-01314

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

JULIE KELLER RIZZO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BOARD OF EDUCATION OF EAST AURORA UNION
FREE SCHOOL DISTRICT, EAST AURORA UNION
FREE SCHOOL DISTRICT AND BRIAN D. RUSS,
DEFENDANTS-RESPONDENTS.

RUPP PFALZGRAF LLC, BUFFALO (MATTHEW D. MILLER OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (HEATHER L. DECHERT OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 11, 2024. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action under the New York State Human Rights Law ([NYSHRL] Executive Law § 290 *et seq.*) asserting causes of action for, inter alia, disability discrimination, failure to reasonably accommodate, and retaliation. Supreme Court granted defendants' motion for summary judgment dismissing the complaint, and plaintiff now appeals. We affirm.

Plaintiff is a middle school teacher employed by defendant East Aurora Union Free School District (District), which closed to in-person instruction in March 2020 in response to the COVID-19 pandemic. In the summer of 2020, the District began preparations to reopen with a hybrid educational model, under which students would be split into groups that would rotate in-person attendance, while teachers and aides would be present in person five days a week to provide instruction and supervision. Plaintiff, who has a genetic immune deficiency, requested an accommodation allowing her to work remotely and teach from her home to avoid exposure to groups of people and shared facilities. Defendants responded to plaintiff's accommodation request with an interactive inquiry into potential accommodations, ultimately concluding that in-person attendance was an essential function of plaintiff's employment as a middle school teacher and offering an unpaid, job-protected leave of absence. Plaintiff did not

return to in-person work until the fall of 2021.

To establish a prima facie case of discrimination under the NYSHRL, a plaintiff must establish, inter alia, that they were "otherwise qualified to perform the essential functions of the position, with or without a reasonable accommodation" (*Simeone v County of Suffolk*, 36 AD3d 890, 890 [2d Dept 2007]; see Executive Law § 292 [21]; *Fama v American Intl. Group*, 306 AD2d 310, 312 [2d Dept 2003], lv denied 1 NY3d 508 [2004]). Where "an employee has a physical impairment that prevents the employee from performing the core duties of [their] job even with a reasonable accommodation, the employee does not have a disability covered by the statute, and consequently, the employer is free to take adverse employment action against the employee based on that impairment" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834 [2014]; see § 292 [21]). Here, defendants met their initial burden on the motion by establishing that they engaged in "a good faith interactive process that assesse[d] the needs of [plaintiff as a] disabled individual and the reasonableness of the accommodation requested" (*Martin v United Parcel Serv. of Am., Inc.*, 104 AD3d 1173, 1174 [4th Dept 2013] [internal quotation marks omitted]), and that, because an essential function of plaintiff's employment was supervising middle school children present in the school, her requested accommodation, i.e., that she be allowed to teach from home, was unreasonable (see *Nordenstam v State Univ. of N.Y. Coll. of Env'tl. Science & Forestry*, 184 AD3d 1157, 1158 [4th Dept 2020]; see generally *Pimentel v Citibank, N.A.*, 29 AD3d 141, 146, 151 [1st Dept 2006], lv denied 7 NY3d 707 [2006]). In opposition, plaintiff failed to raise a triable issue of fact with respect thereto (see *Nordenstam*, 184 AD3d at 1158; *McCarthy v St. Francis Hosp.*, 41 AD3d 794, 794 [2d Dept 2007], lv denied 9 NY3d 813 [2007]; *Pimentel*, 29 AD3d at 149).

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

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

970

KA 22-00848

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EDWARD ROBINSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered November 6, 2020. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, those parts of the omnibus motion seeking to suppress physical evidence and statements are granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that County Court erred in refusing to suppress physical evidence as well as statements he made subsequent to his arrest because the officers lacked the requisite objective, credible reason to approach his parked vehicle to request information (*see People v De Bour*, 40 NY2d 210, 223 [1976]; *see also People v Hollman*, 79 NY2d 181, 184-185 [1992]). We agree.

The testimony at the suppression hearing established that, at approximately 9:45 p.m. on July 27, 2018, two Syracuse Police Department (SPD) officers were patrolling around an apartment complex that was in what one officer described as a "high crime area . . . between two gang territories." At that time, there was a "trespass affidavit" on file with the SPD, i.e., in this instance, a statement signed under the penalty of perjury by a partially identified property manager that requested that any person "found on or in the property . . . who is not a tenant, guest of a tenant, or on the property with legitimate business, be arrested and prosecuted for trespass." The

officers approached defendant, approximately 30 seconds after they entered the parking lot, and observed him sitting alone in an idling car, ostensibly for the purpose of determining whether defendant was trespassing. While defendant provided one officer his identification establishing that he was a resident of the apartment complex, the other officer observed a bag with a beige substance that the officer believed to be cocaine in the pocket of the driver's door. The officers directed defendant to exit the vehicle, and during the ensuing search of defendant's person the police officers found a loaded handgun in his pocket and a bag of cocaine in his underwear.

"In evaluating police conduct, a court 'must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter' " (*People v Savage*, 137 AD3d 1637, 1638 [4th Dept 2016]; see *De Bour*, 40 NY2d at 222-223). "The approach of [an] occupant[] of a stopped or parked vehicle to request information is analyzed under the first [level] of the *De Bour* hierarchy . . . and need only be justified by an 'articulable basis,' meaning an 'objective, credible reason not necessarily indicative of criminality' " (*People v Grady*, 272 AD2d 952, 952 [4th Dept 2000], lv denied 95 NY2d 905 [2000], quoting *People v Ocasio*, 85 NY2d 982, 985 [1995]; see *Hollman*, 79 NY2d at 184-185; *People v Dixon*, 203 AD3d 1726, 1727 [4th Dept 2022], lv denied 38 NY3d 1032 [2022]). Although the first level "sets a low bar for an initial encounter" (*People v Barksdale*, 26 NY3d 139, 143 [2015]), the Court of Appeals has nevertheless observed that, "[i]n determining the legality of an encounter under *De Bour* and *Hollman*, it has been crucial whether a nexus to [defendant's] conduct existed, that is, whether the police were aware of or observed conduct which provided a particularized reason to request information" (*People v McIntosh*, 96 NY2d 521, 526-527 [2001]; see *Savage*, 137 AD3d 1638).

To that end, "[t]he fact that an encounter occurred in a high crime vicinity, without more, has not passed *De Bour* and *Hollman* scrutiny" (*McIntosh*, 96 NY2d at 527; see *Savage*, 137 AD3d at 1638). Thus, the officer's testimony that the apartment complex was in a high-crime area did not justify approaching defendant. The trespass affidavit failed to afford the officers any more particularized reason for approaching defendant. Therein, although the property manager for the apartment complex stated generally that there "was reason to believe that persons are congregating on the . . . property . . . [who] do not reside at said property," there was no allegation in the trespass affidavit that the property was, for example, "plagued by illegal drug trade" or gang violence (*People v Roque*, 99 NY2d 50, 52 [2002]; see generally *Barksdale*, 26 NY3d at 142 n 2). Indeed, the property manager did not specify any prior or ongoing incidents of criminal activity on the premises, but instead expressed a general belief that persons might be "congregating on the property," which is a multi-building residential apartment complex, "without [the property manager's] permission." The property manager nonetheless also acknowledged in the trespass affidavit that non-residents were often permissibly on the property, such as guests of tenants. Thus, defendant was not "parked at an establishment around which criminal

activity was known to occur" (*Dixon*, 203 AD3d at 1728). Further, the officers observed defendant momentary idling in a vehicle in a publicly accessible parking lot on a summer evening outside a residential apartment complex (see *Savage*, 137 AD3d at 1639), not "in a private space restricted by signage and a lock" (*Barksdale*, 26 NY3d at 143). Thus, nothing in the officers' observation of defendant's conduct, even considered in light of the assertions in the trespass affidavit, "provided a *particularized* reason to request information" (*McIntosh*, 96 NY2d at 527 [emphasis added]). Instead, one of the approaching officers agreed at the suppression hearing that he believed that the trespass affidavit provided "blanket authority to approach anyone that is at [the apartment complex]." Under the facts of this case, a determination that the trespass affidavit permitted the officers' request for information from defendant would improperly negate the necessity that law enforcement officers comply with the minimal requirement of having an "objective, credible reason, not necessarily indicative of criminality" to justify a level one encounter (*Hollman*, 79 NY2d at 184; see *De Bour*, 40 NY2d at 223; *Savage*, 137 AD3d at 1639). We therefore conclude that the court should have granted those parts of defendant's omnibus motion seeking to suppress physical evidence and his oral statements to the officers.

In light of our determination, defendant's remaining contentions are academic. Further, inasmuch as our determination results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed (see *Savage*, 137 AD3d at 1640; *People v Hightower*, 136 AD3d 1396, 1397 [4th Dept 2016]). We therefore remit the matter to County Court for proceedings pursuant to CPL 470.45.

All concur except LINDLEY and DELCONTE, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. In our view, the request for information from defendant by the police officers in this case was lawful based on the holding in *People v Barksdale* (26 NY3d 139 [2015]). We would therefore affirm the judgment and uphold the denial of defendant's omnibus motion insofar as it sought suppression of contraband, including a loaded firearm recovered from his person, and incriminating statements he made to the police following his arrest.

In *Barksdale*, the arresting officers observed the defendant standing in the lobby of an apartment building in Manhattan that participated in the trespass affidavit program (TAP) (see *id.* at 141-142). By participating in TAP, the building's management authorized the police to patrol the premises and arrest trespassers. When observed by the officers, the defendant was not engaged in any suspicious activity; he was just standing in the lobby. The officers approached the defendant and asked what he was doing in the building. Although the defendant said that he was visiting a friend, he could not provide the officers with the name of his friend. The officers then placed the defendant under arrest for trespassing, leading to the discovery of a weapon in his possession.

In seeking to suppress the weapon, the defendant in *Barksdale*

contended that the police had no legal basis to approach him to request information, but Supreme Court concluded otherwise, as did the First Department (see *People v Barksdale*, 110 AD3d 498 [1st Dept 2013]), which determined that the officers had an objective credible reason to ask defendant whether he lived in the building (see *id.* at 498-499). The Court of Appeals affirmed, noting that the police patrol at issue "was intended in part to combat trespassing, that is, 'knowingly enter[ing] or remain[ing] unlawfully in or upon premises' (Penal Law § 140.05), that the building at issue was enrolled in the TAP for the purpose of addressing that problem, and that this branch of the TAP is rooted in tenant protection throughout Manhattan" (*Barksdale*, 26 NY3d at 144). Under those circumstances, the Court concluded, "a police officer could have identified a trespasser only by requesting information" (*id.*).

Here, the manager of the apartment complex in question signed a trespass affidavit stating, among other things, that people who did not reside in the complex had been congregating on the property, and the arresting officers testified at the suppression hearing that the property was "a high-crime area . . . between two gang territories." Under the circumstances, we conclude that, pursuant to *Barksdale*, the officers were justified in approaching defendant in the parking lot to ascertain whether he resided at the apartment complex or whether he was trespassing. Stated otherwise, the officers had "an objective, credible reason, not necessarily indicative of criminality," to approach defendant and request information (*People v Hollman*, 79 NY2d 181, 184 [1992]), a level one intrusion under *People v De Bour* (40 NY2d 210, 223 [1976]). The approach was not based on "mere whim, caprice or idle curiosity" (*id.* at 217).

Although it is true, as the majority points out, that defendant, unlike his counterpart in *Barksdale*, was not in an enclosed area protected by a lock, that does not make it any less likely that he was trespassing. Indeed, because the defendant in *Barksdale* was in the lobby of a locked apartment building with no signs of a forced entry, the officers in that case had less reason to suspect trespassing than the officers in our case. Moreover, here, there was evidence that the apartment building subject to the trespass affidavit was in a high-crime area. While the fact that the encounter occurred in a high-crime area does not alone justify a level one police intrusion (see *People v McIntosh*, 96 NY2d 521, 526-527 [2001]), it is clearly a relevant factor. Here, as in *People v Dixon* (203 AD3d 1726, 1728 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022]), where we relied on *Barksdale* to determine that the police lawfully requested information from a defendant who was sitting in a vehicle in a parking lot outside a cocktail lounge in a high-crime area, defendant's presence in a high-crime area, coupled with the trespass affidavit, justified the officers' request for information (see also *People v Anderson*, 306 AD2d 54, 54 [1st Dept 2003], *lv denied* 100 NY2d 578 [2003]; *People v Crawford*, 279 AD2d 267, 267 [1st Dept 2001], *lv denied* 96 NY2d 799 [2001]; *People v Tinort*, 272 AD2d 206, 206-207 [1st Dept 2000], *lv denied* 95 NY2d 872 [2000]; *People v Greene*, 271 AD2d 235, 236 [1st Dept 2000], *lv denied* 95 NY2d 853 [2000]). While we question whether

the Court of Appeals today would reaffirm the holding in *Barksdale*, which conditions a suspect's right to be left alone by the police upon the existence of a trespass affidavit signed by a third party, we are constrained to follow it.

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

973

KA 23-01803

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARRYL M. OVERSTREET, DEFENDANT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered September 7, 2023. The judgment convicted defendant upon his plea of guilty of use of a child in a sexual performance (two counts) and disseminating indecent material to minors in the first degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence, 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 a plea of guilty of three counts of disseminating indecent material to minors in the first degree as a sexually motivated felony (Penal Law §§ 130.91, former 235.22) and two counts of use of a child in a sexual performance (§ 263.05), arising from multiple incidents involving separate victims. Defendant was sentenced to an indeterminate term of 2½ to 7 years of imprisonment for each count of disseminating indecent material to minors in the first degree as a sexually motivated felony as well as an indeterminate term of 5 to 15 years of imprisonment for each count of use of a child in a sexual performance. County Court directed that the sentences on all five counts run consecutively to each other.

Defendant failed to preserve his contention that the court abused its discretion in imposing an enhanced sentence based on his violations of the presentencing release conditions (*see People v Bishop*, 198 AD3d 1381, 1381 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]; *see generally People v Tonge*, 93 NY2d 838, 839-840 [1999]), and we decline to reach that contention as a matter of discretion in the interest of justice (*see CPL 470.15* [3] [c]).

Contrary to defendant's contention concerning the denial of his

request for youthful offender status, after applying the nine *Cruickshank* factors (*People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]; see *People v Z.H.*, 192 AD3d 55, 58-61 [4th Dept 2020]; *People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we conclude that the court did not abuse its discretion in refusing to grant defendant youthful offender status (see *People v Spencer*, 197 AD3d 1004, 1004-1005 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021]; see generally *People v Macon*, 169 AD3d 1439, 1440 [4th Dept 2019], *lv denied* 33 NY3d 978 [2019]), and we decline to exercise our discretion in the interest of justice to adjudicate defendant a youthful offender (see *Spencer*, 197 AD3d at 1005; see generally *People v Rice*, 175 AD3d 1826, 1826 [4th Dept 2019], *lv denied* 34 NY3d 1132 [2020]).

We conclude, however, that the sentence promise with respect to the three counts of disseminating indecent material to minors in the first degree was premised on an illegal indeterminate term of incarceration without any period of postrelease supervision and that the sentence ultimately imposed upon those counts is likewise illegal. Specifically, the counts of disseminating indecent material to minors in the first degree to which defendant pleaded guilty were each charged, and pleaded to, as a sexually motivated felony (Penal Law §§ 130.91, former 235.22). Penal Law § 60.13 provides that the sentence on a conviction for a sexually motivated felony must comply with "the provisions of section 70.80," which in turn requires that, excluding certain exceptions not present here, the sentence for a felony sex offense must be for a determinate term (see § 70.80 [4] [a]) and must include a period of postrelease supervision (see § 70.80 [3], [9]; see also § 70.45 [2-a] [a]). Defendant's failure to raise this issue "is of no moment, inasmuch as we cannot permit an illegal sentence to stand" (*People v Grace*, 145 AD3d 1462, 1463 [4th Dept 2016] [internal quotation marks omitted]; see *People v Terry*, 90 AD3d 1571, 1572 [4th Dept 2011]). Although defendant has not requested that we vacate those parts of the judgment convicting him of the two counts of use of a child in a sexual performance (*cf. People v Ciccarelli*, 32 AD3d 1175, 1176 [4th Dept 2006]) and the record before this Court does not establish that defendant's pleas of guilty on those counts were induced by the promise of illegal sentencing on the three counts of disseminating indecent material to minors in the first degree (*cf. People v Horton*, 207 AD3d 1230, 1232 [4th Dept 2022]), we conclude that, inasmuch as it is possible that "defendant's guilty pleas [to all counts] were . . . induced by the promise of illegal . . . sentencing, we must . . . afford defendant the opportunity to either withdraw his guilty plea[s on all counts] or be resentenced in compliance with [the law]" (*id.*). We therefore modify the judgment by vacating the sentence and we remit the matter to County Court to afford defendant the opportunity either to be resentenced to a legal term of incarceration and, as applicable, periods of postrelease supervision, or to withdraw his guilty plea.

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

975

KA 24-01063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY J. DIBBLE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, EASTON THOMPSON KASPEREK SHIFFRIN LLP (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered May 8, 2024. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, criminal possession of stolen property in the second degree, grand larceny in the second degree, unlawful fleeing a police officer in a motor vehicle in the second degree and unauthorized use of a vehicle 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, following a jury trial, of assault in the first degree (Penal Law § 120.10 [4]), criminal possession of stolen property in the second degree (§ 165.52), and grand larceny in the second degree (§ 155.40 [1]), among other offenses. We affirm.

We conclude that, contrary to defendant's contention, the evidence is legally sufficient to establish that the value of the truck, hitch, and trailer he stole exceeded the statutory minimum of \$50,000 (see Penal Law §§ 155.40 [1]; 165.52). The value of stolen property is "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime" (§ 155.20 [1]; see *People v Barnes*, 139 AD3d 1371, 1374 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016]), and "a victim must provide a basis of knowledge for [the victim's] statement of value before it can be accepted as legally sufficient evidence of such value" (*People v Lopez*, 79 NY2d 402, 404 [1992]; see *People v Morgan*, 111 AD3d 1254, 1257 [4th Dept 2013]). "Conclusory statements and rough estimates of value are not sufficient" (*People v Loomis*, 56 AD3d 1046, 1047 [3d Dept 2008]; see *People v Slack*, 137 AD3d 1568, 1569 [4th Dept 2016],

lv denied 27 NY3d 1139 [2016]; *Morgan*, 111 AD3d at 1257).

Here, one of the partners of the dairy farm from which the items were stolen, who was present for the purchases of all items and had a "basis for [his] knowledge of the value of . . . the items" (*People v Hensley*, 227 AD3d 1548, 1551 [4th Dept 2024]; see *Lopez*, 79 NY2d at 404), testified that the stolen truck had been purchased several months before the theft for approximately \$48,000. On the date of the theft, the truck had only 5,000 miles on its odometer and was still in pristine condition. A new truck, which was the same make and model as the stolen truck, was purchased shortly after the theft for \$58,500. The hitch, which was purchased at the same time as the truck, cost approximately \$1,500. The truck and the hitch were "in 'like-new' condition" (*People v Sloan*, 159 AD2d 301, 302 [1st Dept 1990], *lv denied* 76 NY2d 743 [1990]). The cattle trailer was purchased around 2013 for approximately \$25,000, and the witness testified that it was appraised for tax purposes at \$10,000 to \$12,000 just months before the theft, which is sufficient to establish the requisite " 'basis of knowledge' for [the] witness's 'statement of value' " (*People v Guarnieri*, 122 AD3d 1078, 1079 [3d Dept 2014], quoting *Lopez*, 79 NY2d at 404). Viewed in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), the evidence regarding valuation provided a valid line of reasoning and permissible inferences from which a rational jury could conclude that the value of the truck, hitch, and trailer exceeded \$50,000 (see *People v Raszl*, 108 AD3d 1049, 1050 [4th Dept 2013]; *People v Monclova*, 89 AD3d 424, 425 [1st Dept 2011], *lv denied* 18 NY3d 861 [2011]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

We further conclude that the evidence is legally sufficient to support the conviction of assault in the second degree (*cf. People v Spencer*, 181 AD3d 1257, 1259 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]; see generally *People v Ford*, 11 NY3d 875, 878 [2008]; *People v Sala*, 95 NY2d 254, 260 [2000]; *Bleakley*, 69 NY2d at 495).

Defendant further contends that Supreme Court erred in denying his motion seeking dismissal of the indictment under CPL 30.30 or sanctions pursuant to CPL 245.80 based on alleged discovery violations. We reject that contention. Although the People promptly disclosed surveillance camera footage from four cameras at the dairy farm, which depicted defendant and his theft, there was an excessive delay in disclosing the fact that there were six other cameras at the farm that may have contained footage from the day of the incident. However, inasmuch as the footage in question was not in the possession, custody, or control of the police or the People when the initial certificate of compliance was filed, that footage was not subject to automatic discovery under CPL 245.20 (former [1]) (see *People v Radford*, 237 AD3d 1511, 1512 [4th Dept 2025], *lv denied* 43 NY3d 1048 [2025]; *People v Walker*, 232 AD3d 1214, 1217 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]). Consequently, the People's initial failure to provide the footage does not render the initial certificate of compliance improper, and thus the People's statement of readiness was not illusory.

In any event, considering the various *Bay* factors (see *People v Bay*, 41 NY3d 200, 212 [2023]), we conclude that the court did not err in determining that the People met their burden of establishing that they exercised due diligence in obtaining the videos and disclosing the existence of the additional cameras. " '[I]t would not have been particularly obvious to the People that [any additional footage] was missing,' " given the conflicting information they received from the owners of the dairy farm (*People v Rojas-Aponte*, 242 AD3d 1537, 1540 [4th Dept 2025], *lv denied* 44 NY3d 1086 [2026]). Applying "a holistic assessment of the People's efforts to comply with the automatic discovery provisions, rather than a strict item-by-item test" (*People v Cooperman*, 225 AD3d 1216, 1220 [4th Dept 2024], citing *Bay*, 41 NY3d at 212-213), we conclude that the People complied with their obligations under CPL article 245 and that the court did not err in refusing to dismiss the indictment pursuant to CPL 30.30 or otherwise impose a sanction on the People pursuant to CPL 245.80.

Defendant failed to preserve for our review his contention that the Supreme Court's holding in *Erlinger v United States* (602 US 821 [2024]) renders unconstitutional New York's recidivist sentencing regime (see *People v Hernandez*, 43 NY3d 591, 597-598 [2025]; *People v Daniels*, 239 AD3d 1442, 1442-1443 [4th Dept 2025], *lv denied* 44 NY3d 982 [2025]; see generally *People v Cabrera*, 41 NY3d 35, 42-46 [2023]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]; *People v Emanuel*, 240 AD3d 1324, 1327 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]; *Daniels*, 239 AD3d at 1443).

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

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

983

CA 25-00726

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

IN THE MATTER OF ROCHESTER POLICE LOCUST CLUB, INC.,
PETITIONER-PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CITY OF ROCHESTER, RESPONDENT-DEFENDANT-APPELLANT.

MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR
RESPONDENT-DEFENDANT-APPELLANT.

TREVETT CRISTO, ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR
PETITIONER-PLAINTIFF-RESPONDENT.

ALLEN OVERY SHEARMAN STERLING US LLP, NEW YORK CITY (JOSHUA EBERSOLE
OF COUNSEL), FOR NEW YORK CIVIL LIBERTIES UNION, AMICUS CURIAE.

Appeal from a judgment (denominated order and judgment) of the
Supreme Court, Monroe County (Joseph D. Waldorf, J.), entered April
28, 2025, in a hybrid proceeding pursuant to CPLR article 78 and
declaratory judgment action. The judgment, inter alia, declared
unlawful portions of Local Law No. 2.

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

Memorandum: In this hybrid CPLR article 78 proceeding and
declaratory judgment action, respondent-defendant City of Rochester
(defendant) appeals from a judgment that, among other things, declared
unlawful portions of Local Law No. 2 (2019) of the City of Rochester
(Local Law No. 2 or Local Law) authorizing the Police Accountability
Board (PAB) to engage in discipline-related activities with respect to
officers of the Rochester Police Department (RPD), who are represented
by their union, petitioner-plaintiff Rochester Police Locust Club,
Inc. (plaintiff).

This is the third time that litigation involving Local Law No. 2
has been before this Court. In 2019, we vacated a preliminary
injunction barring the Local Law from being voted on, but we did not
reach "the substantive merits of the Local Law" (*Matter of Rochester
Police Locust Club, Inc. v City of Rochester*, 176 AD3d 1646, 1647 [4th
Dept 2019]). In 2021, we addressed the merits of portions of the law,
after Supreme Court declared that "those portions of Local Law No. 2
which authorize and empower [the PAB] to conduct disciplinary hearings
and discipline officers of the City of Rochester Police Department are

determined and declared to be invalid, void and unenforceable" (emphasis added). We concluded that the court "properly invalidated Local Law No. 2 insofar as it imbues [the] PAB with disciplinary authority over Rochester police officers without regard to collective bargaining" (*Matter of Rochester Police Locust Club, Inc. v City of Rochester*, 196 AD3d 74, 82 [4th Dept 2021], *affd* 41 NY3d 156 [2023] [*Locust I*]). The Court of Appeals affirmed, concluding "that the portion of Local Law No. 2 . . . addressing police discipline" and, more specifically, police "disciplinary procedures" was invalid (*Rochester Police Locust Club, Inc.*, 41 NY3d at 166 [emphasis added]), reasoning that the police disciplinary procedures in Local Law No. 2 "ran afoul of the disciplinary procedures imposed by Civil Service Law §§ 75 and 76 and the Taylor Law [Civil Service Law art 14] that rendered those procedures proper subjects of collective bargaining" (*id.* at 165-166).

As relevant here, the collective bargaining agreement (CBA) between defendant and plaintiff specifically addresses both police discipline and police disciplinary procedures, including outlining the manner in which interviews of officers are to be conducted; by whom and when the interviews may take place; what prior written notice an officer is entitled to receive; the officer's right to representation at such interviews; and their attorney's right to ask questions during the same. The CBA also includes, as an appendix, "discipline guidelines & classification of penalties," as well as guidelines for command discipline.

After the Court of Appeals issued its decision, the PAB began, according to plaintiff, subpoenaing officer testimony as part of police misconduct investigations, opening independent investigations into suspected police misconduct, sending officer statement requests to RPD command staff and RPD officers concerning investigations, and publishing case closure reports on its website, despite having been informed by defendant's Corporation Counsel that it had no legal authority to do so.

Plaintiff thus commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking to invalidate—to the extent not already invalidated by *Locust I*—any provisions of Local Law No. 2 that pertained to the investigation of complaints of police misconduct or made recommendations as to police discipline. Following motion practice, Supreme Court concluded that the PAB had "been stripped of any express or implied statutory powers relating to its investigation or disciplinary-related activities concerning RPD officers" and the court declared Local Law "Section[s] 18-3 (C), (D), (E), (F), (G), (I), 18-5 (A), (B), (G) (1) through (4) and (6) through (8), (H) (1) and (2), 18-5 (I), (J), 18-6 (A) (3), and 18-8" unlawful because they conflicted with the Civil Service Law, the Taylor Law, the CBA between defendant and plaintiff, and *Locust I*. The court likewise granted plaintiff article 78 relief. Defendant appeals, and we now affirm.

Defendant raises a number of procedural contentions, including that the petition-complaint does not present a justiciable controversy

and improperly seeks an advisory opinion. We reject those contentions. CPLR 3001 provides, in relevant part, that "[S]upreme [C]ourt may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "The remedy of a declaratory judgment is proper when the pleadings and affidavits submitted state a real controversy involving substantial legal interests, and it has been shown that a declaratory judgment would be useful" (*Reliance Ins. Co. of N.Y. v Garsart Bldg. Corp.*, 122 AD2d 128, 131 [2d Dept 1986]), and declaratory judgment "may not be used as a vehicle for an advisory opinion" (*Matter of Green Thumb Lawn Care, Inc. v Iwanowicz*, 107 AD3d 1402, 1405 [4th Dept 2013], *lv denied* 22 NY3d 866 [2014] [internal quotation marks omitted]). Here, plaintiff alleges that the PAB has sought to subpoena at least one RPD officer and has issued case closure statements recommending discipline as to other officers, and, in light of the holding in *Locust I*, we conclude that there is a genuine controversy whether the PAB may lawfully take such actions. Likewise, we conclude that plaintiff maintains organizational standing to pursue its CPLR article 78 proceeding (see *Matter of Cobbs Hill Vil. Tenants' Assn. v City of Rochester*, 194 AD3d 1437, 1440 [4th Dept 2021]).

Contrary to defendant's contention, we conclude that, with respect to plaintiff's article 78 proceeding, case closure reports issued by the PAB constitute final agency determinations that are ripe for judicial review. The Court of Appeals has articulated a two-part test to resolve the question of when agency action is final. "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005], *rearg denied* 5 NY3d 824 [2005]; see *Matter of Columbus Monument Corp. v City of Syracuse*, 218 AD3d 1184, 1186-1187 [4th Dept 2023]).

Here, attached to the petition-complaint were copies of at least one officer statement request and a case closure report issued after the Court of Appeals issued its decision in *Locust I*. Case closure reports are issued at the conclusion of the PAB's investigations and contain all the pertinent factual details, the standard of proof by which the officer's conduct is reviewed, whether the individual allegations were sustained, and recommended findings and disciplinary actions, and, as defendant's Corporation Counsel recognized, published case closure reports pose harm to individual officers. We conclude that the publication of case closure reports evinced the PAB's "definitive position and signaled the completion of agency activity" (*Matter of Essex County v Zagata*, 91 NY2d 447, 454 [1998]), and we note that a contrary result would effectively insulate PAB from judicial review. Moreover, contrary to defendant's further contention with respect to the article 78 proceeding, the doctrine of exhaustion of administrative remedies does not apply where, as here, "an agency's action is challenged as beyond its grant of power or when resort to an

administrative remedy would be futile" (*Lehigh Portland Cement Co. v New York State Dept. of Env'tl. Conservation*, 87 NY2d 136, 140 [1995]).

On the merits, defendant does not object to the declaration to the extent that it declared invalid section 18-5 (H), (I), and (J) (2)-(4), which involve reasonable cause determinations, hearing processes, and discipline, respectively, along with sections 18-6 (A) (3) and 18-8, and thus, we have no occasion to disturb the judgment with respect to those provisions. Rather, defendant challenges the court's determination to the extent that it rendered invalid any local law provision purporting to grant PAB investigatory powers over police misconduct, i.e., sections 18-3 (C)-(I), 18-5 (A), and 18-5 (G) (1)-(8), or involving the creation of a "disciplinary matrix," i.e., section 18-5 (B) and (J) (1).

Defendant contends that *Locust I* did not declare the PAB's investigatory powers invalid. We reject that contention. "[T]he Taylor Law prevails, and collective bargaining is required [for disciplinary procedures], where no legislation specifically commits police discipline to the discretion of local officials" (*Rochester Police Locust Club, Inc.*, 41 NY3d at 163, quoting *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, 6 NY3d 563, 571 [2006]). In *Locust I*, the Court of Appeals expressly held that, as of 1985, "there was no longer a conflicting charter provision in force that 'specifically commit[ted] police discipline to the discretion of local officials'; therefore, 'the policy of the Taylor Law prevail[ed], and collective bargaining [was] required' on the issue of police discipline" (*id.* at 165) and, more specifically, police "disciplinary procedures" (*id.* at 163).

Here, defendant and plaintiff engaged in collective bargaining not only as to the types of discipline that could be imposed but also regarding other procedures inextricably intertwined with police discipline, such as the conduct of investigations. To that end, as noted above, the CBA sets forth, among other things, the manner in which interviews are to be conducted, by whom and when the interviews may take place, what prior written notice an officer is entitled to receive, the officer's right to representation at such interviews, and their attorneys' right to ask questions, as well as guidelines for command discipline and proposed penalties. To the extent that Local Law No. 2 attempted to usurp or alter those disciplinary procedures by granting the PAB authority to issue subpoenas, compel officer testimony, and create a new disciplinary matrix, "it ran afoul of the disciplinary procedures imposed by Civil Service Law §§ 75 and 76 and the Taylor Law that rendered those procedures proper subjects of collective bargaining" (*Rochester Police Locust Club, Inc.*, 41 NY3d at 165-166).

We have reviewed defendant's remaining contentions and conclude that they lack merit.

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

1008

KA 24-00031

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON A. CHABOT, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

JASON A. CHABOT, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Steuben County Court (Chauncey J. Watches, J.), rendered November 30, 2023. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree and endangering the welfare of a child (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 one count of sexual abuse in the first degree (Penal Law § 130.65 [3]) and two counts of endangering the welfare of a child (§ 260.10 [1]).

Defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. Defendant failed to preserve for our review his challenge to the sufficiency of the evidence inasmuch as his motion for a trial order of dismissal was not specifically directed at the errors alleged on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Cooley*, 220 AD3d 1189, 1189 [4th Dept 2023], *lv denied* 41 NY3d 964 [2024]). Contrary to defendant's assertion, a motion pursuant to CPL 330.30 is not, by itself, sufficient to preserve such a contention (*see People v Padro*, 75 NY2d 820, 821 [1990], *rearg denied* 75 NY2d 1005 [1990], *rearg dismissed* 81 NY2d 989 [1993]; *People v Picente*, 35 AD3d 1210, 1210-1211 [4th Dept 2006], *lv denied* 8 NY3d 949 [2007]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Arnold*, 107 AD3d 1526, 1528 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013]).

We reject defendant's contention that Steuben County was an inappropriate venue for the trial of this matter. The People have the burden of proving by a preponderance of the evidence "that the county where the crime is prosecuted is the proper venue because either the crime was committed there . . . or one of the statutory exceptions is applicable" (*People v Moore*, 46 NY2d 1, 6 [1978]). When an offense is committed in an automobile during the course of a trip, "it may be impossible to determine in what county the offense occurred" (*id.* at 8). The private vehicle exception thus "insures a forum" (*id.*) by providing that "[a]n offense committed in a private vehicle during a trip thereof extending through more than one county may be prosecuted in any county through which such vehicle passed in the course of such trip" (CPL 20.40 [4] [g]). The private vehicle exception does not apply where the county in which the crime occurred is known (see *People v Cullen*, 50 NY2d 168, 174 [1980], *rearg denied* 50 NY2d 1059 [1980]). Contrary to defendant's contention, it was not possible to readily identify the location of the crime given that the conduct occurred at some point while defendant and the child victim were passengers in a motor vehicle being driven from Steuben County to Chemung County and back and that the witnesses could not identify precisely when during the trip the conduct occurred, as it was dark outside.

We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs, together with the trial exhibits submitted following the argument, and conclude that none warrants modification or reversal of the judgment.

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

1017

CA 24-01453

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

FRANCIS L. GUADAGNO, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF FRANCIS J.
GUADAGNO, DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

DOLCE PANEPINTO, P.C., BUFFALO (EDWARD L. SMITH, III, OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 9, 2024. The order granted the motion of defendant Erie County Medical Center Corporation for summary judgment dismissing the complaint against it.

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 against defendant Erie County Medical Center Corporation.

Memorandum: In this medical malpractice action, plaintiff seeks damages for the wrongful death of plaintiff's decedent following decedent's discharge against medical advice from the hospital operated by defendant Erie County Medical Center Corporation (defendant). Plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint against it. We reverse.

We conclude, under the circumstances of this case, that defendant had a duty to ensure that decedent was no longer incapacitated to the degree that there was a likelihood to result in harm to decedent or others in order to allow for his discharge (*cf. Kowalski v St. Francis Hosp. & Health Ctrs.*, 21 NY3d 480, 485-486 [2013]). A hospital does not owe an intoxicated patient, who went to the hospital *voluntarily*, a duty to prevent that patient from leaving the hospital against medical advice even when that patient has been admitted to the hospital for medical treatment (*see id.* at 486; *Ingutti v Rochester Gen. Hosp.*, 114 AD3d 1302, 1302-1303 [4th Dept 2014], *appeal dismissed* 23 NY3d 929 [2014]). By contrast, however, the decedent here was

admitted involuntarily (see Mental Hygiene Law former § 22.09 [e]). Defendant therefore had a duty to retain decedent for emergency treatment if decedent was incapacitated by alcohol or substances to such a degree that there was a likelihood to result in harm to decedent or others, as those terms are defined under Mental Hygiene Law former § 22.09 (*cf. Kowalski*, 21 NY3d at 485-486).

Assuming, arguendo, that defendant met its burden of demonstrating that it did not breach its duty to ensure that decedent was no longer incapacitated to the degree that there was a likelihood to result in harm to decedent or others, we conclude that plaintiff raised an issue of fact. Plaintiff's expert opined that, under the circumstances and "especially in such proximity to the events that occurred in the hospital in the hours prior to discharge," it was a breach of the standard of care to allow decedent to be discharged (see generally *Carroll v Niagara Falls Mem. Med. Ctr.*, 218 AD3d 1373, 1374 [4th Dept 2023]; *Ozugowski v City of New York*, 90 AD3d 875, 877 [2d Dept 2011]; *Bell v New York City Health & Hosps. Corp.*, 90 AD2d 270, 280-281 [2d Dept 1982]).

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

1019

CA 25-00021

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

IN THE MATTER OF PETER W. LOEHR, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DR. BONITA DURAND, INTERIM PRESIDENT AND
CEO OF BUFFALO STATE UNIVERSITY, RESPONDENT-RESPONDENT.

PETER W. LOEHR, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered June 5, 2024, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition and amendments.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondent to provide certain documents sought pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6). Petitioner appeals from a judgment that dismissed the petition and amendments. Contrary to petitioner's contention, Supreme Court properly granted respondent's motion to dismiss the petition for failing to name a necessary party.

A party whose interest may be adversely affected by a potential judgment must be made a party in a CPLR article 78 proceeding (see CPLR 1001 [a]; *Matter of Martin v Ronan*, 47 NY2d 486, 490 [1979]; *Matter of Spence v Cahill*, 300 AD2d 992, 992-993 [4th Dept 2002], *lv denied* 1 NY3d 508 [2004]). Here, we conclude that the State University of New York (SUNY) FOIL Appeals Office is a necessary party inasmuch as it made the final determinations as to petitioner's FOIL requests (see generally *Matter of A&F Scaccia Realty Corp. v New York City Dept. of Env'tl. Protection*, 200 AD3d 875, 877 [1st Dept 2021]; *Matter of McNeill v Town Bd. of Town of Ithaca*, 260 AD2d 829, 830 [3d Dept 1999], *lv denied* 93 NY2d 812 [1999]) and that respondent is not a proper party because she did not render the final determinations as to petitioner's FOIL requests (see *Matter of La Russo v Neuringer*, 105 AD3d 743, 744 [2d Dept 2013]; see also *Matter of Schulz v Town of Hopewell Zoning Bd. of Appeals*, 163 AD3d 1477, 1478 [4th Dept 2018]). In light of petitioner's failure to include a necessary party, the

petition was properly dismissed (see *Spence*, 300 AD2d at 992-993; *McNeill*, 260 AD2d at 829). Finally, we deny petitioner's request to add the necessary party or parties inasmuch as the statute of limitations has expired (see generally *Matter of Lodge v D'Aliso*, 2 AD3d 525, 526 [2d Dept 2003], *lv denied* 2 NY3d 702 [2004]).