



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

DECISIONS FILED

JUNE 26, 2026

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

315/24

KA 20-00239

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SAMUEL SHAW, ALSO KNOWN AS SAV, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered August 16, 2019. The judgment, insofar as appealed from, modified on the law by reversing those parts convicting defendant of murder in the second degree under counts 3 and 4 of the indictment and dismissing those counts and by directing that the sentences imposed on counts 7 and 8 run concurrently with the sentences imposed on counts 1, 2, 5, and 6. The judgment was modified insofar as appealed from by order of this Court entered July 26, 2024 (229 AD3d 1180), and the Court of Appeals on February 19, 2026 modified the order of this Court and remitted the case to this Court for further proceedings (- NY3d - [2026]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Shaw*, - NY3d -, 2026 NY Slip Op 00961 [2026], *modfg* 229 AD3d 1180 [4th Dept 2024]). Defendant was convicted upon a jury verdict of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]), two counts of murder in the second degree (§ 125.25 [1]), one count each of attempted murder in the second degree (§§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]), and three counts of criminal possession of a weapon (CPW) in the second degree (§ 265.03 [1] [b]; [3]). In our prior

decision, we modified the judgment of conviction by reversing those parts convicting defendant of murder in the second degree under counts 3 and 4 of the indictment on the ground that they were lesser inclusory offenses of counts 1 and 2 and by directing that the sentences imposed on counts 7 and 8 run concurrently with the sentences imposed on counts 1, 2, 5, and 6 (*Shaw*, 229 AD3d at 1181).

One of the contentions advanced by defendant on appeal was that, in violation of *Payton v New York* (445 US 573 [1980]), the police unlawfully arrested him without a warrant after ordering him at gunpoint to exit the apartment of a female friend with whom he had spent the night. Defendant further contended that, as a result of his unlawful arrest, County Court should have suppressed a firearm found by the police inside the apartment after the tenant consented to a search of the premises. Although we agreed with defendant that his arrest was unlawful, we concluded that suppression of the gun was not required because the tenant voluntarily consented to the search of her apartment and thus the recovery of the gun was sufficiently attenuated from the taint of defendant's unlawful arrest (*Shaw*, 229 AD3d at 1184).

The dissenting justice concluded that the tenant's consent to search the apartment was not voluntary and that, even if it was, "it was not sufficiently attenuated from the [*Payton*] violation . . . to purge the taint of the illegality" (*Shaw*, 229 AD3d at 1186 [Ogden, J., dissenting]). Although the dissenting justice concluded that the court erred in refusing to suppress the gun, she concluded that the error was harmless except with respect to count 9 of the indictment, which related to defendant's possession of a weapon on the date of his arrest (*id.* at 1187 [Ogden, J., dissenting]). The dissenting Justice granted defendant's application for leave to appeal.

The Court of Appeals determined that the majority applied "the wrong factors in assessing the voluntariness of the tenant's consent" (*Shaw*, — NY3d at —, 2026 NY Slip Op 00961, *5) and remitted the matter for us "to consider whether the gun should be suppressed, under the correct legal standard for determining the validity of the tenant's consent, with respect to count nine only" (*id.* at —, 2026 NY Slip Op 00961, *7). The Court advised that *People v Gonzalez* (39 NY2d 122, 128-130 [1976]) sets forth the correct standard for determining the voluntariness of the tenant's consent (see *Shaw*, — NY3d at —, 2026 NY Slip Op 00961, *6). With respect to counts 1, 2, and 5 through 8, however, the Court of Appeals affirmed the judgment on the alternative ground that any error in the court's suppression ruling would be harmless (*id.* at —, 2026 NY Slip Op 00961, *7). We note that, inasmuch as the sentence imposed on count 9 is concurrent to the life sentences imposed on the murder counts, resolution of the suppression issue one way or the other will have no practical effect on defendant.

Under *Gonzalez*, in determining whether the tenant's consent to search was voluntary, we must consider whether that consent was a "true act of the will, an unequivocal product of an essentially free and unconstrained choice" as opposed to the product of "official coercion, actual or implicit, overt or subtle" or only "a yielding to overbearing official pressure" (*Gonzalez*, 39 NY2d at 128). Factors that should be considered in determining whether consent was voluntary include whether the consenter was "in custody or under arrest," whether the consenter was handcuffed when consent was given, and whether "the immediate events of an arrest, especially a resisted arrest . . . engender[ed] an atmosphere of authority ordinarily contradictory of a capacity to exercise a free and unconstrained will" (*id.* at 128-129; see also *Shaw*, - NY3d at -, 2026 NY Slip Op 00961, *6). "Submission to authority is not consent" (*Gonzalez*, 39 NY2d at 129).

Here, upon remittal, we have considered the above factors and again conclude that suppression is not warranted inasmuch as the tenant's consent was voluntarily given and sufficiently attenuated from the taint arising from defendant's unlawful arrest outside the apartment. The evidence at the suppression hearing established that, after the tenant emerged from her apartment with her hands up, the police directed her to the ground at gunpoint and placed her in handcuffs. After the tenant sat alone in the back seat of a patrol car for five to seven minutes, an investigator explained to her why the police were at her apartment. The investigator said that he knew that defendant brought into her apartment a gun that had been used in a double homicide and that the police were interested only in obtaining the gun. After being informed of the names of the homicide victims, the tenant began crying and hugged the investigator. She evidently knew the victims and wanted to assist the police in retrieving the gun, which was inside the apartment where she resided with her children. The tenant then signed a consent form allowing the police to search her apartment. According to the investigator, the tenant "jumped at the opportunity" to consent. By that point of the encounter, the tenant had been informed that she was not a suspect and her handcuffs had been removed. Moreover, at no time did the tenant resist any of the officer's commands.

Although defendant contends that the tenant's consent was involuntary because it was given shortly after she had been removed from her apartment under highly coercive circumstances, the tenant testified at the suppression hearing that, when she signed the consent form, she was not "intimidated or anything like that" and that her consent was voluntary. The tenant provided similar testimony at trial. As we noted in our prior decision, "[t]he tenant never claimed, in or out of court, that her consent to search was anything but voluntary, and we reject defendant's contention that the tenant's testimony at the hearing is unworthy of belief" (*Shaw*, 229 AD3d at

1185). Under the circumstances, to conclude that the tenant did not voluntarily consent to the search would require us to find that she was lying under oath or mistaken as to her own mindset. We perceive no basis in the record for making such a finding, and we therefore adhere to our determination of voluntariness.

The Court of Appeals did not explicitly remit the matter for us to determine whether the tenant's consent, if voluntary, was sufficiently attenuated from defendant's illegal arrest. Nevertheless, addressing the issue out of an abundance of caution, we conclude that the tenant's consent to search was "acquired by means sufficiently distinguishable from the illegal arrest to be purged of the illegality" (*People v Borges*, 69 NY2d 1031, 1033 [1987]).

Although not dispositive, "the voluntariness of the consent is an important factor in the court's determination of attenuation" (*id.*). Other factors to consider include "the temporal proximity of the consent to the arrest, the presence or absence of intervening circumstances, whether the police purpose underlying the illegality was to obtain the consent or the fruits of the search, whether the consent was volunteered or requested, whether the defendant was aware he could decline to consent, and particularly, the purpose and flagrancy of the official misconduct" (*id.*; see *Matter of Leroy M.*, 16 NY3d 243, 246 [2011], *cert denied* 565 US 842 [2011]). That list of factors is not exhaustive (see *Borges*, 69 NY2d at 1033).

Here, as noted, the tenant voluntarily consented to the search, so that important attenuation factor favors the People. Also favoring the People is the fact that there is no reason to believe that the police constructively arrested defendant inside the tenant's apartment for the purpose of obtaining the tenant's "consent or the fruits of the search" (*id.*). While the police may have eschewed obtaining an arrest warrant in order to avoid attachment of defendant's right to counsel, the firearm that defendant sought to suppress was not a product of the warrantless arrest. Instead, it was the product of the warrantless search, which was lawfully conducted based on the tenant's voluntary consent. Stated otherwise, the *Payton* violation did not put the police " 'in a better position than [they] would have been in if no illegality had transpired' " (*People v Jones*, 2 NY3d 235, 242 [2004], quoting *Nix v Williams*, 467 US 431, 443 [1984]).

We cannot agree with defendant that the failure of the police to obtain an arrest warrant constitutes flagrant official misconduct. Where probable cause exists to believe that a suspect has committed a crime, the police are not required to obtain an arrest warrant (see *People v Siler*, 197 AD2d 842, 843 [4th Dept 1993], *lv denied* 82 NY2d 903 [1993]; see also *People v Anderson*, 290 AD2d 658, 658-659 [3d Dept 2002], *lv denied* 97 NY2d 750 [2002]), and "a deliberate failure by the police to secure an arrest warrant before speaking with a defendant in

order to avoid triggering his right to counsel is insufficient to warrant suppression" (Anderson, 290 AD2d at 659; see *People v Caviano*, 194 AD2d 429, 431 [1st Dept 1993], *lv denied* 82 NY2d 892 [1993], *reconsideration denied* 83 NY2d 803 [1994]; see generally *People v Robles*, 72 NY2d 689, 695-699 [1988]). If failing to obtain an arrest warrant does not, standing alone, warrant suppression, it should not be deemed flagrant official misconduct for attenuation purposes.

We further determine that there were intervening circumstances between the arrest and consent to search. During the five-to-seven-minute interval between defendant's arrest and the tenant's consent, the police explained to the tenant that she was not the target of their investigation and that defendant may have brought a loaded firearm into the apartment, where her children resided. The tenant had no knowledge of that information until after she was ordered out of the apartment. While other attenuation factors favor defendant, such as the fact that the police did not inform the tenant that she could refuse consent, we conclude that the balance of factors supports a finding that the tenant's consent was not tainted by the unlawful arrest of defendant.

All concur except OGDEN, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent. I stand by my original conclusions that the tenant's consent to search the apartment was not voluntary and that, even assuming, arguendo, that the tenant's consent was voluntary, it was not sufficiently attenuated from the Payton violation (*People v Shaw*, 229 AD3d 1180, 1186 [4th Dept 2024] [Ogden, J., dissenting], *mod* - NY3d -, 2026 NY Slip Op 00961 [2026]). I would therefore modify the judgment by granting the omnibus motion insofar as it sought to suppress the gun, reversing that part convicting defendant of criminal possession of a weapon in the second degree under count 9 of the indictment, and dismissing that count of the indictment.

I respectfully disagree with the majority's conclusion that "there is no reason to believe that the police constructively arrested defendant inside the tenant's apartment for the purpose of obtaining the tenant's 'consent or the fruits of the search.'" In my view, the body camera footage admitted in evidence at the hearing reveals both that law enforcement believed defendant brought a gun into that apartment and that they actively sought to obtain that gun. As I previously explained, "the reason the police did not seek an arrest warrant in advance was because they did not want defendant's right to counsel to attach" (*Shaw*, 229 AD3d at 1187 [Ogden, J., dissenting]). Certainly, in conducting an arrest in this manner—with 15 members of Monroe County's SWAT team and additional uniformed officers arriving at the apartment and ordering defendant to come out empty handed and

with his hands up—the police were seeking all the fruits that would flow from the unlawful encounter.

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

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KA 16-01592

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LARRY BENTON, DEFENDANT-APPELLANT.

ADAM AMIRAUT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 13, 2016. The judgment convicted defendant upon his plea of guilty of murder in the second degree (two counts), robbery in the first degree (three counts), burglary 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 a guilty plea of two counts of murder in the second degree (Penal Law § 125.25 [3]), one count of burglary in the first degree (§ 140.30 [2]), three counts of robbery in the first degree (§ 160.15 [1], [2], [3]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We affirm.

Defendant contends that he was deprived of effective assistance of counsel when defense counsel made certain comments before defendant entered his plea. We reject that contention. Defense counsel's brief statement, made in response to an inquiry from County Court, did not deprive defendant of effective assistance of counsel. In the statement, defense counsel advocated for his client "while maintaining his ethical obligations" (*People v DePallo*, 275 AD2d 60, 62 [2d Dept 2000], *affd* 96 NY2d 437 [2001]; *see People v Walton*, 14 AD3d 419, 420 [1st Dept 2005], *lv denied* 5 NY3d 796 [2005]; *see generally People v Tyler*, 245 AD2d 1100, 1100 [4th Dept 1997], *lv denied* 91 NY2d 978 [1998]).

Defendant failed to preserve for our review his contention that his guilty plea was coerced by the court (*see People v Jackson*, 233 AD3d 1520, 1520 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]). In any event, the court did not coerce defendant into pleading guilty

(see *People v Pitcher*, 126 AD3d 1471, 1472 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]; *People v Faison*, 270 AD2d 717, 717 [3d Dept 2000]; see generally *People v Brown*, 14 NY3d 113, 118 [2010]).

We reject defendant's contention that the court erred in refusing to suppress identification evidence (see generally *People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]; *People v Evans*, 137 AD3d 1683, 1683 [4th Dept 2016], *lv denied* 27 NY3d 1131 [2016]; *People v Tolentino*, 16 AD3d 181, 181 [1st Dept 2005], *lv denied* 5 NY3d 770 [2005]).

Finally, defendant's remaining contention does not warrant reversal or modification of the judgment.

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

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CA 24-01262

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

SARAH R., AS PARENT AND NATURAL GUARDIAN
OF E.E.R., AN INFANT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CROUSE HEALTH HOSPITAL, INC., DEFENDANT-RESPONDENT,
THOMAS CURRAN, M.D., MELISSA NELSON, M.D.,
ELLEN BIFANO, M.D., NEONATAL ASSOCIATES OF CENTRAL
NEW YORK, P.C., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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

THE FITZGERALD LAW FIRM, P.C., YONKERS (MITCHELL GITTIN OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

GALE GALE & HUNT, LLC, FAYETTEVILLE (MATTHEW J. VANBEVEREN OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County
(Joseph E. Lamendola, J.), entered July 30, 2024, in a medical
malpractice action. The order granted the motion of defendant Crouse
Health Hospital, Inc., for summary judgment and dismissed the
complaint against said defendant.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs, the motion of defendant
Crouse Health Hospital, Inc., is denied and the complaint against it
is reinstated.

Memorandum: In this medical malpractice action, plaintiff and
defendants Thomas Curran, M.D., Melissa Nelson, M.D., Ellen Bifano,
M.D., and Neonatal Associates of Central New York, P.C. (collectively,
Neonatal defendants) separately appeal from an order that granted the
motion of defendant Crouse Health Hospital, Inc. (Crouse) for summary
judgment dismissing the complaint against it. We reverse the order,
deny Crouse's motion, and reinstate the complaint against it.

"[I]t is well settled that, [i]n general, a hospital may not be
held vicariously liable for the malpractice of a private attending
physician who is not an employee" (*Pasek v Catholic Health Sys., Inc.*,
195 AD3d 1381, 1381 [4th Dept 2021] [internal quotation marks
omitted]). A hospital may, however, be liable for the negligence of

an independent physician "under a theory of apparent or ostensible agency by estoppel" (*id.* at 1382 [internal quotation marks omitted]). "In the context of a medical malpractice action against a hospital, the patient must have reasonably believed that the physicians treating [them] were provided by the hospital or acted on the hospital's behalf" (*id.* [internal quotation marks omitted]). "All the surrounding circumstances are relevant in determining whether [a] plaintiff could have reasonably believed that [a] treating physician was provided by the hospital or otherwise acting on the hospital's behalf" (*Casucci v Kenmore Mercy Hosp.*, 144 AD2d 910, 911 [4th Dept 1988]).

Here, Crouse met its burden on the motion, with respect to plaintiff's claim of vicarious liability for the acts of the Neonatal defendants based on a theory of apparent agency, by establishing that the Neonatal defendants were independent contractors and not employees of Crouse (see *Van Hook v Doak*, 227 AD3d 1537, 1538-1539 [4th Dept 2024]; *Pasek*, 195 AD3d at 1383-1384; see also *Sullivan v Sirop*, 74 AD3d 1326, 1328 [2d Dept 2010]; *Dragotta v Southampton Hosp.*, 39 AD3d 697, 699 [2d Dept 2007]). We agree with plaintiff, however, that she raised a triable issue of fact in opposition to the motion. Plaintiff submitted the affidavit of defendant Curran, who stated that he "wore Crouse-issued scrubs that were the same scrubs worn by hospital physicians" and that his badge identified him as a "Physician" on the "Medical Staff" of "Crouse Health." He further stated in the affidavit that it was "more likely than not" that he was the "male doctor" with whom plaintiff spoke after the infant's birth and that plaintiff "could reasonably have assumed [he] was an employee of the hospital." Viewing the evidence in the light most favorable to plaintiff, we conclude that plaintiff raised a triable issue of fact whether Crouse may be vicariously liable under a theory of apparent or ostensible agency (see *Weiszberger v KCM Therapy*, 189 AD3d 1121, 1123 [2d Dept 2020]; *Sampson v Contillo*, 55 AD3d 588, 591 [2d Dept 2008]; *Dragotta*, 39 AD3d at 699; see generally *Sklarova v Coopersmith*, 180 AD3d 510, 512 [1st Dept 2020]). We further conclude that, under the circumstances of this case, plaintiff also raised a triable issue of fact whether she could have "properly assume[d] that the treating doctors . . . of the hospital[']s neonatal unit] were acting on behalf of the hospital" because she had no opportunity to engage the services of the Neonatal defendants before emergent conditions necessitated their intervention in the infant's care (*Mduba v Benedictine Hosp.*, 52 AD2d 450, 453 [3d Dept 1976]; see generally *Casucci*, 144 AD2d at 911).

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

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CA 25-00277

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

ROBERT OWEN LEHMAN FOUNDATION, INC.,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ISRAELITISCHE KULTUSGEMEINDE WIEN, DEFENDANT,
NAVA BAR, ROBERT RIEGER TRUST, AND JACOB BARAK,
AS TRUSTEE OF THE ROBERT RIEGER TRUST,
DEFENDANTS-APPELLANTS,
SUSAN ZIRKL MEMORIAL FOUNDATION TRUST AND
MICHAEL D. LISSNER, AS TRUSTEE OF THE
SUSAN ZIRKL MEMORIAL FOUNDATION TRUST,
DEFENDANTS-RESPONDENTS.

NAVA BAR, ROBERT RIEGER TRUST AND JACOB BARAK,
AS TRUSTEE OF THE ROBERT RIEGER TRUST,
THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

ROBERT OWEN LEHMAN, THIRD-PARTY DEFENDANT-RESPONDENT.

DUNNINGTON BARTHOLOW & MILLER LLP, NEW YORK CITY (CLAUDIA G. JAFFE OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

BAKER & HOSTETLER LLP, NEW YORK CITY (OREN J. WARSHAVSKY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered August 23, 2024. The judgment, among other things, declared that defendants Susan Zirkel Memorial Foundation Trust and Michael D. Lissner, as Trustee of the Susan Zirkel Memorial Foundation Trust, are the rightful owners of the subject artwork.

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

Memorandum: In this litigation concerning the ownership of a portrait made in 1917 by Austrian artist Egon Schiele of his wife, defendants-third-party plaintiffs Nava Bar, Robert Rieger Trust, and Jacob Barak, as Trustee of the Robert Rieger Trust (collectively, Rieger defendants) appeal from a judgment, entered following a nonjury

trial, that, inter alia, declared that defendants Susan Zirkl Memorial Foundation Trust and Michael D. Lissner, as Trustee of the Susan Zirkl Memorial Foundation Trust (collectively, Maylander defendants) are the rightful owners of the artwork. We affirm. Viewing the record in the light most favorable to sustain the judgment and giving due deference to Supreme Court's credibility determinations (see *Dennis v Cerrone*, 229 AD3d 1116, 1119 [4th Dept 2024]), we conclude that, contrary to the Rieger defendants' contention, there is a fair interpretation of the evidence supporting the court's determination that the Maylander defendants are the rightful owners of the artwork (see generally *Matter of Roth v S & H Grossinger*, 284 AD2d 746, 747-748 [3d Dept 2001]). We note that we affirm the court's determination on the merits rather than on its alternative holding with respect to laches, and thus the Holocaust Expropriated Art Recovery Act of 2025 (Pub L 119-82, 140 US Stat 752 [119th Cong, 2d Sess, Jan. 3, 2026]) does not affect our analysis. We have reviewed the Rieger defendants' remaining contentions and conclude that none warrants reversal or modification of the judgment.

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

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CA 25-01104

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

THREE BUDS, LLC, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

NCTBP CALABRESE, LLC, AND DOUG CALABRESE,
DEFENDANTS-RESPONDENTS.

SEAN T. HANNA, WEBSTER, FOR PLAINTIFF-APPELLANT.

GANGULY BROTHERS, PLLC, ROCHESTER (AVIK K. GANGULY OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Joseph D. Waldorf, J.), entered June 13, 2025, in a breach of contract action. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment on the second amended complaint and dismissed defendants' affirmative defenses and counterclaims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking partial summary judgment on liability on the cause of action for breach of contract against NCTBP Calabrese, LLC, and as modified the order is affirmed without costs.

Memorandum: Plaintiff entered into a lease agreement with defendant NCTBP Calabrese, LLC (NCTBP), to operate a cannabis dispensary business. NCTBP was to provide a certificate of occupancy for the leased premises but, following a construction accident, the building's floor suffered a partial collapse and a notice of condemnation was issued. Plaintiff was unable to occupy the leased premises and defendants did not resolve the structural issues. Plaintiff commenced this action against defendants, asserting causes of action including breach of contract, breach of implied warranty of good faith and fair dealing, and unjust enrichment. Plaintiff also seeks to pierce the corporate veil to impose personal liability on defendant Doug Calabrese.

Plaintiff moved for, inter alia, partial summary judgment on its breach of contract cause of action, partial summary judgment on its breach of implied warranty of good faith and fair dealing cause of action, and summary judgment on its unjust enrichment cause of action, and requested that Supreme Court pierce the corporate veil. Plaintiff, as limited by its brief, appeals from an order insofar as it denied the motion with respect to breach of contract, breach of

implied warranty of good faith and fair dealing, and unjust enrichment and refused to pierce the corporate veil.

Initially, we reject plaintiff's contention that the court should have pierced the corporate veil to hold Calabrese liable. "The determination to pierce the corporate veil is fact-laden and thus is not well suited for resolution by summary judgment" (*Matter of Alpha Bytes Computer Corp. v Slaton*, 307 AD2d 725, 726 [4th Dept 2003]). "[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). "[T]he mere claim that the [entity] was completely dominated by the owners, or conclusory assertions that the corporation acted as their alter ego, without more, will not suffice to support the equitable relief of piercing the corporate veil" (*Inner Harbor Phase I L.P. v COR Inner Harbor Co. LLC*, 211 AD3d 1475, 1479 [4th Dept 2022] [internal quotation marks omitted]). Here, plaintiff's affidavit submitted in support of its motion, as it pertains to its request to pierce the corporate veil, was predicated largely "upon information and belief" and on other conclusory assertions and therefore is insufficient to satisfy plaintiff's initial burden on summary judgment.

We agree with plaintiff, however, that the court erred in denying that part of its motion for partial summary judgment on the breach of contract cause of action against NCTBP inasmuch as plaintiff met its initial burden with respect to that cause of action and defendants failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "It is well settled that the elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*Arista Dev., LLC v Clearmind Holdings, LLC*, 207 AD3d 1127, 1127 [4th Dept 2022] [internal quotation marks omitted]; *see Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Here, plaintiff established, as a matter of law, that the lease existed, that plaintiff performed under the lease, and that NCTBP failed to repair or replace necessary structural parts of the premises, as required under the lease. The court erred in determining that defendants raised an issue of fact with respect to whether the contingency clause in the lease created a condition precedent that had to be satisfied before NCTBP's obligations under the lease arose (*see generally Chrisanntha, Inc. v deBaptiste*, 196 AD3d 1033, 1036 [4th Dept 2021]). The court further erred in determining that defendants raised a triable issue of fact with respect to the certificate of occupancy inasmuch as the inability to obtain a certificate of occupancy was caused by NCTBP's breach of the lease agreement and its failure to repair or replace necessary structural parts of the premises. We therefore modify the order by granting that part of the motion seeking partial summary judgment on liability on the cause of action for breach of contract against NCTBP.

We, however, reject plaintiff's contention that the court erred in denying that part of its motion for partial summary judgment on the breach of the implied warranty of good faith and fair dealing cause of action. A claim for breach of implied warranty of good faith and fair dealing must be based on a violation of a duty independent of the agreement and may not be duplicative of a breach of contract claim (see *Marinaccio v Town of Clarence*, 151 AD3d 1784, 1786 [4th Dept 2017], appeal dismissed 30 NY3d 1039 [2017]; *Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corp.*, 109 AD3d 80, 92-93 [4th Dept 2013], *affd* 24 NY3d 538 [2014]; see generally *Val Tech Holdings, Inc. v Wilson Manifolds, Inc.*, 119 AD3d 1327, 1330-1331 [4th Dept 2014]). Here, plaintiff's claim is based on NCTBP's failure to maintain or repair the building, which is also the basis of plaintiff's breach of contract cause of action and does not implicate a duty independent of the lease agreement.

We further reject plaintiff's contention that the court erred in denying that part of its motion for summary judgment on the unjust enrichment cause of action. "The elements of an unjust enrichment cause of action are that (1) the defendant was enriched; (2) the enrichment was at the expense of the plaintiff; and (3) it would be inequitable to allow the defendant to retain that which is claimed by the plaintiff" (*OneWest Bank, FSB v Spencer*, 145 AD3d 1488, 1489-1490 [4th Dept 2016]; see *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). "[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*Georgia Malone & Co., Inc.*, 19 NY3d at 516 [emphasis added & internal quotation marks omitted]; see *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], *rearg denied* 12 NY3d 889 [2009]). "Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp.*, 12 NY3d at 142; see *Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]). Here, clause 21 of the lease agreement governs the subject matter of plaintiff's particular claims pertaining to the unjust enrichment cause of action, including trade fixtures and improvements to the property.

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

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KA 24-01093

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TYRONE S. DAVIS, JR., 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 April 30, 2024. The judgment convicted defendant, upon a jury verdict, of aggravated family offense, criminal contempt in the first degree and aggravated harassment 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 aggravated family offense (Penal Law § 240.75), criminal contempt in the first degree (§ 215.51 [b] [iii]) and aggravated harassment in the second degree (§ 240.30 [1] [a]).

Contrary to defendant's contention, the conduct of County Court did not deprive him of a fair trial (see *People v Parker*, 197 AD3d 732, 734 [2d Dept 2021]; *People v DeNormand*, 1 AD3d 1047, 1048 [4th Dept 2003], *lv denied* 1 NY3d 626 [2004]; cf. *People v Yut Wai Tom*, 53 NY2d 44, 60-61 [1981]; see also *People v Moulton*, 43 NY2d 944, 946 [1978]).

We reject defendant's contention that the court erred in refusing to admit in evidence an order of protection issued in favor of defendant. The court did not abuse its broad discretion in making the evidentiary ruling inasmuch as the order of protection in defendant's favor is not relevant to the elements of the crimes charged against him (see generally *People v Aska*, 91 NY2d 979, 981 [1998]).

Contrary to defendant's further contention, to the extent that defendant preserved his challenge to the sufficiency of the evidence (see generally *People v Hawkins*, 48 AD3d 1279, 1280 [4th Dept 2008], *affd* 11 NY3d 484 [2008]), we conclude that the evidence is legally sufficient to support the conviction (see generally *People v Bleakley*,

69 NY2d 490, 495 [1987])). To the extent defendant's challenge is unpreserved, "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 Sawyer*, 242 AD3d 1541, 1542 [4th Dept 2025], *lv denied* 44 NY3d 1054 [2025] [internal quotation marks omitted]) and, 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 *Bleakley*, 69 NY2d at 495).

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

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KA 25-00191

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

RHODESIA ANDERSON, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), dated January 30, 2025. 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 reversed on the law, that part of the omnibus motion seeking to dismiss the indictment is denied, the indictment is reinstated, and the matter is remitted to Supreme Court, Erie County, for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the indictment. The indictment charged defendant with, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), and Supreme Court dismissed the indictment on the grounds that the grand jury proceeding was defective because the People failed to instruct the grand jury on a justification defense and improperly introduced evidence of defendant's prior conviction. The People now appeal, and we reverse.

A court may dismiss an indictment on the ground that a grand jury proceeding is defective where, inter alia, the proceeding is so irregular "that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]; see CPL 210.20 [1] [c]). That is a "demanding test" (*People v Darby*, 75 NY2d 449, 454 [1990]) and the "exceptional remedy of dismissal is . . . warranted only where a defect in the indictment created a possibility of prejudice" (*People v Huston*, 88 NY2d 400, 409 [1996]). "[N]ot every improper comment, elicitation of inadmissible testimony, impermissible question or mere mistake renders an indictment defective" (*id.*). Dismissal is limited "to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the

[g]rand [j]ury" (*id.*). In other words, dismissal is warranted only where there is "a showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant" (*People v Thompson*, 22 NY3d 687, 699 [2014], *rearg denied* 23 NY3d 948 [2014]).

"The People generally enjoy wide discretion in presenting their case to the [g]rand [j]ury . . . and are not obligated to search for evidence favorable to the defense or to present all evidence in their possession that is favorable to the accused" (*People v Lancaster*, 69 NY2d 20, 25-26 [1986], *cert denied* 480 US 922 [1987]; *see Huston*, 88 NY2d at 406). "The prosecutor's discretion in presenting the case to the [g]rand [j]ury, however, is not unbounded, for it is settled that at a [g]rand [j]ury proceeding, the prosecutor performs the dual role of advocate and public officer, charged with the duty not only to secure indictments but also to see that justice is done; as a public officer [they] owe[] a duty of fair dealing to the accused and candor to the courts" (*Lancaster*, 69 NY2d at 26 [internal quotation marks omitted]; *see Huston*, 88 NY2d at 406).

The prosecutor's duty of fair dealing extends to the grand jury instructions (*see Lancaster*, 69 NY2d at 26). CPL 190.25 (6) provides, as relevant here, that "[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it." "If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment" (*People v Graham*, 148 AD3d 1517, 1519 [4th Dept 2017]; *see Lancaster*, 69 NY2d at 27-28; *People v Valles*, 62 NY2d 36, 38-39 [1984]).

We agree with the People that the evidence before the grand jury was not sufficient to support a justification charge (*see People v Mitchell*, 82 NY2d 509, 515 [1993]), and thus the court erred in dismissing the indictment on that ground. The evidence before the grand jury included a surveillance video of the incident, which shows defendant and a man, who knew one another prior to the incident, engaged in a verbal argument in front of a convenience store. After they separated momentarily, the man grabbed defendant by the throat and slammed her against a vehicle and then to the ground. After struggling for a while on the ground, both defendant and the man got up and defendant entered her parked vehicle. She backed it out of the parking space and then started driving down the street. As she was driving, the man walked toward her direction but did not appear to have anything in his hands, which were by his side. Defendant aimed a gun at the man and fired several times in his direction as she drove away, striking one of the bystanders standing in front of the store.

A person may not use deadly physical force upon another person unless the person "reasonably believes that such other person is using or about to use deadly physical force" (Penal Law § 35.15 [2] [a]). Here, there was no reasonable view of the evidence that the man was using or about to use deadly physical force upon defendant as she was driving away from the store (*see generally People v St. John*, 215 AD3d

1267, 1268 [4th Dept 2023], *lv denied* 40 NY3d 999 [2023]). Further, the defense of justification is inapplicable where, as here, defendant had the opportunity to retreat and failed to do so (see § 35.15 [2] [a]; see generally *St. John*, 215 AD3d at 1268).

With respect to the second ground for dismissal, we agree with the People that presenting evidence of defendant's prior conviction to the grand jury did not render the proceedings defective. The prosecutor charged the grand jury with criminal possession of a weapon in the second degree pursuant to Penal Law § 265.03 (3), which provides that a person is guilty of that count when "such person possesses any loaded firearm. Such possession shall not, except as provided in [§ 265.02 (1) or (7)], constitute a violation of this subdivision if such possession takes place in such person's home or place of business." Penal Law § 265.02 (1) provides that a person is guilty of criminal possession of a weapon in the third degree when such person commits the crime of criminal possession of a weapon in the fourth degree as defined in, *inter alia*, section 265.01 (1), and has previously been convicted of any crime. A person is guilty of criminal possession of a weapon in the fourth degree under section 265.01 (1) when they possess any firearm.

Despite the fact that the grand jury could readily infer from the evidence that this incident did not occur in defendant's home or place of business, the People did not advance that theory during the grand jury proceeding and instead charged the grand jury with criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) using the prior conviction exception, *i.e.*, that defendant possessed a loaded firearm and had a prior criminal conviction (see *id.*; § 265.02 [1]). Thus, the prosecutor introduced evidence that defendant had a prior conviction of criminal possession of a weapon in the second degree, which is the same charge the grand jury was now considering for this case. We conclude that introducing evidence of defendant's prior conviction of criminal possession of a weapon in the second degree as an element of the crime of criminal possession of a weapon in the second degree as set forth in Penal Law § 265.03 (3) was not improper inasmuch as the prosecutor has "wide discretion" in presenting a matter to the grand jury (*Huston*, 88 NY2d at 406; see *Lancaster*, 69 NY2d at 25-26).

In her responding brief defendant raises additional reasons why the grand jury proceeding was defective, but those issues are not properly before us inasmuch as they were not decided adversely to the People (see *People v Nicholson*, 26 NY3d 813, 825 [2016]; *People v Concepcion*, 17 NY3d 192, 195 [2011]).

All concur except OGDEN and NOWAK, JJ., who concur in the result in the following memorandum: We write separately to express our concern with the prosecutor's introduction of evidence during the grand jury proceeding that defendant had a prior conviction. Despite the fact that the grand jury could have readily inferred from the evidence that the instant incident did not occur in defendant's home or place of business, the prosecutor opted to introduce additional evidence that defendant had a prior conviction for criminal possession

of a weapon in the second degree—the exact same charge that the grand jury was tasked with considering.

Although we agree with the majority that the prosecutor has “wide discretion” in presenting a matter to the grand jury (*People v Huston*, 88 NY2d 400, 406 [1996]; see *People v Lancaster*, 69 NY2d 20, 25-26 [1986], cert denied 480 US 922 [1987]), we believe that the certificate of conviction was unduly suggestive of defendant’s propensity to commit crimes—notwithstanding the prosecutor’s curative instruction that it could not be used for that purpose. Nevertheless, we concur with the majority’s determination inasmuch as we are unable to conclude that the prosecutor’s introduction of that evidence establishes the type of pervasive pattern of bias or misconduct warranting the exceptional remedy of dismissal of the indictment (see generally *People v Thompson*, 22 NY3d 687, 699 [2014], rearg denied 23 NY3d 948 [2014]).

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

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CA 24-02018

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

NEWCO CAPITAL GROUP LLC, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SPE TRADING, INC./ SPE TRADING INC/
SPE TRADING, INC/ SPE TRADING INC./ S P E TRADING INC/
INTERNATIONAL DATA SYSTEMS, ESPI TRADING INC,
MAGRO INTERNATIONAL, INC., AND JAIME RAFAEL SOTO,
DEFENDANTS-APPELLANTS.

LEBEDIN KOFMAN, LLP, NEW YORK CITY (ALYSON M. LUFTIG OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

PIEKARSKI LAW, PLLC, NEW YORK CITY, CARTER LEDYARD & MILBURN LLP
(JACOB H. NEMON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(Daniel J. Doyle, J.), entered January 17, 2025. The judgment awarded
damages and attorneys' fees to plaintiff.

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

Memorandum: Plaintiff commenced this action following
defendants' alleged breach of a revenue purchase agreement (agreement)
entered into between plaintiff and defendants. Defendant Jaime Rafael
Soto was the "Guarantor," and the remaining defendants (entity
defendants) were the "Merchant." Under the agreement, plaintiff
advanced a monetary amount to the entity defendants in exchange for
7% of the future revenues of their business until the purchased
amount, i.e., an agreed-upon amount that was greater than the advanced
amount, was paid to plaintiff. The agreement contained a weekly
remittance amount, which constituted a "good faith estimate of"
plaintiff's share of the future revenue stream. Soto guaranteed the
entity defendants' performance of the agreement.

After an alleged event of default under the agreement, plaintiff
commenced this action for breach of the agreement and personal
guarantee and moved for summary judgment on the complaint. Defendants
now appeal from an order granting the motion in part and awarding
damages and attorneys' fees to plaintiff. We deem the appeal to be
taken from the judgment subsequently entered on that order inasmuch as
the notice of appeal "from an order directing summary judgment [is]
deemed to specify a judgment upon said order entered after service of

the notice of appeal and before entry of the order of" this Court (CPLR 5501 [c]; see *AH Wines, Inc. v C6 Capital Funding LLC*, 208 AD3d 1623, 1623 [4th Dept 2022], *appeal dismissed* 39 NY3d 1172 [2023]), and we affirm.

We reject defendants' contention that plaintiff's documentary submissions did not meet the statutory requirements for the admission of a business record under CPLR 4518 (a). Plaintiff submitted the affidavit of its manager, who swore that he was "personally familiar with plaintiff's record-keeping practices and procedures" (*Bank of N.Y. Mellon v Anderson*, 151 AD3d 1926, 1927 [4th Dept 2017]), and we conclude that Supreme Court properly considered the documents (see *Bank of Am., N.A. v Greene*, 216 AD3d 718, 719 [2d Dept 2023]).

Contrary to defendants' contention, plaintiff met its burden on the motion. "It is well settled that the elements of a breach of contract cause of action are 'the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages' " (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]; see *Pearl St. Parking Assoc. LLC v County of Erie*, 207 AD3d 1029, 1031 [4th Dept 2022]). Plaintiff established that an agreement existed, it performed under the agreement, defendants breached the agreement, and plaintiff sustained damages (see *Tapp Partners, LLC v Wall Sections Inc.*, 244 AD3d 1727, 1728 [4th Dept 2025]; cf. *Bridge Funding Cap LLC v SimonExpress Pizza, LLC* [appeal No. 2], 240 AD3d 1186, 1189-1190 [4th Dept 2025]). An event of default under the agreement included, as relevant here, the entity defendants' failing to request a reconciliation or adjustments to the remittance within one business day of their remittance returned for insufficient funds in the bank account. Plaintiff established that it deposited funds to the entity defendants' bank account, and the entity defendants performed under the agreement for several months. However, on January 4, 2024, the entity defendants' bank returned the code of "R01 - Insufficient Funds," and the entity defendants failed to timely request a reconciliation or adjustment to their remittance.

We reject defendants' contention that the agreement is void because it is, in actuality, a criminally usurious loan. It is well settled that usury laws apply only to loans (see *Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 744 [1992]). If the borrower establishes that the loan is usurious, the transaction is deemed void and unenforceable (see *Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 326 [2021]; *Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]). But "[i]f the transaction is not a loan, 'there can be no usury, however unconscionable the contract may be' " (*Seidel*, 79 NY2d at 744). "When determining whether a transaction constitutes a usurious loan, it must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it" (*True Bus. Funding, LLC v Guerrero A Constr. Corp.*, 239 AD3d 787, 788 [2d Dept 2025] [internal quotation marks omitted]; see *Adar Bays, LLC*, 37 NY3d at 334).

The primary question is "whether the plaintiff is absolutely entitled to repayment under all circumstances; [u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan" (*Samson MCA LLC v Joseph A. Russo M.D. P.C./IV Therapeutics PLLC* [appeal No. 2], 219 AD3d 1126, 1127 [4th Dept 2023] [internal quotation marks omitted]; see *Bridge Funding Cap LLC*, 240 AD3d at 1188; *LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665-666 [2d Dept 2020]). " 'Usually, courts weigh three factors when determining whether repayment is absolute or contingent: (1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy' " (*Bridge Funding Cap LLC*, 240 AD3d at 1188; see *Kapitus Servicing, Inc. v Suburban Waste Servs., Inc.*, 246 AD3d 661, 661 [1st Dept 2026]; *True Bus. Funding, LLC*, 239 AD3d at 788; *Samson MCA LLC*, 219 AD3d at 1128), and defendants fail to assert any other factors in support of their contention.

With respect to the first factor, the agreement had two reconciliation provisions, whereby the weekly remittance would be modified both retroactively and prospectively upon request and with proof of earned revenue amounts. If the entity defendants made either request, plaintiff was required to modify the remittance amount to reflect the entity defendants' actual receipts. We reject defendants' contentions that the reconciliation provisions are convoluted or that the agreement provides plaintiff with sole discretion to reconcile, so as to render the provisions illusory (*cf. Oakshire Props., LLC v Argus Capital Funding, LLC*, 229 AD3d 1199, 1201 [4th Dept 2024]). Under the second factor, the agreement did not have a finite term or payment schedule. Indeed, "the term of the agreement was not finite inasmuch as the amount of the [weekly] payments [made by the entity defendants] could change as a consequence of the application of the agreement's reconciliation provisions" (*Bridge Funding Cap LLC*, 240 AD3d at 1189 [internal quotation marks omitted]). With respect to the third factor, the agreement stated that the entity defendants "going bankrupt or going out of business, or experiencing a slowdown in business, or a delay in collecting [their] receivables, in and of itself, does not constitute a breach of this Agreement," and thus plaintiff did not have recourse in the event that the entity defendants declared bankruptcy (see *Samson MCA LLC*, 219 AD3d at 1128). We therefore conclude that the agreement was a revenue purchase agreement and not a usurious loan (see *Bridge Funding Cap LLC*, 240 AD3d at 1188-1189; *True Bus. Funding, LLC*, 239 AD3d at 788; *Samson MCA LLC*, 219 AD3d at 1128).

We also reject defendants' contention that the agreement is unconscionable. "Whether a contract or any clause of the contract is unconscionable is a matter of law for the court to decide against the background of the contract's commercial setting, purpose, and effect" (*Wilson Trading Corp. v David Ferguson, Ltd.*, 23 NY2d 398, 403 [1968]; see *Divito v Fiandach*, 200 AD3d 1564, 1565 [4th Dept 2021]). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the

part of one of the parties together with contract terms [that] are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988] [internal quotation marks omitted]; see *Matter of Lawrence*, 24 NY3d 320, 336-337 [2014], *rearg denied* 24 NY3d 1215 [2015]; *Divito*, 200 AD3d at 1565). "The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice. The focus is on such matters as the size and commercial setting of the transaction . . . , whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power" (*Gillman*, 73 NY2d at 10-11).

Here, defendants failed to raise a triable issue of fact whether the agreement is unconscionable. Although they point to provisions in the agreement that they allege are unconscionable, defendants submitted no evidence in opposition to the motion and made no allegation in their answer that they lacked a meaningful choice in entering the agreement (see *Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 793-794 [2d Dept 2012]).

We have considered defendants' remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

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

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CA 25-01019

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

TOWN OF NEW HARTFORD, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MEAZ ALAGIC, DEFENDANT-APPELLANT.

STEPHANIE R. DIGIORGIO, UTICA, FOR DEFENDANT-APPELLANT.

JOHN P. ORILIO, HINCKLEY, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Mark R. Rose, J.), entered November 19, 2024. The order prohibited defendant from impeding access to a right-of-way and scheduled further proceedings on damages.

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

Memorandum: Defendant appeals from a non-final liability order, following a bench trial, that prohibited defendant from impeding access to a right-of-way and scheduled further proceedings on damages. The appeal must be dismissed inasmuch as the order appealed from is not a final judgment and is not an order deciding a motion made upon notice (see *generally* CPLR 5701 [a] [1], [2]; *Paese v Paese*, 175 AD3d 506, 506 [2d Dept 2019]; *Rossi v Morse*, 153 AD3d 1637, 1637 [4th Dept 2017]). Defendant did not seek leave to appeal from the order, and we decline to treat the notice of appeal as an application for leave to appeal (see CPLR 5701 [c]; *Gena v Mu*, 240 AD3d 1405, 1406 [4th Dept 2025]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CAF 25-00452

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

IN THE MATTER OF PHILLIP M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

PHILLIP M., RESPONDENT-APPELLANT.

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Shannon E. Filbert, J.), entered December 23, 2024, in a proceeding pursuant to Family Court Act article 10. The order denied respondent's motion to dismiss the petition.

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 father appeals from an order that denied his motion to dismiss the neglect petition for, inter alia, lack of personal jurisdiction and failure to state a cause of action. We affirm.

Under the circumstances of this case, we reject the father's contention that Family Court erred in denying the motion insofar as it sought to dismiss the petition for lack of personal jurisdiction (see Family Ct Act § 1036 [d]; *Matter of Carolyn Z.*, 53 AD3d 875, 876 [3d Dept 2008], *lv dismissed* 11 NY3d 807 [2008]). We also reject the father's contention that the court erred in denying the motion insofar as it sought to dismiss the petition for failing to state a cause of action for neglect. On a motion to dismiss, "[t]he court may not dismiss a neglect petition if, 'accept[ing] as true the allegations set forth in the petition . . . and afford[ing] the pleading a liberal construction[,] . . . the petition sets forth sufficient factual allegations which, if proven at [a fact-finding hearing] by a preponderance of the evidence, would sustain a finding of neglect' " (*Matter of Courtney G.*, 49 AD3d 1327, 1327 [4th Dept 2008]; see *Matter of Ja'layna FF. [Jalyssa GG.]*, 211 AD3d 1363, 1365 [3d Dept 2022]). Petitioner is afforded the benefit of every favorable inference that

can be drawn from the allegations set forth in the petition (see *Matter of Yaqoob A.-S. [Bushra A.]*, 229 AD3d 540, 541 [2d Dept 2024]). Here, the allegations against the father were facially sufficient to state a cause of action for neglect (see *Ja'layna FF.*, 211 AD3d at 1365-1366; *Courtney G.*, 49 AD3d at 1327-1328).

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

290

CA 25-00714

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

JAMES BUSCH, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

COUNTY OF ERIE, GRACE MOKA, R.N.,
JULIA DIBIASE-JOHNSTON, R.N., ALLISON PARKER,
HEIDI CORNELL, NP, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

JEREMY C. TOTH, COUNTY ATTORNEY, BUFFALO, FOR DEFENDANTS-APPELLANTS.

SHAW & SHAW, P.C., HAMBURG (BLAKE ZACCAGNINO OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered March 17, 2025. The order denied in part the motion of defendants-appellants to dismiss the second amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking to dismiss the premises liability claim and the claim for punitive damages, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence and 42 USC § 1983 action seeking damages for injuries he sustained after he was diagnosed with hepatitis A while incarcerated in the custody of defendant County of Erie (County). Defendants-appellants (defendants) removed the case to federal court. After discovery, defendants moved for summary judgment dismissing the amended complaint. The federal court granted the motion with respect to the 42 USC § 1983 and conspiracy claims and with respect to the punitive damages claims asserted against the County related to plaintiff's federal constitutional claims. The federal court declined to exercise jurisdiction over plaintiff's state law negligence claims and any related claims, and dismissed those claims without prejudice to refile in state court. Plaintiff filed a second amended summons and complaint in state court. Defendants moved pursuant to CPLR 3211 to dismiss the second amended complaint against them. Supreme Court granted the motion to the extent of dismissing the medical malpractice claim against defendants, but otherwise denied the motion. Defendants appeal.

We agree with defendants that the court erred in denying that

part of their motion seeking dismissal of the premises liability claim, which includes alleged violations of Correction Law §§ 141 and 500-c and County Law § 217, and we therefore modify the order accordingly. Collateral estoppel “bars the relitigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment” (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018] [internal quotation marks omitted]). “What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). “Where a federal court declines to exercise jurisdiction over a plaintiff’s state law claims, collateral estoppel may still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff’s state claims” (*Williams v New York City Tr. Auth.*, 171 AD3d 990, 992 [2d Dept 2019] [internal quotation marks omitted]).

Here, defendants established identity of issues inasmuch as plaintiff’s premises liability claim, i.e., that the conditions of confinement were improper or unsafe in exposing him to the risk of contracting hepatitis A, is the same as that raised and decided in the federal court (see *Pinnacle Consultants v Leucadia Natl. Corp.*, 94 NY2d 426, 432-433 [2000]; see also *Ryan*, 62 NY2d at 502). The federal court found that plaintiff failed to establish any unsanitary conditions or any deprivations of an identifiable human need that existed. We conclude that “[w]here a federal court has made an ‘explicit finding that plaintiff produced no evidence on the relevant specific factual issue in the litigation,’ as was done here, the application of the collateral estoppel bar to plaintiff’s” identical state claim is warranted (*Russell v New York Univ.*, 42 NY3d 377, 387 [2024]; see *Abromavage v Deutsche Bank Sec. Inc.*, – AD3d –, 2026 NY Slip Op 00052 [1st Dept 2026]).

We reject defendants’ contention that the court erred in denying that part of their motion seeking dismissal of the negligent training and supervision, negligent hiring, and negligent retention claims. Defendants’ contention that there is no employer-employee relationship between the County and the individual defendants was raised for the first time in their reply papers and is therefore not properly before us (see *Metcalf v County of Erie*, 219 AD3d 1168, 1172 [4th Dept 2023]; *Tanksley v LCO Bldg. LLC*, 196 AD3d 1037, 1040 [4th Dept 2021]).

Finally, we agree with defendants that the court erred in denying that part of their motion seeking dismissal of the claim for punitive damages asserted against defendants, and we therefore further modify the order accordingly. Municipalities such as the County are not subject to punitive damages (see *Matter of Rosbaugh [Town of Lodi]*, 43 NY3d 567, 570 [2025]; *Martinetti v Town of New Hartford Police Dept.*, 307 AD2d 735, 737 [4th Dept 2003]). We further note that, inasmuch as there are no remaining claims against the individual defendants, the claim for punitive damages asserted against them necessarily fails

(see generally *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616-617 [1994]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

291

CA 25-00267

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

DYENA RASHADA, PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

SADIA N. AHMED, M.D., AHMED & AHMED PHYSICIANS,
P.C., DOING BUSINESS AS SUBURBAN RHEUMATOLOGY,
AND ERIC L. SNITZER, M.D.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL),
FOR PLAINTIFF-APPELLANT-RESPONDENT.

EAGAN & HEIMER PLLC, BUFFALO (LAUREN A. HEIMER OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS-APPELLANTS SADIA N. AHMED, M.D., AND AHMED &
AHMED PHYSICIANS, P.C., DOING BUSINESS AS SUBURBAN RHEUMATOLOGY.

ROACH BROWN MCCARTHY & GRUBER, P.C., BUFFALO (MARK D. ARCARA OF
COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT ERIC L. SNITZER, M.D.

Appeal and cross-appeals from an order of the Supreme Court, Erie
County (Catherine R. Nugent Panepinto, J.), entered February 7, 2025,
in a medical malpractice action. The order denied the motion of
plaintiff for summary judgment and denied the cross-motions of
defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting the cross-motion of
defendant Eric L. Snitzer, M.D., in part and dismissing the complaint,
as amplified by the bill of particulars, insofar as it asserts a claim
of negligence against him for his failure to recommend a biopsy of the
mass in plaintiff's hand and as modified the order is affirmed without
costs.

Memorandum: Plaintiff commenced this medical malpractice action
seeking damages for injuries she allegedly sustained as a result of,
inter alia, defendants' failure to timely diagnose and treat a
synovial sarcoma (cancer) in her left hand. Plaintiff treated with
Sadia N. Ahmed, M.D. and Ahmed & Ahmed Physicians, P.C., doing
business as Suburban Rheumatology (collectively, Ahmed defendants),
for left hand pain and swelling for several years. Due to worsening
pain, the Ahmed defendants ordered an MRI, which was obtained in 2018
and interpreted by defendant Eric L. Snitzer, M.D., a radiologist. In
his report, Snitzer stated that the MRI showed a mass in the left hand
but did not indicate the presence of cancer. Plaintiff continued

treatment with the Ahmed defendants for three more years and, after plaintiff experienced worsening pain, the Ahmed defendants ordered another MRI in 2021. A nonparty radiologist read the 2021 MRI and recommended a biopsy of the mass within the hand. The biopsy revealed cancer, which required the amputation of plaintiff's left hand. According to plaintiff, the Ahmed defendants were negligent in failing to properly diagnose and treat plaintiff's condition and in failing to recommend a biopsy of the mass in her hand after the 2018 MRI. Plaintiff further alleged that Snitzer was negligent in failing to properly interpret the 2018 MRI and in failing to recommend a biopsy following that MRI. Plaintiff moved for, *inter alia*, summary judgment on the complaint, and the Ahmed defendants and Snitzer separately cross-moved for summary judgment dismissing the complaint and all cross-claims against them. Plaintiff appeals and defendants cross-appeal from an order denying the motion and cross-motions.

To meet her initial burden on the motion of establishing entitlement to judgment as a matter of law, plaintiff must demonstrate that defendants "deviated from acceptable medical practice, and that such deviation was a proximate cause of . . . plaintiff's injury" (*James v Wormuth*, 21 NY3d 540, 545 [2013]; see generally *Clune v Moore*, 142 AD3d 1330, 1331 [4th Dept 2016]; *Salter v Deaconess Family Medicine Ctr.* [appeal No. 2], 267 AD2d 976, 976 [4th Dept 1999]). Here, contrary to plaintiff's contention on appeal, we conclude that plaintiff failed to meet her initial burden with respect to the Ahmed defendants and Snitzer inasmuch as plaintiff submitted the testimony of Ahmed and Snitzer, which raised issues of fact whether defendants deviated from the applicable standard of care (see generally *Giancarlo v Kurek*, 160 AD3d 1368, 1369 [4th Dept 2018]; *Reading v Fabiano*, 137 AD3d 1686, 1687 [4th Dept 2016]). Having failed to meet her initial burden on the element of deviation, plaintiff's motion required denial without consideration of the sufficiency of defendants' opposition papers (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Gumkowski v Schwaab*, 244 AD3d 1755, 1757 [4th Dept 2025]; *Sawyer v Kaleida Health*, 112 AD3d 1341, 1341-1342 [4th Dept 2013]).

With regard to the cross-appeals, defendants were required to meet their initial burden by "present[ing] factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [they] complied with the accepted standard of care or did not cause any injury to the patient" (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015] [internal quotation marks omitted]; see *Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521 [4th Dept 2019]; *Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]). A defendant physician may submit their own affidavit to meet that burden (see *Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]), but that affidavit "must be detailed, specific and factual in nature and [must] not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Isensee*, 174 AD3d at 1521 [internal quotation marks omitted]; see *Webb*, 133 AD3d at 1386). Furthermore, "the expert affidavit must address each of the specific . . . claims of negligence raised in [the] plaintiff[']s bill of particulars"

(*Isensee*, 174 AD3d at 1521 [internal quotation marks omitted]; see *Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011]). "Once the defendant meets [their] burden, the burden shifts to [the] plaintiff to raise an issue of fact by submitting a physician's affidavit" (*Groff*, 161 AD3d at 1520 [internal quotation marks omitted]); the burden shifts "only as to the elements on which the defendant met the prima facie burden" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]).

We conclude that the Ahmed defendants met their initial burden on the cross-motion with respect to both elements through the submission of Ahmed's affirmation, which was "detailed, specific and factual in nature" and addressed each negligence claim raised in plaintiff's bill of particulars (*Stradtman v Cavaretta* [appeal No. 2.], 179 AD3d 1468, 1469 [4th Dept 2020] [internal quotation marks omitted]; see also *Lewis v Sulaiman*, 217 AD3d 1443, 1444 [4th Dept 2023]; *Groff*, 161 AD3d at 1520). We further conclude that, in opposition to the Ahmed defendants' cross-motion, plaintiff raised a triable issue of fact with respect to both deviation and proximate cause with the submission of expert affirmations from a rheumatologist and a plastic surgeon (see *Allman v Roswell Park Cancer Inst. Corp.*, 239 AD3d 1341, 1342-1343 [4th Dept 2025]; *Leberman v Glick*, 207 AD3d 1203, 1205 [4th Dept 2022]; *Cooke v Corning Hosp.*, 198 AD3d 1382, 1383-1384 [4th Dept 2021]). To the extent that the Ahmed defendants contend that plaintiff's expert was not qualified to render an opinion, that contention is improperly raised for the first time on appeal (see *White v Bajwa*, 161 AD3d 1513, 1516 [4th Dept 2018]; see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

We conclude that Snitzer met his initial burden on the cross-motion with respect to the element of causation. Indeed, Snitzer submitted the affirmation of an expert orthopedic surgical oncologist who opined that plaintiff's cancer existed for several years before the 2018 MRI that was interpreted by Snitzer and, at that time, the cancer was of a size and location that made any limb salvaging treatments unrealistic (see generally *Bubar*, 177 AD3d at 1359). However, plaintiff raised an issue of fact regarding causation by submitting the expert affirmation of the plastic surgeon who opined that Snitzer's improper interpretation of the 2018 MRI resulted in a delay of her cancer diagnosis and decreased a chance of limb salvage surgery (see generally *Finnegan v Kasowitz*, 239 AD3d 1337, 1338 [4th Dept 2025]; *Leberman*, 207 AD3d at 1205-1206).

We reject Snitzer's contention that plaintiff's expert plastic surgeon lacked "the requisite skill, training, education, knowledge or experience from which it can be assumed that [the expert's] opinion . . . is reliable" (*Payne v Buffalo Gen. Hosp.*, 96 AD3d 1628, 1629-1630 [4th Dept 2012] [internal quotation marks omitted]; see *Fay v Satterly*, 158 AD3d 1220, 1221 [4th Dept 2018]). It is well settled that "[a] physician need not be a specialist in a particular field to qualify as a medical expert and any alleged lack of knowledge in a particular area of expertise [would] go[] to the weight and not the admissibility of the testimony" (*Moon Ok Kwon v Martin*, 19 AD3d 664,

664 [2d Dept 2005]; see also *Borawski v Huang*, 34 AD3d 409, 410-411 [2d Dept 2006]; *Corcino v Filstein*, 32 AD3d 201, 202 [1st Dept 2006]). Further, contrary to Snitzer's contention, the expert opinion of the plastic surgeon was properly considered by Supreme Court "inasmuch as . . . it does not misstate[] the facts in the record and it is not vague, conclusory, [or] speculative" (*Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020] [internal quotation marks omitted]; cf. *Bubar*, 177 AD3d at 1362), and "squarely opposes the affirmation of the moving part[y's] expert, . . . result[ing] [in] a classic battle of the experts that is properly left to a jury for resolution" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; see *Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

We agree with Snitzer, however, that the court erred in denying that part of his cross-motion with respect to the claim that he was negligent for failing to recommend a biopsy inasmuch as he, as a radiologist, did not "assume[] a general duty of care to schedule or urge further testing, or [to] diagnose [or treat plaintiff's underlying] medical condition[]" (*Martingano v Hall*, 188 AD3d 1638, 1641 [4th Dept 2020], *lv denied* 36 NY3d 912 [2021] [internal quotation marks omitted]; see *Neyman v Doshi Diagnostic Imaging Servs., P.C.*, 153 AD3d 538, 546 [2d Dept 2017]; see generally *Mann v Okere*, 195 AD3d 910, 912 [2d Dept 2021]). We therefore modify the order accordingly.

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

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KA 24-01580

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AUBREY REED, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered August 1, 2024. The judgment convicted defendant upon a guilty plea of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that his waiver of the right to appeal is invalid and that the postrelease supervision component of his sentence is unduly harsh and severe. The record establishes that defendant knowingly, voluntarily and intelligently waived his right to appeal (see *People v Blount*, 239 AD3d 1426, 1427 [4th Dept 2025], *lv denied* 44 NY3d 981 [2025]; see generally *People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* 589 US 1302 [2020]), and that waiver encompasses his challenge to the severity of the sentence (see *People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

303

CAF 25-00368

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

IN THE MATTER OF MARISSA FOURNIER,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JUAN RODRIGUEZ PEREZ, RESPONDENT-RESPONDENT.

DIPASQUALE LAW PLLC, ROCHESTER (ANDREW J. DIPASQUALE OF COUNSEL), FOR
PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Anthony C. LaValle, R.), dated December 10, 2024, in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Onondaga County, for further proceedings on the petition.

Memorandum: In this proceeding pursuant to Family Court Act article 8, petitioner appeals from an order dismissing a family offense petition that she filed against her estranged husband. The order, issued by a Court Attorney Referee after only one court appearance, stated that dismissal was warranted due to "insufficient evidence of a family offense." During the sole court appearance, the purpose of which was for the Referee to determine whether to issue a temporary order of protection on petitioner's behalf (see Family Ct Act § 828 [1] [a]), petitioner refused to consent to having the Referee hear and determine her petition. Respondent was not present, so he did not consent either. We agree with petitioner that the Referee lacked jurisdiction to dismiss the petition.

"A referee derives authority from an order of reference by the court (see CPLR 4311), which can be made only upon consent of the parties, except in limited circumstances" (*Matter of Rivera v Arocho*, 120 AD3d 1350, 1351 [2d Dept 2014]; see CPLR 4317). "Absent the parties' consent to the reference, the . . . [r]eferee ha[s] the power only to hear and report [their] findings" (*Rivera*, 120 AD3d at 1351 [emphasis added]; see CPLR 4317 [a]; *McCormack v McCormack*, 174 AD2d 612, 613 [2d Dept 1991]). An appropriate order of reference is thus an "essential jurisdictional predicate" to the authority of the referee to act (*Gershon v Cunningham*, 88 AD3d 944, 945 [2d Dept 2011] [internal quotation marks omitted]; see *Falanga v Hillabrant*, 208 AD3d

1308, 1312 [2d Dept 2022]), and a referee "who attempts to determine matters not referred to [them] by the order of reference acts beyond and in excess of [their] jurisdiction" (*McCormack*, 174 AD2d at 613).

Here, as noted, petitioner never consented to the Referee hearing the matter. Although CPLR 4317 (b) permits a referee to hear and determine an issue without the consent of the parties where the trial of the issue "will require the examination of a long account," where the issue is one "of damages separately triable and not requiring a trial by jury," or "where otherwise authorized by law," none of those exceptions to the consent requirement applies here. Thus, the Referee "lacked jurisdiction to dismiss the petition" (*Matter of David S.S. v Mia B.M.*, 48 AD3d 1246, 1246 [4th Dept 2008]; see *Rivera*, 120 AD3d at 1351), even without prejudice. We note in any event that, absent a fact-finding hearing, which did not take place, the Referee had no grounds to dismiss the petition based on insufficient evidence.

We further conclude that reversal is also required because the Referee failed to inform petitioner of her right to counsel. Petitioner was entitled to assigned counsel on her family offense petition (see Family Ct Act § 262 [a] [ii]; *Matter of Aleman v Lansch*, 158 AD3d 790, 792 [2d Dept 2018]), and the record on appeal does not establish that she was ever informed of that statutory right or waived that right (see *Matter of Melissa H. v Shameer S.*, 100 AD3d 535, 535 [1st Dept 2012]; cf. *Matter of Phelps v Hunter*, 101 AD3d 1689, 1689 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]; *Matter of Samora v Coutsoukis*, 292 AD2d 390, 391 [2d Dept 2002], *lv denied* 99 NY2d 506 [2003]).

Finally, with respect to petitioner's request that this Court remit the matter to a different referee, we note that such assignments should be made by the trial court in the manner prescribed in 22 NYCRR part 36.

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

311

CA 25-00925

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

ENDENI MONTES AND ROSA MONTES, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

CITY OF ROCHESTER, ROCHESTER CITY POLICE DEPARTMENT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

PATRICK BEATH, CORPORATION COUNSEL, CITY OF ROCHESTER, ROCHESTER
(CARLA WILLIAMS-PAULEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered March 26, 2025, in a negligence action. The order, insofar as appealed from, granted that part of the motion of defendants City of Rochester and Rochester City Police Department for summary judgment dismissing the amended complaint against the City of Rochester.

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

Memorandum: Plaintiffs-homeowners whose home was struck by a vehicle proceeding through a T-intersection at a high rate of speed-commenced this negligence action seeking damages sustained as a result of the accident. Defendants City of Rochester (City) and Rochester City Police Department moved for summary judgment dismissing the amended complaint against them. Supreme Court issued an order granting that motion, and plaintiffs now appeal, as limited by their brief, from the order insofar as it granted the motion with respect to the City. We affirm.

"Highway planning, design, and maintenance . . . are proprietary functions, arising from a municipality's proprietary duty to keep its roads and highways in a reasonably safe condition" (*Turturro v City of New York*, 28 NY3d 469, 479 [2016] [internal quotation marks omitted]). "A municipality's proprietary duty to keep its roadways in a reasonably safe condition is well settled" (*id.*; see *Baker v State of New York*, 238 AD3d 1468, 1468 [4th Dept 2025], *lv denied* 44 NY3d 911 [2026]); however, that duty is limited to the "traveling public, pedestrians, motorists and the like" (*Lopes v Rostad*, 45 NY2d 617, 624 [1978]). Inasmuch as plaintiffs were not members of the traveling public, the City's duty to keep and maintain its roads did not extend

to them under the circumstances here. Thus, as plaintiffs and the City correctly agree, the court erred insofar as it determined that the City's nondelegable duty to keep its roads in a reasonably safe condition applied to the facts of this case.

Plaintiffs contend, however, that the City owed a duty to foreseeable plaintiffs whose injuries are proximately caused by unsafe conditions within its control. We reject that contention. To the extent that any duty would arguably apply to a municipality's general efforts to protect private property adjacent to a roadway, those efforts would involve the "exercis[e of] a governmental function—i.e., undertaking functions or services that are not typically provided by private actors" (*Ferreira v City of Binghamton*, 38 NY3d 298, 309 [2022]). Plaintiffs would thus be required to "demonstrate that a special duty was created" (*Valdez v City of New York*, 18 NY3d 69, 75 [2011]), which they have failed to allege or establish here. Contrary to plaintiffs' contention, foreseeability bears on the scope of a duty, not whether that duty exists at all (see 532 *Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr.*, 96 NY2d 280, 288-289 [2001]). "Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" (*id.* at 289).

Plaintiffs' remaining contentions are academic in light of the foregoing.

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

318

KA 23-01511

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARRYL BRADSHAW, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 31, 2023. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [3]). The charge arose from an incident in which defendant, while incarcerated at the Cayuga Correctional Facility, assaulted a correction officer with a "cutting weapon."

Defendant contends that County Court erred in denying defense counsel's request for a competency examination of defendant pursuant to CPL 730.30. That contention " 'survives the plea . . . to the extent that it implicates the voluntariness of the plea' " (*People v Yeara*, 227 AD3d 1517, 1518 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]; see *People v Chapman*, 179 AD3d 1526, 1527 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]). Nevertheless, we reject defendant's contention. A court must issue an order of examination "when it is of the opinion that the defendant may be an incapacitated person" (CPL 730.30 [1]). "The determination whether to order a competency examination, either sua sponte or upon defense counsel's request, lies within the sound discretion of the court" (*People v Thorpe*, 218 AD3d 1124, 1125 [4th Dept 2023], citing *People v Morgan*, 87 NY2d 878, 879-880 [1995]). Here, we conclude that the court did not abuse its discretion in denying the request inasmuch as the court had ample opportunity to observe defendant prior to that request, and there 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 Robinson*, 225 AD3d 1266, 1267 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]; see *Thorpe*, 218 AD3d at 1125; *People v Watson*, 45 AD3d 1342, 1344 [4th Dept 2007], *lv denied* 10 NY3d 818 [2008])).

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

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TP 25-01673

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

IN THE MATTER OF CHARTER
COMMUNICATIONS, LLC, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT-PETITIONER,
AND JON E. EISEN, RESPONDENT.

KABAT CHAPMAN & OZMER LLP, ATLANTA, GEORGIA (NATHAN D. CHAPMAN,
ADMITTED PRO HAC VICE, OF COUNSEL), FOR PETITIONER-RESPONDENT.

MELISSA FRANCO, GENERAL COUNSEL, NEW YORK STATE DIVISION OF HUMAN
RIGHTS, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR RESPONDENT-
PETITIONER.

Proceeding pursuant to Executive Law § 298 and CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Danielle M. Fogel, J.], entered September 22, 2025) to review a determination of respondent-petitioner New York State Division of Human Rights. The determination, among other things, adjudged that petitioner retaliated against respondent, Jon E. Eisen, and ordered petitioner to pay compensatory damages and a civil fine.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross-petition is granted, and petitioner-respondent is directed to pay respondent, Jon E. Eisen, the sum of \$7,500 for mental anguish with interest at the rate of 9% per annum commencing June 13, 2025, and to pay the Comptroller of the State of New York the sum of \$50,000 for a civil fine and penalty with interest at the rate of 9% per annum commencing June 13, 2025.

Memorandum: Petitioner-respondent (petitioner) commenced this proceeding pursuant to Executive Law § 298 and CPLR article 78 seeking to annul the determination of respondent-petitioner, New York State Division of Human Rights (SDHR), that petitioner unlawfully retaliated against respondent, Jon E. Eisen (complainant). SDHR awarded complainant compensatory damages for mental anguish in the amount of \$7,500 and imposed a civil fine and penalty against petitioner in the amount of \$50,000. SDHR filed a cross-petition seeking to confirm and enforce the determination.

Our review of the determination, which adopted the findings of the adjudication counsel made after the public hearing (see 9 NYCRR 465.17 [c] [2]), "is limited to consideration of whether substantial evidence supports the agency determination" (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331 [2003]; see 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 179-180 [1978]; *Matter of Hirsch v New York State Div. of Human Rights*, 232 AD3d 1248, 1249 [4th Dept 2024]).

"It is peculiarly within the domain of the [SDHR] Commissioner, who is presumed to have special expertise in the matter, to assess whether the facts and the law support a finding of unlawful [retaliation]" (*Matter of Garvey Nursing Home v New York State Div. of Human Rights*, 209 AD2d 619, 619 [2d Dept 1994] [internal quotation marks omitted]). We are not permitted to " 'weigh the evidence or reject' [SDHR's] 'choice where the evidence is conflicting and room for a choice exists' " (*Matter of Clifton Park Apts., LLC v New York State Div. of Human Rights*, 41 NY3d 326, 333 [2024], quoting *Matter of State Div. of Human Rights v County of Onondaga Sheriff's Dept.*, 71 NY2d 623, 631 [1988]; see *Matter of City of Niagara Falls v New York State Div. of Human Rights*, 94 AD3d 1442, 1443-1444 [4th Dept 2012]). "Thus, when a rational basis for the conclusion adopted by [SDHR] is found, the judicial function is exhausted" (*Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106 [1987]; see also *Rainer N. Mittl, Ophthalmologist, P.C.*, 100 NY2d at 331; *City of Niagara Falls*, 94 AD3d at 1443-1444).

Initially, we reject petitioner's contention that SDHR erred in amending the complaint. After he was fired from his employment with petitioner, complainant filed a complaint with SDHR alleging age discrimination. Petitioner responded by sending a letter to complainant in September 2019 stating that, because of a binding arbitration agreement between the parties, complainant could not pursue his claim against petitioner through a court action. Petitioner advised complainant to "be aware" that the arbitration agreement entitled petitioner to costs and fees, including attorneys' fees, incurred if petitioner was forced to seek court action to compel complainant to resolve his dispute through arbitration instead of litigation. Petitioner then filed the instant complaint alleging age discrimination and retaliation. Thereafter, while the complaint was pending, petitioner sent complainant two additional letters in June 2020 and March 2021 asking complainant to withdraw his complaint with SDHR because of the arbitration agreement.

We conclude that SDHR properly amended the complaint to conform the pleading to the proof by including the June 2020 and March 2021 letters on the retaliation claim (see generally CPLR 3025 [c]; 9 NYCRR 465.4 [a]; *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Matter of Barton v Barton*, 111 AD3d 1348, 1349 [4th Dept 2013]). We reject petitioner's contention that it was prejudiced by the amendment (see generally *Kimso Apts., LLC*, 24 NY3d at 411). Petitioner's conduct in sending the June 2020 and March 2021 letters was essentially the same conduct as its sending the September 2019 letter giving rise to the

complaint. All three letters were entered into evidence and a subject of direct and cross-examination of the witnesses.

We conclude that there is substantial evidence to support the determination that petitioner retaliated against complainant when it sent the letters to him. The letters stated that complainant could not pursue his claims against petitioner but must instead resolve them through arbitration and threatened complainant with the possibility of being responsible for petitioner's costs and attorneys' fees if petitioner was forced to seek court action to compel complainant to resolve his dispute through arbitration instead of litigation. Contrary to petitioner's contention, "such threats could have dissuaded a reasonable person from" pursuing the discrimination complaint (*Clifton Park Apts., LLC*, 41 NY3d at 333).

Contrary to petitioner's contention, the award to complainant for mental anguish is supported by substantial evidence in the form of complainant's testimony, is reasonably related to the wrongdoing, and is comparable to awards in similar cases (see *Matter of New York State Div. of Human Rights v GSN Transp.*, 193 AD3d 1333, 1334-1335 [4th Dept 2021]; *Matter of Stellar Dental Mgt. LLC v New York State Div. of Human Rights*, 162 AD3d 1655, 1658 [4th Dept 2018]; *Matter of Mohawk Val. Orthopedics, LLP v Carcone*, 66 AD3d 1350, 1351 [4th Dept 2009]). We reject petitioner's further contention that SDHR's imposition of a civil penalty was excessive and arbitrary and capricious. It is well settled that "[j]udicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law . . . [A] penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]; see *Stellar Dental Mgt. LLC*, 162 AD3d at 1658). Here, SDHR's award of a civil fine and penalty of \$50,000 is not shocking to our sense of fairness (see *Matter of County of Erie v New York State Div. of Human Rights*, 121 AD3d 1564, 1566 [4th Dept 2014]).

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

332

CA 25-00978

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

PAUL RYAN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SUSAN CUNNINGHAM, ALAN LINCOLN, NANCY KERRIGAN,
CHARLIE BERNET, KRISTA TASKEY, DIANA MARLEY,
DAVID SMART, HUNTWOOD HOMEOWNERS ASSOCIATION,
PROPERTY MANAGEMENT ALLIANCE, LLC,
AND MURRAY LANDSCAPING, DEFENDANTS-RESPONDENTS.

PAUL RYAN, PLAINTIFF-APPELLANT PRO SE.

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR
DEFENDANT-RESPONDENT SUSAN CUNNINGHAM.

SMITH SOVIK KENDRICK & SUGNET P.C., SYRACUSE (GARDAR G. OLAFSSON OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS ALAN LINCOLN, NANCY KERRIGAN,
CHARLIE BERNET, KRISTA TASKEY, DIANA MARLEY AND HUNTWOOD HOMEOWNERS
ASSOCIATION.

Appeal from an order of the Supreme Court, Onondaga County
(Robert E. Antonacci, II, J.), entered March 25, 2025. The order
denied plaintiff's application for an order to show cause.

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

Memorandum: Plaintiff appeals from an order insofar as it denied
his application for an order to show cause seeking the removal of a
wall erected adjacent to a back deck by his adjoining townhome
neighbor. We conclude that the appeal must be dismissed because "no
appeal lies . . . from the denial of an application to sign an order
to show cause" (*Quattrone v Erie 2 Chautauqua-Cattaraugus Bd. of Coop.
Educ. Servs.*, 243 AD3d 1337, 1338 [4th Dept 2025] [internal quotation
marks omitted]; see *M.B. v F.B.*, 235 AD3d 497, 498 [1st Dept 2025], *lv
denied* 44 NY3d 901 [2025]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

336

KA 23-01026

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYMOND E. DECKER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 5, 2023. The judgment convicted defendant upon a jury verdict of aggravated family offense (six counts), criminal contempt in the second degree (six counts) and criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal contempt in the second degree under counts 8 through 11 and 13 and 14 of the indictment and dismissing those counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of six counts of aggravated family offense (Penal Law § 240.75 [1]), six counts of criminal contempt in the second degree (§ 215.50 [3]), and one count of criminal contempt in the first degree (§ 215.51 [c]). We note at the outset that, as the People correctly concede, those parts of the judgment convicting defendant of the six counts of criminal contempt in the second degree must be reversed and those counts of the indictment dismissed because, as charged, they are inclusory concurrent counts of the aggravated family offense counts (*see generally People v Green*, 56 NY2d 427, 430-431 [1982], *rearg denied* 57 NY2d 775 [1982]; *People v Woods*, 229 AD3d 1073, 1075 [4th Dept 2024], *lv denied* 42 NY3d 973 [2024]). We have reviewed defendant's contentions and conclude that none warrants reversal or further modification of the judgment.

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

338

KA 25-00952

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMIQUE PIERCE, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Stephen T. Miller, A.J.), dated April 30, 2025. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (SORA) (Correction Law § 168 *et seq.*).

Defendant contends, initially, that Supreme Court improperly relied on certain materials, including the case summary, inasmuch as they were not formally submitted in evidence at the SORA hearing (see generally *People v Jewell*, 119 AD3d 1446, 1447 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]; *People v Fredenburg*, 27 AD3d 970, 970 [3d Dept 2006]). That contention is not preserved for our review (see *Jewell*, 119 AD3d at 1447; see also *People v Singleton*, 221 AD3d 1517, 1517-1518 [4th Dept 2023], *lv denied* 41 NY3d 906 [2024]).

Next, defendant contends that the court erred in assessing points for risk factors 11 and 14 of the risk assessment instrument because the People failed to prove those risk factors by the requisite clear and convincing evidence (see generally Correction Law § 168-n [3]; *People v Mingo*, 12 NY3d 563, 571 [2009]). Contrary to defendant's contention with respect to risk factor 11, we conclude that the People established "a pattern of drug or alcohol use in . . . defendant's history evincing substance abuse" (*People v Richardson*, 197 AD3d 878, 879 [4th Dept 2021], *lv denied* 37 NY3d 918 [2022] [internal quotation marks omitted]; see generally *People v Gerros*, 175 AD3d 1111, 1111 [4th Dept 2019]). In addition, the case summary indicated that

defendant used marihuana and alcohol with at least one of the underage victims (see *People v Jackson*, 203 AD3d 1680, 1681 [4th Dept 2022]).

With respect to risk factor 14, and with respect to the court's denial of defendant's request for a downward departure, the parties correctly agree that the court failed to set forth its findings of fact and conclusions of law, as required by Correction Law § 168-n (3) (see *People v Dean*, 169 AD3d 1414, 1415 [4th Dept 2019]). "Absent those findings and conclusions, we are unable to review [on the record before us] whether the court properly determined defendant's risk level" (*People v Terrill*, 17 AD3d 1045, 1046 [4th Dept 2005]; see *People v Hoppe*, 1 AD3d 712, 713 [3d Dept 2003]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court for compliance with Correction Law § 168-n (3) (see *Dean*, 169 AD3d at 1415; *People v Long*, 81 AD3d 1432, 1433 [4th Dept 2011]; *People v Cullen*, 53 AD3d 1105, 1106 [4th Dept 2008]).

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

339

KA 25-00512

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRY WALLACE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Karen Bailey Turner, J.), dated September 12, 2024. The order denied the petition of defendant for modification of his risk level pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs, the petition is granted and defendant is determined to be a level one risk pursuant to the Sex Offender Registration Act.

Memorandum: Defendant appeals from an order that denied his pro se petition pursuant to Correction Law § 168-o (2) seeking a downward modification of his previously imposed classification as a level two risk pursuant to the Sex Offender Registration Act (SORA).

A defendant subject to SORA requirements may petition “for an order modifying the level of notification. The petition shall set forth the level of notification sought, together with the reasons for seeking such determination. The sex offender shall bear the burden of proving the facts supporting the requested modification by clear and convincing evidence” (Correction Law § 168-o [2]; see *People v Ross*, 210 AD3d 1444, 1444 [4th Dept 2022], lv denied 39 NY3d 908 [2023]; *People v Higgins*, 55 AD3d 1303, 1303 [4th Dept 2008]). “[T]he relevant inquiry regarding Correction Law § 168-o (2) applications is whether conditions have changed subsequent to the initial risk level determination warranting a modification thereof” (*People v Bentley*, 186 AD3d 1135, 1136 [4th Dept 2020], lv denied 36 NY3d 903 [2020] [internal quotation marks omitted]).

Here, County Court did not abuse its discretion in denying the petition inasmuch as defendant failed to establish that he completed sex offender treatment and failed to update his annual photo (see

People v Diaz, 242 AD3d 1567, 1568-1569 [4th Dept 2025])). Nonetheless, we reverse the order on appeal in the exercise of our discretion and grant the petition (see generally *People v Van Leer*, 239 AD3d 779, 781 [2d Dept 2025])). Defendant has not sexually reoffended since his underlying offense requiring registration, and we agree with the determination of the Board of Examiners of Sex Offenders that there is "no compelling reason that would further serve public safety for [defendant] to remain at a [1]level [two classification inasmuch] as he has shown by his law-abiding behavior for several years that he is capable of leading a prosocial and stable lifestyle."

Defendant's remaining contention is academic in light of our determination.

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

340

KA 23-00941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DELVIN BOATWRIGHT, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 27, 2023. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment against defendant is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We agree with defendant that Supreme Court erred in refusing to suppress physical evidence, including two handguns, because they were recovered during an unlawful inventory search of the vehicle in which he was a passenger, and therefore reverse.

"An inventory search is exactly what its name suggests, a search designed to properly catalogue the contents of the item searched" (*People v Johnson*, 1 NY3d 252, 256 [2003]; see *People v Douglas*, 40 NY3d 385, 388 [2023]). Inventory searches may not be used as "a ruse for a general rummaging in order to discover incriminating evidence" (*Johnson*, 1 NY3d at 256 [internal quotation marks omitted]) and, unlike a traffic stop, "will be constitutionally invalid where the search was merely a pretext to search for evidence of a crime" (*People v Cunningham*, 239 AD3d 1418, 1418 [4th Dept 2025]). "Only a lawfully impounded vehicle may be subjected to an inventory search" (*People v Mortel*, 197 AD3d 196, 215 [2d Dept 2021], *lv denied* 37 NY3d 1097 [2021]; see *People v Tardi*, 28 NY3d 1077, 1078-1079 [2016]; *People v Walker*, 20 NY3d 122, 125-126 [2012]; *People v Brundige*, 243 AD3d 1329,

1330 [4th Dept 2025], *lv denied* 44 NY3d 1064 [2026]), and "[t]he People bear the threshold burden of demonstrating that the subject vehicle was lawfully impounded at the time of the inventory search" (*Mortel*, 197 AD3d at 214; *see People v Padilla*, 21 NY3d 268, 272 [2013], *cert denied* 571 US 889 [2013]; *People v Gray*, 234 AD3d 1130, 1131 [3d Dept 2025]).

According to the testimony at the suppression hearing, a Rochester Police Department (RPD) officer initiated a traffic stop of a vehicle he witnessed pass through a red light. As the vehicle slowed and pulled over, an individual exited the back passenger-side door and fled on foot, while repeatedly looking back at the officer and reaching for his waistband. The officer did not pursue the fleeing individual but, instead, approached the two remaining occupants in the vehicle—the driver and defendant, the front-seat passenger. While approaching, the officer observed that the vehicle had a temporary State of Texas paper license plate, which, according to the officer, had been the subject of a recent anti-fraud bulletin issued by the New York State Police. The driver did not produce any other documentation regarding the vehicle's registration following a request from the officer. As the officer clarified on cross-examination, he concluded, at that time, that the car was not registered solely on his "assum[ption]" that the temporary paper license plate was invalid. As the officer and his body-worn camera footage confirmed, however, he had "no information to verify" whether the temporary paper license plate was, as of that time, invalid. Nonetheless, the officer determined that the vehicle was not roadworthy and would be towed pursuant to RPD policy. The officer then detained defendant and the driver, and proceeded to conduct an inventory search of the vehicle with the assistance of another officer, during which two handguns were recovered.

Based on the evidence, we agree with defendant that the People failed to meet their burden at the suppression hearing of demonstrating that the vehicle was lawfully impounded pursuant to RPD policy at the time of the inventory search inasmuch as the officer was not in possession of information that the vehicle was not registered at the time he decided that it would be towed (*see Mortel*, 197 AD3d at 216; *People v Solivan*, 156 AD3d 1434, 1436 [4th Dept 2017]; *cf. People v Marasa*, 284 AD2d 971, 972 [4th Dept 2001], *lv denied* 96 NY2d 940 [2001]). Thus, the court erred in refusing to suppress the evidence recovered in the vehicle (*see Cunningham*, 239 AD3d at 1420; *People v Anderson*, 203 AD3d 1579, 1579 [4th Dept 2022]). We therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to suppress physical evidence, and dismiss the indictment against him.

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

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

341

KA 24-01094

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON EVANS, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU 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 March 25, 2024. The judgment convicted defendant upon a jury verdict of burglary in the first degree and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [2]) and robbery in the first degree (§ 160.15 [3]). The conviction arose from an incident in which two masked perpetrators broke into the victim's home, physically assaulted the victim, and stole numerous items.

Defendant contends that the evidence is legally insufficient to establish his identity as one of the perpetrators of the offenses. Initially, contrary to the People's assertion, defendant's contention is preserved for our review inasmuch as his motion for a trial order of dismissal was " 'specifically directed' at [that] alleged error" (*People v Gray*, 86 NY2d 10, 19 [1995]). We nonetheless conclude that it is without merit. Here, in addition to other evidence placing defendant at or near the victim's home, the victim testified that, despite the masks, the victim could identify defendant as one of the two perpetrators and, contrary to defendant's further contention, that testimony " 'was not so inconsistent or unbelievable as to render it incredible as a matter of law' " (*People v Lewis*, 151 AD3d 1727, 1728 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; see *People v Spencer*, 191 AD3d 1331, 1332 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the

evidence with respect to defendant's identity as one of the perpetrators (see *People v Clea*, 242 AD3d 1588, 1590 [4th Dept 2025], *lv denied* 44 NY3d 1065 [2026]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, the " '[i]ssues of identification and credibility, including the weight to be given to inconsistencies in testimony, were properly considered by the jury[,] and there is no basis for disturbing its determinations' " (*People v Odums*, 121 AD3d 1503, 1504 [4th Dept 2014], *lv denied* 26 NY3d 1042 [2015]; see *People v Peace*, 234 AD3d 1345, 1346 [4th Dept 2025], *lv denied* 43 NY3d 965 [2025]).

We reject defendant's contention that County Court erred in allowing a federal law enforcement officer to testify as an expert on geolocation data in addition to cell phone site and GPS data. " 'The qualification of a witness to testify as an expert rests in the discretion of the court, and its determination will not be disturbed in the absence of serious mistake, an error of law or an abuse of discretion' " (*People v Owens*, 70 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 14 NY3d 890 [2010]; see *People v Lee*, 96 NY2d 157, 162 [2001]). The purpose of expert testimony is to assist the jurors in "appreciat[ing] and understand[ing] matters beyond the knowledge of the average juror" (*People v Lemanski*, 217 AD2d 962, 962 [4th Dept 1995]). Here, the federal law enforcement officer established that his " 'extensive training and experience rendered [him] qualified to provide such [testimony]' " (*Owens*, 70 AD3d at 1470).

Finally, the sentence is not unduly harsh or severe.

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

342

KA 23-01769

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEITH FLEMING, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (AARON FRIEDMAN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered April 18, 2023. The judgment convicted defendant upon a jury verdict of assault in the second degree, aggravated criminal contempt, and criminal contempt 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 assault in the second degree (Penal Law § 120.05 [2]), aggravated criminal contempt (§ 215.52 [1]), and criminal contempt in the first degree (§ 215.51 [b] [v]), arising out of an incident where he allegedly, among other things, stabbed his ex-girlfriend (complainant) in the stomach with a knife. We affirm.

Defendant contends that County Court erred in discharging a deaf sworn juror during voir dire after it ascertained that a certified interpreter would not be available for the duration of the trial. That contention, inasmuch as it is predicated upon alleged violations of, inter alia, CPL 270.15 (3), is unpreserved for our review because defendant did not rely on those specific provisions in opposing the court's discharge of the sworn juror here (see *People v Wells*, 15 NY3d 927, 928 [2010], cert denied 565 US 828 [2011]; *People v Thomas*, 169 AD3d 1255, 1256 [3d Dept 2019], lv denied 33 NY3d 1036 [2019]). Contrary to defendant's further contention, the court's alleged violation of CPL 270.15 does not fall within the " 'very narrow exception' " to the preservation rule of a mode of proceedings error (*People v Mack*, 27 NY3d 534, 540 [2016], rearg denied 28 NY3d 944 [2016]; see *People v Szurgot*, 239 AD3d 1444, 1445 [4th Dept 2025], lv denied 44 NY3d 1013 [2025]).

In any event, we conclude that defendant's contention is without merit. CPL 270.15 (3) provides that "[i]f before twelve jurors are sworn, a juror already sworn becomes unable to serve by reason of illness or other incapacity, the court must discharge" that juror. We review the court's decision to discharge a sworn juror for abuse of discretion (see *People v White*, 228 AD3d 889, 890 [2d Dept 2024], *lv denied* 42 NY3d 1022 [2024]). Discharge of a juror for incapacity is proper where it "emanate[s] from the trial court's concern that the juror would be incapable of [performing the] essential prerequisite[s] of proper jury service" (*Wells*, 15 NY3d at 928; see *People v Knowles*, 79 AD3d 16, 23-24 [3d Dept 2010], *lv denied* 16 NY3d 896 [2011]; see generally *People v Wilson*, 106 AD2d 146, 151 [4th Dept 1985]).

Here, we conclude that the court did not abuse its discretion in dismissing the sworn juror in question. The juror was incapable of fulfilling the duties of a juror inasmuch as he would miss trial testimony due to the absence of an interpreter for the duration of the trial (see *Wells*, 15 NY3d at 928). Moreover, the reason that the juror could not fulfill his duties was outside of his control—i.e., the lack of any interpreter services that would be available for the duration of the trial (see *White*, 228 AD3d at 890; *Knowles*, 79 AD3d at 23-24; cf. *Wilson*, 106 AD2d at 151).

Defendant also contends that the court erred in limiting his cross-examination of the complainant at trial with respect to a response that she purportedly posted on Facebook several months after the alleged crime, which expressed hostility toward defendant. To the extent that defendant contends that the court's decision to prohibit any cross-examination about the Facebook post violated his constitutional right to present a defense, that contention is not preserved for our review inasmuch as he did not object to the court's ruling on that constitutional basis at trial (see *People v Lane*, 7 NY3d 888, 889 [2006]; *People v Harris*, 229 AD3d 1055, 1056 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]; *People v Jones*, 193 AD3d 1410, 1412 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

To the extent that defendant contends that the court erred in limiting his cross-examination as a matter of evidence law, which is preserved for our review (see CPL 470.05 [2]), we conclude that his contention is without merit. "It is well settled that '[a]n accused's right to cross-examine witnesses . . . is not absolute' . . . [and that] [t]he trial court has discretion to determine the scope of the cross-examination of a witness" (*People v Corby*, 6 NY3d 231, 234 [2005]; see *People v Rivera*, 105 AD3d 1343, 1344 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]). Consequently, "trial courts retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant" (*Rivera*, 105 AD3d at 1344 [internal quotation marks omitted]; see *People v Lester*, 83 AD3d 1578, 1578 [4th Dept 2011], *lv denied* 17 NY3d 818 [2011]).

It is well settled that, in presenting the defense, counsel for the defendant "may establish, during both cross[-]examination and . . . its direct case, the victim's . . . hostility . . . or motive to lie . . . This is not a collateral inquiry, but is directly probative on the issue of credibility" (*People v Taylor*, 40 AD3d 782, 784 [2d Dept 2007], *lv denied* 9 NY3d 927 [2007]; see *People v Horton*, 145 AD3d 1575, 1576 [4th Dept 2016]). Here, however, we conclude that the court did not abuse its discretion in limiting defendant's cross-examination of the complainant with respect to the Facebook post. Although the complainant's hostility toward defendant was central to his defense, inasmuch as it provided a basis to assert that she falsely accused him of stabbing her, we conclude that defendant did not establish that there was a reasonable basis in fact to support his proposed questioning of the complainant about the Facebook post (see *People v Carrier*, 270 AD2d 800, 801 [4th Dept 2000], *lv denied* 95 NY2d 864 [2000]). Although the post was certainly derogatory toward defendant, it did not clearly establish the complainant's motive to lie or fabricate, particularly inasmuch as the post was made several months *after* the complainant first accused defendant of the crime (*cf. People v Sampel*, 16 AD3d 1023, 1024 [4th Dept 2005]). Furthermore, we note that the court permitted defendant to cross-examine the complainant about the tumultuous nature of her relationship with defendant, which included instances where she acted violently toward him, as well as about her criminal history (see *People v Little*, 23 AD3d 1117, 1118 [4th Dept 2005], *lv denied* 6 NY3d 777 [2006]). Given that the court permitted defendant to cross-examine the complainant about incidents that revealed her hostility toward defendant or called into question her honesty, we cannot say that it was an abuse of discretion for the court to preclude cross-examination about the Facebook post at issue here.

Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant reversal or modification of the judgment.

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

345.1

CAF 25-01699

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

IN THE MATTER OF ASHLEY R. SENNETT,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DANIEL T. LIEBETREU, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DAVIDOFF HUTCHER & CITRON, LLP, NEW YORK CITY (PATRICIA A. GRANT OF COUNSEL), FOR PETITIONER-APPELLANT.

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

BRADLEY J. ROOKE, BROADALBIN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Timothy L. Virkler, A.J.), entered April 29, 2025, in a proceeding pursuant to Family Court Act article 6. The order dismissed the cross-petition.

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

Same memorandum as in *Matter of Liebetreu v Sennett* ([appeal No. 1] – AD3d – [June 26, 2026] [4th Dept 2026]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

345

CAF 25-00637

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

IN THE MATTER OF DANIEL T. LIEBETREU,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ASHLEY R. SENNETT, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DAVIDOFF HUTCHER & CITRON, LLP, NEW YORK CITY (PATRICIA A. GRANT OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

BRADLEY J. ROOKE, BROADALBIN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Timothy L. Virkler, A.J.), entered March 17, 2025, in a proceeding pursuant to Domestic Relations Law article 5-A. The order, inter alia, directed respondent to return the subject children to Jefferson County.

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

Memorandum: In these proceedings pursuant to Domestic Relations Law article 5-A and Family Court Act article 6, respondent-petitioner mother appeals, in appeal No. 1, from an order that, inter alia, granted petitioner-respondent father's petition seeking to enforce the parties' parenting agreement, which was incorporated, but not merged, into their divorce decree, and directed the mother to return the subject children to Jefferson County. In appeal No. 2, the mother appeals from an order that dismissed her cross-petition seeking, inter alia, to modify the parties' parenting agreement to permit her to relocate with the subject children to the state of Maine. We affirm in both appeals.

Contrary to the mother's contention in appeal No. 1, Family Court did not err in determining that she violated an order of custody by unilaterally relocating to Maine with the children while the father was on military deployment in the Middle East. The proponent of a violation petition "must establish by clear and convincing evidence (1) that a lawful order of the court was in effect, clearly expressing an unequivocal mandate, (2) the appearance, with reasonable certainty,

that the order was disobeyed, (3) that the party to be held in contempt had knowledge of the court's order, and (4) prejudice to the right of a party to the litigation" (*Matter of Mendoza-Pautrat v Razdan*, 160 AD3d 963, 964 [2d Dept 2018]; see Judiciary Law § 753 [A]; Family Ct Act § 156; *Matter of Mauro v Costello*, 162 AD3d 1475, 1475-1476 [4th Dept 2018]).

"It is well established that a separation agreement that is incorporated but not merged into a judgment of divorce 'is a contract subject to the principles of contract construction and interpretation' " (*Roche v Lorenzo-Roche*, 149 AD3d 1513, 1513 [4th Dept 2017], quoting *Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990], *rearg denied* 76 NY2d 889 [1990]; see *Matter of Wheeler v Wheeler*, 174 AD3d 1507, 1508 [4th Dept 2019]). "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent . . . [,] [and] [t]he best evidence of what the parties . . . intend is what they say in their writing" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [internal quotation marks omitted]). Whether a contract provision is ambiguous is a question of law for the court to determine "by looking within the four corners of the document, not to outside sources" (*Kass v Kass*, 91 NY2d 554, 566 [1998]).

Here, the parties' parenting agreement, which was incorporated but not merged into their divorce decree, clearly and unequivocally provided that parenting time was to be split 50/50 between the parents and, although it gave primary residential custody to the mother, did not permit either party to unilaterally relocate with the children outside Jefferson County. Contrary to the mother's contention, the court properly determined that "Paragraph C" of the parenting agreement, which, *inter alia*, required the father to "work with the [m]other to ensure future military permanent change of station (PCS) moves facilitate her career ambitions and wellbeing," did not grant the mother unilateral decision-making authority to relocate. The court did not determine that "Paragraph C" was ambiguous but, rather, construed its plain language to apply only if the father received a new PCS, which did not occur here, arriving at a construction that "give[s] fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*Sears v Sears*, 138 AD3d 1401, 1401 [4th Dept 2016] [internal quotation marks omitted]; see also *Greenfield*, 98 NY2d at 569; *Wheeler*, 174 AD3d at 1509).

Thus, the court did not err in determining that the parenting agreement was a lawful court order, in effect, with a clear mandate prohibiting unilateral relocation of the children outside Jefferson County, which the mother was aware of (see *Matter of Cooley v Roloson*, 201 AD3d 1299, 1299 [4th Dept 2022]; *Mauro*, 162 AD3d at 1475-1476), and that the father established that the mother's conduct in unilaterally relocating with the subject children while he was deployed in the Middle East "defeated, impaired, impeded or prejudiced a right or remedy" of the father under that parenting agreement

(*Mauro*, 162 AD3d at 1476 [internal quotation marks omitted]; see Judiciary Law § 753 [A]), namely, his ability to exercise his parenting time (see *Matter of McRae v Brown*, 211 AD3d 1523, 1523-1524 [4th Dept 2022]; *Mauro*, 162 AD3d at 1476; see also *Matter of Michelle L. v Steven M.*, 227 AD3d 1159, 1164 [3d Dept 2024]). Therefore, we conclude that the father established by clear and convincing evidence that the mother violated the parenting agreement (see *McRae*, 211 AD3d at 1524; *Rech v Rech*, 162 AD3d 1731, 1732 [4th Dept 2018]).

We further reject the mother's contention, in appeal No. 2, that the court erred in denying her cross-petition. Generally, when a parent petitions to modify a custody order and relocate out of state, "the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child[ren]" (*Matter of Tropea v Tropea*, 87 NY2d 727, 736 [1996]). Thus, factors to consider in assessing a parent's request to relocate include "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child[ren] and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child[ren]'s future contact with the noncustodial parent, the degree to which the custodial parent's and child[ren]'s life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and the child[ren] through suitable visitation arrangements" (*id.* at 740-741; see *Matter of Holtz v Weaver*, 94 AD3d 1557, 1557 [4th Dept 2012]).

After considering all of the relevant factors, we conclude that the court properly determined that the mother failed to meet her burden of establishing by a preponderance of the evidence that the proposed relocation from Jefferson County to Maine is in the children's best interests (see *Matter of Eason v Bowick*, 165 AD3d 1592, 1592 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347 [4th Dept 2012], *lv denied* 19 NY3d 802 [2012]; see also *Matter of Betts v Moore*, 175 AD3d 874, 874-875 [4th Dept 2019]). Although the mother testified that she has family support and greater career opportunities in Maine, she failed to provide evidence that similar career opportunities did not exist in Jefferson County (see *Eason*, 165 AD3d at 1592; *Matter of Yadow v Bianco*, 115 AD3d 1338, 1339 [4th Dept 2014]), and the evidence presented at the hearing supports the court's determination that the proposed relocation would have a detrimental impact on the children's relationship with the father (see *Eason*, 165 AD3d at 1592-1593; *Matter of Shepherd v Stocker*, 159 AD3d 1441, 1442 [4th Dept 2018]).

We agree with the mother that the order in appeal No. 2 erroneously states that her cross-petition was dismissed without prejudice "for failure to prosecute," contradicting the underlying decision, which provides that the cross-petition was denied and dismissed on the ground that the mother "failed to meet her burden of proof" of establishing that it would be in the children's best interests to move to Maine. However, inasmuch as "[i]t 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]), we conclude that the error in the order does not warrant modification or reversal.

We have reviewed the mother's remaining contention in appeal No. 1 and conclude that it is without merit.

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

348

CAF 24-01293

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

IN THE MATTER OF ALEJANDRO G.-P. AND NEYMAR G.-P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NEIDY M.P., RESPONDENT,
AND JOSE A., RESPONDENT-APPELLANT.

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

STEVEN DAHLBERG, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO
(RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered July 12, 2024, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent-appellant neglected the subject children.

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-appellant (respondent) appeals from an order that, inter alia, determined that he neglected the subject children.

Contrary to respondent's contention, Family Court properly determined that he neglected the children. To establish neglect, "petitioner was required to show, by a preponderance of the evidence, first, that [the] child[ren]'s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship" (*Matter of Landen S. [Timothy S.]*, 227 AD3d 1465, 1465-1466 [4th Dept 2024] [internal quotation marks omitted]; see *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Landen S.*, 227 AD3d at 1466 [internal quotation marks omitted]).

Here, the record establishes that respondent mother left one of

the subject children in the care of respondent and that the child sustained bruising and a cut on an arm as a result (see *Matter of Vashti M. [Carolette M.]*, 214 AD3d 1335, 1336 [4th Dept 2023], *appeal dismissed* 39 NY3d 1177 [2023]; *Matter of Amarion M. [Faith W.]*, 214 AD3d 1457, 1457-1458 [4th Dept 2023], *lv denied* 39 NY3d 915 [2023]). We conclude that there is a sound and substantial basis in the record for the court's determination that respondent neglected that child by inflicting excessive corporal punishment on the child (see *Amarion M.*, 214 AD3d at 1458). Moreover, the record establishes that both of the subject children were exposed to domestic violence between the mother and respondent (see *Matter of Alejandro G.-P. [Neidy P.]*, 246 AD3d 1464, 1465 [4th Dept 2026]). We therefore conclude that the court's findings concerning respondent's neglect of the subject children have a sound and substantial basis in the record (see generally *Matter of Shakema R. v Mesha B.*, 236 AD3d 1383, 1386 [4th Dept 2025], *lv denied* 43 NY3d 906 [2025]).

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

353

CA 25-00491

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

IN THE MATTER OF JAMES S., PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

FRANK S. PAPPALARDO, ACTING DIRECTOR, MENTAL HYGIENE LEGAL SERVICE,
SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (WILLIAM M. HAYES OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Robert Bauer, A.J.), entered February 24, 2025, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (see § 10.09 [h]).

We reject petitioner's contention that the evidence is legally insufficient to establish that he is a dangerous sex offender requiring confinement. Pursuant to the Mental Hygiene Law, a detained sex offender is classified as a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]).

Here, the parties stipulated that petitioner has a mental abnormality. Contrary to petitioner's contention, we conclude that respondent established by clear and convincing evidence that petitioner requires continued confinement (see *Matter of Charles B. v State of New York*, 192 AD3d 1583, 1585 [4th Dept 2021], lv denied 37 NY3d 913 [2021]). Respondent presented the testimony and report of its expert that petitioner continued to require confinement, that he had not made sufficient progress in treatment, that his present

behavior and assessments suggested that he posed an above average risk of reoffending, and that he did not have a sufficient plan for his reentry into the community (see *id.* at 1585-1586; see also *Matter of Francisco R. v State of New York*, 214 AD3d 1409, 1410 [4th Dept 2023]; *Matter of Allan M. v State of New York*, 163 AD3d 1493, 1494 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018]).

We reject petitioner's further contention that Supreme Court's determination is against the weight of the evidence. We perceive no basis to disturb the court's decision to credit the testimony of respondent's expert over the opinions and testimony of the independent expert (see *Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]; see also *Matter of State of New York v Robert T.*, 214 AD3d 1405, 1407 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]; *Matter of State of New York v Leslie L.*, 174 AD3d 1326, 1328 [4th Dept 2019], *lv denied* 34 NY3d 903 [2019]).

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

355

CA 25-01311

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

IN THE MATTER OF SEAN MAHONEY,
PETITIONER-PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THE VILLAGE OF SPRINGVILLE, THE VILLAGE
OF SPRINGVILLE BOARD OF TRUSTEES, AND
TIMOTHY MICHAELS, RUSS BELSCHER, MARY PADASAK,
LINDSAY BUNCY, AND JESSICA SCHUSTER, SAID PERSONS
CONSTITUTING THE VILLAGE OF SPRINGVILLE BOARD OF
TRUSTEES, RESPONDENTS-DEFENDANTS-APPELLANTS.

LIPPES MATHIAS LLP, BUFFALO (SVETLANA K. IVY OF COUNSEL), FOR
RESPONDENTS-DEFENDANTS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL),
FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John J. DelMonte, J.), entered July 23, 2025. The order, inter alia, granted petitioner an extension of time to serve pleadings.

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

Memorandum: In this hybrid CPLR article 78 proceeding and action under 42 USC § 1983, petitioner-plaintiff (petitioner) seeks a judgment vacating and annulling the decision of respondent-defendant Village of Springville Board of Trustees terminating his employment with respondent-defendant Village of Springville as well as awarding damages for his alleged wrongful termination. Respondents-defendants (respondents) appeal from an order of Supreme Court that, inter alia, granted petitioner's request for affirmative relief extending his time to serve the amended notice of petition-summons and petition-complaint pursuant to CPLR 306-b in the interest of justice. We affirm.

It is "well settled that the determination to grant '[a]n extension of time for service is a matter within the court's discretion' " (*Moss v Bathurst*, 87 AD3d 1373, 1374 [4th Dept 2011]; see *Matter of Delaware Operations Assoc. LLC v New York State Dept. of Health*, 187 AD3d 1560, 1561 [4th Dept 2020]). Here, upon consideration of the relevant factors (see *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]), including the expiration of the statute of limitations, the potentially meritorious nature of

petitioner's causes of action against respondents, and respondents' failure to show any prejudice, we conclude that the court did not abuse its discretion in granting petitioner's request for an extension of time for service (see *Doe v D'Angelo*, 154 AD3d 1300, 1301 [4th Dept 2017]; *Moss*, 87 AD3d at 1374; *Busler v Corbett*, 259 AD2d 13, 17 [4th Dept 1999]).

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

365

KA 24-01737

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHAUNCEY M. CREWS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 11, 2023. The judgment convicted defendant upon a jury verdict of rape in the first degree and criminal sexual act 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 rape in the first degree (Penal Law former § 130.35 [1]) and criminal sexual act in the first degree (former § 130.50 [1]), arising out of an incident where defendant engaged in vaginal and oral sexual conduct with the complainant by forcible compulsion. We affirm.

Defendant contends that Supreme Court erred in denying his motion seeking, inter alia, to strike the People's certificate of compliance (COC) and supplemental COCs and to dismiss the indictment on statutory speedy trial grounds (see CPL 30.30), arguing that the People's failure to timely disclose certain body-worn camera (BWC) footage rendered the COCs 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]).

Assuming, arguendo, that defendant's motion, made after the start of jury selection, was not untimely (*cf. People v Deas*, 226 AD3d 823, 826-827 [2d Dept 2024], *lv denied* 42 NY3d 969 [2024]; see generally CPL 210.20 [2]; *People v Crespo*, 32 NY3d 176, 182-183 [2018], *cert denied* 589 US 929 [2019]), inasmuch as it was made "as soon as

practicable" once defendant learned about the untimely disclosed BWC footage (CPL former 245.50 [4] [c]), we nevertheless conclude that the court did not err in refusing to strike the COCs and dismiss the indictment on statutory speedy trial grounds. Specifically, 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 BWC footage in question and in disclosing it to defendant. We note that the initial discovery supplied by the People pursuant to their mandatory obligations under CPL article 245 was voluminous and included, among other things, other BWC footage relevant to the case. Further, the prosecutor explained that she had made multiple requests to the police for all BWC footage associated with the case and it is evident that, in connection with those requests, the police initially provided nearly all of that footage to the People. In light of the foregoing, we conclude that "[i]t would not have been particularly obvious to the People that [any additional footage] was missing" (*People v Dibble*, 247 AD3d 1566, 1568 [4th Dept 2026] [internal quotation marks omitted]; see *People v Rojas-Aponte*, 242 AD3d 1537, 1540 [4th Dept 2025], *lv denied* 44 NY3d 1068 [2026]; *People v Watkins*, 224 AD3d 1342, 1344 [4th Dept 2024], *lv denied* 41 NY3d 986 [2024]). We further note that it appears from the record that the People disclosed the BWC footage at issue to defendant promptly, once they were able to retrieve it. Simply put, this is not a case where the People denied the existence of clearly discoverable material (see generally *Bay*, 41 NY3d at 212; *People v Lawrence*, 231 AD3d 1497, 1500 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]). Thus, 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, consequently, the court did not err in refusing to dismiss the indictment pursuant to CPL 30.30. In our view, to conclude that the People did not exercise due diligence with respect to the belatedly disclosed BWC footage here would hew too closely to the "perfect prosecutor" approach expressly rejected by the Court of Appeals (*Bay*, 41 NY3d at 212 [internal quotation marks omitted]; see *Lawrence*, 231 AD3d at 1500).

Defendant also contends—based on the People's failure to timely disclose the aforementioned BWC footage—that the court erred in denying his motion to the extent that it sought either dismissal of the indictment or preclusion of the complainant's testimony at trial as a sanction under CPL 245.80 and instead only precluding the People from relying on that footage during their case-in-chief. We reject that contention. Specifically, we conclude that, under the circumstances of this case, the court did not abuse its discretion in fashioning an appropriate sanction (see *People v Bookman*, 224 AD3d 1269, 1270 [4th Dept 2024]; see generally *People v Jenkins*, 98 NY2d 280, 284 [2002]). Indeed, we also note that defendant was not prejudiced by any delay in disclosure of the BWC footage in question because the record establishes that he was "given a meaningful opportunity to use the allegedly exculpatory [or impeaching] material to cross-examine the People's witnesses or as evidence during his

case" (*People v Cortijo*, 70 NY2d 868, 870 [1987]; see *People v Caruso*, 219 AD3d 1682, 1683 [4th Dept 2023]; *People v Thomas*, 158 AD3d 1135, 1135 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]).

Defendant's contention that the court erred in its substantive *Molineux* ruling and that the complainant's testimony exceeded the scope of that ruling are unpreserved for our review inasmuch as he did not object to the court's substantive ruling and merely asserted that the factual allegations in the People's *Molineux* application were too general (see *People v Case*, 197 AD3d 985, 987 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]; *People v Green*, 196 AD3d 1148, 1150-1151 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1161 [2022]). Defendant's further contention that the court erred in failing to give the jury a limiting instruction regarding the *Molineux* evidence is unpreserved for our review because defendant failed to request a limiting instruction during the complainant's testimony or as part of the court's jury charge and did not object to the court's failure to give one (see *People v Hymes*, 174 AD3d 1295, 1299-1300 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]; *People v Peterson*, 240 AD3d 1194, 1196 [4th Dept 2025], *lv denied* 44 NY3d 1053 [2025]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that "the jury failed to give the evidence the weight it should be accorded" (*People v Carlson*, 184 AD3d 1139, 1141 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020] [internal quotation marks omitted]; see *People v Turner*, 197 AD3d 997, 998 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]; *People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]). Here, the video footage of the sexual acts that form the basis for the charges at the center of this case, which was entered in evidence at trial, coupled with the complainant's trial testimony, amply establish that defendant used forcible compulsion to engage in oral and vaginal sexual conduct with the complainant (see generally Penal Law § 130.00 [8] [a], [b]; *People v Thompson*, 72 NY2d 410, 415-416 [1988], *rearg denied* 73 NY2d 870 [1989]). Ultimately, we conclude that the jury was in the best position to assess the complainant's credibility (see generally *People v Ruiz*, 159 AD3d 1375, 1375 [4th Dept 2018]), and we perceive no reason to reject the jury's credibility determination.

Defendant further contends that he was denied effective assistance of counsel by a litany of alleged errors, including, inter alia, defense counsel's failure to request a *Molineux* limiting instruction and his failure to request an adverse inference instruction with respect to the People's failure to obtain the complainant's cell phone or to preserve the metadata from video clips obtained from the cell phone. " 'Although the failure to request

limiting instructions may constitute ineffective assistance of counsel if the error were so serious that defendant did not receive a fair trial' " (*People v Orcutt*, 51 AD3d 1404, 1405 [4th Dept 2008]), here, defense counsel may have had a strategic reason for failing to request a further limiting instruction with respect to the *Molineux* evidence inasmuch as the theory of the defense was that defendant and complainant had a fraught and atypical relationship, which included some domestic violence and verbal threats, and that the nature of that relationship provided context for the sexual acts at the center of this case and undermined the assertion that they were the result of forcible compulsion (see generally *Case*, 197 AD3d at 988; *People v Williams*, 107 AD3d 1516, 1516-1517 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013]).

Further, we conclude that defense counsel was not ineffective in failing to request an adverse inference instruction with respect to the People's failure to preserve complainant's cell phone and preserve metadata from video clips obtained from the cell phone, inasmuch as that request had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; see *People v Jordan*, 232 AD3d 1253, 1255 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]). "[A] permissive adverse inference charge should be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where that evidence has been destroyed by agents of the state" (*People v Handy*, 20 NY3d 663, 669 [2013]; see *People v Durant*, 26 NY3d 341, 348-350 [2015]). Here, defendant was not entitled to such a charge inasmuch as there was no evidence that the People ever possessed—let alone destroyed—the evidence in question (see *Jordan*, 232 AD3d at 1255; *People v Jones*, 211 AD3d 1594, 1596-1597 [4th Dept 2022], *lv denied* 39 NY3d 1111 [2023]; *People v Burton*, 126 AD3d 1324, 1325-1326 [4th Dept 2015], *lv denied* 25 NY3d 1199 [2015]).

Defendant's remaining allegations of ineffective assistance of counsel lack merit. Moreover, viewing defense counsel's representation in its totality and as of the time of the representation, including defendant's acquittal on one of the counts charged in the indictment, we conclude that defendant received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant contends that the order of protection issued at the time of sentencing is invalid because it exceeds the maximum permissible duration of such an order, and that the court erred in failing to take into account his jail time credit in determining the duration of the order of protection. As defendant correctly concedes, however, those contentions are unpreserved for our review inasmuch as he did not object to the duration of the order of protection at sentencing (see *People v Cook*, 118 AD3d 1499, 1500 [4th Dept 2014], *lv denied* 24 NY3d 959 [2014]; see generally *People v Nieves*, 2 NY3d 310, 315-317 [2004]), and, under the circumstances of this case, we decline to exercise our discretion to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We conclude that the sentence is not unduly harsh or severe.

Finally, we note that the certificate of disposition and the uniform sentence and commitment form state that defendant was convicted of criminal sexual act in the first degree under Penal Law former § 130.50 without specifying a subdivision, and they must be amended to reflect that he was convicted under Penal Law former § 130.50 (1) (see *People v Martinez*, 37 AD3d 1099, 1100 [4th Dept 2007], *lv denied* 8 NY3d 947 [2007]; see generally *People v Osorio*, 179 AD3d 1512, 1514 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]).

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

376

CA 25-01370

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

TINA M. BATTEY, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

VILLAGE OF YOUNGSTOWN, DEFENDANT-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO, GERBER CIANO KELLY BRADY LLP, GARDEN CITY (BRENDAN T. FITZPATRICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & RITTER LLP, BUFFALO (THOMAS D. LYONS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Mario A. Giacobbe, A.J.), entered August 13, 2025, in a personal injury action. The order denied the motion of defendant for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she tripped and fell on a raised portion of a sidewalk in defendant, Village of Youngstown. Defendant appeals from an order that denied its motion for summary judgment dismissing the complaint. We affirm.

"If the municipality establishes its prima facie entitlement to summary judgment based on the lack of prior written notice, the burden shifts to the plaintiff to come forward with evidentiary proof in admissible form demonstrating the existence of material issues of fact which require a trial of the action" (*Horst v City of Syracuse*, 191 AD3d 1297, 1298-1299 [4th Dept 2021] [internal quotation marks omitted]).

Here, there is no dispute that defendant established that it lacked prior written notice of the alleged defects in the sidewalk. Thus, the burden shifted to plaintiff to establish that an exception to the prior written notice rule is applicable. Such an exception exists where the municipality's affirmative negligence "immediately results in . . . a dangerous condition" (*Horan v Town of Tonawanda*, 83 AD3d 1565, 1567 [4th Dept 2011] [internal quotation marks omitted]; see *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

We conclude that plaintiff raised a triable issue of fact whether

defendant's affirmative negligence immediately created a dangerous condition. Plaintiff submitted the affirmation of her husband, who stated that he had called defendant's Superintendent of Public Works "[i]mmediately upon observing the work and discovering that [defendant] had improperly reinstalled the original slab" and further stated that the sidewalk repair "was misaligned, uneven, unsafe and done in violation of Section 193-6 of the Village Code." Any inconsistencies between his affirmation and his deposition testimony are issues of credibility to be resolved at a trial (see *Hale v Meadowood Farms of Cazenovia, LLC*, 104 AD3d 1330, 1332 [4th Dept 2013]; *Godlewski v Carthage Cent. School Dist.*, 83 AD3d 1571, 1572 [4th Dept 2011]; *Palmer v Horton*, 66 AD3d 1433, 1434 [4th Dept 2009]).

Contrary to defendant's further contention, it failed to establish as a matter of law that the defect in the sidewalk was trivial (see *Morris v Buffalo Gen. Health Sys.*, 203 AD3d 1692, 1693-1694 [4th Dept 2022]).

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

385

KA 23-01766

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONZELL CAMBER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered January 25, 2022. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree (three counts) and reckless endangerment 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, inter alia, three counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Defendant's contention that Supreme Court should have dismissed the indictment because the People's certificate of compliance was illusory and the court failed to make sufficient inquiry into the People's actual readiness for trial is unpreserved for our review because defendant did not move to dismiss the indictment on those grounds (see *People v Robinson*, 225 AD3d 1266, 1267-1268 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]; *People v Elmore*, 211 AD3d 1536, 1538 [4th Dept 2022], *lv denied* 42 NY3d 938 [2024]). Prior to the plea colloquy, the court acknowledged that defendant's former counsel had prepared but not filed a motion seeking dismissal of the indictment on speedy trial grounds. Further, defendant's counsel at the time of the plea confirmed that sufficient discovery had been received, thereby effectively withdrawing any purported motion (see *People v Gilliam*, 96 AD3d 1650, 1651 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]).

Contrary to defendant's contention, the court properly denied that part of his omnibus motion seeking to suppress physical evidence as the product of an unlawful stop. The police may stop a vehicle "when there exists at least a reasonable suspicion that the driver or

occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Spencer*, 84 NY2d 749, 753 [1995], *cert denied* 516 US 905 [1995]; see *People v Hinshaw*, 35 NY3d 427, 430 [2020]; *People v Floyd*, 158 AD3d 1146, 1147 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]). Here, a law enforcement officer who reviewed surveillance video of a suspect firing a weapon from a vehicle took note of the make, model, and license plate color of the vehicle, the number of occupants, and details regarding both occupants' clothing. The officer relayed those details to a second law enforcement officer who then effected the stop of the vehicle in which defendant was a passenger after confirming that the vehicle and its occupants matched that description (see *Floyd*, 158 AD3d at 1147; see generally *People v Moss*, 232 AD3d 1327, 1328 [4th Dept 2024]). We therefore conclude that the officer who effected the stop had reasonable suspicion that an occupant of that vehicle had committed a crime (see *Floyd*, 158 AD3d at 1147).

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

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

391

CA 25-00146

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

CHRISTOPHER F. THURSTON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY B. HOWARD, IN HIS OFFICIAL CAPACITY
AS SHERIFF OF ERIE COUNTY, OFFICE OF ERIE COUNTY
SHERIFF, COUNTY OF ERIE, AND DEPUTY KENT,
DEFENDANTS-APPELLANTS.

LIPPES MATHIAS LLP, BUFFALO (KIRSTIE A. MEANS OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Erie County (Amy C. Martoche, J.), entered December 10, 2024. The judgment awarded plaintiff money damages against defendants.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the bus in which he was riding as a passenger struck a police vehicle driven by an on-duty police officer, defendant Deputy Kent. At the time of the collision, Kent had initiated a U-turn in order to pursue a vehicle that did not have its taillights illuminated. Kent began the U-turn by pulling into the lane of travel of the bus, but he was unable to complete the U-turn and stopped his vehicle in the middle of the lane, where it was struck by the oncoming bus. Following the presentation of evidence, Supreme Court directed a verdict in favor of plaintiff on the issue of Kent's negligence. The jury awarded plaintiff the sums of, inter alia, \$60,000 for past pain and suffering, \$148,000 for past lost wages, \$500,000 for future pain and suffering and \$200,000 for future lost wages. Defendants moved pursuant to CPLR 4404 (a) to set aside the verdict and order a new trial on the ground that, inter alia, the reckless disregard standard of Vehicle and Traffic Law § 1104 was the applicable standard of care. In the alternative, defendants sought, as relevant on appeal, to set aside the verdict with respect to the awards for past and future lost earnings on the basis they were not supported by legally sufficient evidence, were excessive, or were against the weight of the evidence and to reduce the award for future pain and suffering as excessive or against the weight of the evidence.

The court denied defendants' motion, and a judgment was entered in favor of plaintiff. Defendants appeal from the judgment, and we affirm.

Defendants contend that the court erred in failing to apply the reckless disregard standard of Vehicle and Traffic Law § 1104. We reject that contention. Although defendants argued prior to trial that Kent was engaged in an "emergency operation" at the time of the collision and that the reckless disregard standard of section 1104 applied to Kent's conduct, the court precluded defendants' reliance on the reckless disregard standard as a sanction for defendants' violation of a subpoena duces tecum seeking items bearing on the possible relevance of section 1104. Defendants' contention that the court abused its discretion by imposing a sanction that was disproportionate to the disclosure violation is raised for the first time in defendants' reply brief and thus is not properly before this Court (see *Brooks v City of Buffalo*, 209 AD3d 1270, 1272 [4th Dept 2022]).

Contrary to defendants' further contention, the court did not err in granting a directed verdict on the issue of Kent's negligence. "[A] directed verdict is appropriate where the . . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Bolin v Goodman*, 160 AD3d 1350, 1351 [4th Dept 2018] [internal quotation marks omitted]; see *A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1287 [4th Dept 2014]). In determining whether to grant such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Senycia v Vosseler*, 217 AD3d 1520, 1521 [4th Dept 2023] [internal quotation marks omitted]). Here, viewing the evidence in the light most favorable to defendants and according them every favorable inference which may properly be drawn from the facts presented, we conclude that there is no valid line of reasoning and permissible inferences which could lead rational individuals to the conclusion that Kent was not negligent.

We reject defendants' contention that the court erred in precluding them from impeaching plaintiff with evidence of his criminal history. "[W]hile a civil litigant is granted broad authority to use the criminal convictions of a witness to impeach the credibility of that witness, the nature and extent of cross-examination, including with respect to criminal convictions, remains firmly within the discretion of the trial court" (*Ubiles v Halliwell-Kemp*, 167 AD3d 1511, 1511-1512 [4th Dept 2018] [internal quotation marks omitted]; see CPLR 4513; *Tornatore v Cohen*, 162 AD3d 1503, 1504 [4th Dept 2018]). Here, we conclude that the court did not abuse its discretion in precluding defendants from impeaching plaintiff with three prior convictions inasmuch as two of the convictions were too remote (see *Ubiles*, 167 AD3d at 1512) and it would have been more prejudicial than probative to allow cross-examination on any of the convictions (see generally *Siemucha v Garrison*, 111 AD3d 1398, 1400

[4th Dept 2013)).

We reject defendants' contention that the award for past and future lost earnings should be set aside as excessive and not supported by the evidence. It is plaintiff's burden to establish damages for past and future lost earnings "with reasonable certainty" (*Karwacki v Astoria Med. Anesthesia Assoc., P.C.*, 23 AD3d 438, 439 [2d Dept 2005]; see *Huff v Rodriguez*, 45 AD3d 1430, 1433 [4th Dept 2007]). "Recovery for lost earning capacity is not limited to a plaintiff's actual earnings before the accident . . . and the assessment of damages may instead be based on future probabilities" (*Huff*, 45 AD3d at 1433 [internal quotation marks omitted]). Moreover, "[i]n evaluating whether the jury award is excessive, [this Court] considers whether the verdict deviates materially from what is considered reasonable compensation" (*Grasha v Town of Amherst*, 191 AD3d 1286, 1287 [4th Dept 2021], *lv denied* 37 NY3d 906 [2021]; see CPLR 5501 [c]). Here, we conclude that the award for past and future lost earnings is supported by plaintiff's testimony together with his employment records, which provide a "valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; cf. *Shubbuck v Conners*, 15 NY3d 871, 872 [2010]). We further conclude that the award does not deviate materially from reasonable compensation.

We also reject defendants' contention that the award for future pain and suffering is excessive. In view of the evidence concerning the nature and consequences of plaintiff's injuries, we conclude that the amount of damages awarded does not deviate materially from what would be reasonable compensation (see CPLR 5501 [c]; *Grasha*, 191 AD3d at 1287; *Strangio v New York Power Auth.* [appeal No. 2], 275 AD2d 945, 946 [4th Dept 2000]).

Finally, we have reviewed defendants' contentions that the awards for past and future lost earnings and future pain and suffering are against the weight of the evidence, and we conclude that they are without merit.

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

402

KA 24-00043

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY WILLIAMS, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 20, 2023. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* 589 US 1302 [2020]; *People v Moody*, 240 AD3d 1323, 1324 [4th Dept 2025], *lv denied* 44 NY3d 1012 [2025]), and the valid waiver encompasses defendant's challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Finally, we note that the certificate of disposition incorrectly recites that defendant was convicted of criminal possession of a controlled substance in the third degree, and it must be amended to reflect that he was convicted of attempted criminal possession of a controlled substance in the third degree (*see generally People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2022]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

403

KA 22-01666

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASHEEM Q. WRIGHT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Niagara County Court (John James Ottaviano, J.), rendered June 27, 2022. The judgment convicted defendant upon a 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: In appeal No. 1, 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]). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (§§ 110.00, 120.05 [1]).

In appeal No. 1, even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his contention that County Court erred in refusing to suppress the gun recovered from his vehicle as the fruit of an unlawful search (see *People v Langdon*, 240 AD3d 1412, 1412 [4th Dept 2025], *lv denied* 44 NY3d 994 [2025]; *People v Williams*, 225 AD3d 1130, 1130 [4th Dept 2024], *lv denied* 42 NY3d 973 [2024]), we conclude that defendant's contention is unpreserved for our review inasmuch as he did not move for suppression on that ground (see *People v Rodriguez*, 236 AD3d 1306, 1307 [4th Dept 2025], *lv denied* 43 NY3d 1058 [2025]; *People v Wilson*, 213 AD3d 1217, 1218 [4th Dept 2023], *lv denied* 39 NY3d 1158 [2023]; see generally CPL 470.05 [2]). The only ground for suppression advanced by defendant was that his un-*Mirandized* statements to the police made following the discovery of the gun were the result of custodial interrogation, a contention defendant has abandoned on appeal (see *Wilson*, 213 AD3d at 1218; see

generally People v Porter, 200 AD3d 1599, 1600 [4th Dept 2021], *lv denied* 38 NY3d 953 [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 [3] [c]).

In appeal No. 2, defendant raises no contentions with respect to the judgment, except to contend that he did not validly waive his right to appeal. Given the absence of any contentions that the judgment should be reversed or modified, we conclude that defendant's contention regarding the validity of his waiver of the right to appeal is academic, and we therefore dismiss the appeal from the judgment in appeal No. 2 (*see People v Anderson*, 243 AD3d 1286, 1287 [4th Dept 2025], *lv denied* 44 NY3d 1064 [2026]; *People v Lewis*, 232 AD3d 1316, 1316 [4th Dept 2024]; *see generally People v Montreal* [appeal No. 2], 213 AD3d 1255, 1256 [4th Dept 2023]).

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

404

KA 22-01668

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASHEEM Q. WRIGHT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Niagara County Court (John James Ottaviano, J.), rendered June 27, 2022. The judgment convicted defendant upon a plea of guilty of attempted assault in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Wright* ([appeal No. 1] – AD3d – [June 26, 2026] [4th Dept 2026]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

406

KA 25-00649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DUSTIN R. SCHINDLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 12, 2024. The judgment convicted defendant, upon his plea of guilty, of rape 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 rape in the second degree (Penal Law former § 130.30 [1]). We affirm.

Defendant contends that Supreme Court failed to order the matter held for action of the grand jury and, thus, that he did not validly waive indictment. We note that defendant's contention need not be preserved for our review, is not forfeited by his guilty plea, and would not be precluded by a valid waiver of the right to appeal (see *People v Price*, 195 AD3d 1570, 1570 [4th Dept 2021], lv denied 37 NY3d 1029 [2021]). Nonetheless, we reject defendant's contention on the merits. Pursuant to CPL 195.10 (1), "[a] defendant may waive indictment and consent to be prosecuted by superior court information when," among other requirements, "a local criminal court has held the defendant for the action of a grand jury" (CPL 195.10 [1] [a]). "Being so held for the action of a [g]rand [j]ury involves the filing of a felony complaint on which defendant has been arraigned and a finding after a preliminary hearing (unless waived by defendant) that reasonable cause exists to believe that defendant committed a felony" (*Price*, 195 AD3d at 1571 [internal quotation marks omitted]; see *People v D'Amico*, 76 NY2d 877, 879 [1990]).

Where, as here, a court sitting in a hybrid capacity transfers the case from its capacity as a local criminal court to its capacity as Supreme Court, the court "thereby effectively order[s] defendant held for grand jury action" (*People v Cicio*, 157 AD3d 651, 651 [1st

Dept 2018], *lv denied* 31 NY3d 982 [2018]; see *People v Fox*, 158 AD3d 591, 591 [1st Dept 2018], *lv denied* 31 NY3d 1081 [2018]; see generally *Price*, 195 AD3d at 1571). Moreover, defendant does not dispute that, here, the court executed the waiver of indictment in its capacity as Supreme Court, and that the court's order expressly indicated that the matter was held for action by the grand jury. Inasmuch as "Supreme Court was satisfied with the waiver of the indictment and executed an order to that effect[, w]e . . . 'may presume that the matter was properly before that court' " (*People v Hernandez*, 63 AD3d 1615, 1616 [4th Dept 2009], *lv denied* 13 NY3d 745 [2009]).

We likewise reject defendant's related contention that he was required to expressly waive his right to a preliminary hearing and that such right could not be delegated to defense counsel (see *People v Feliz*, 202 AD3d 633, 633 [1st Dept 2022], *lv denied* 38 NY3d 1032 [2022]; see also *People v Gassner*, 193 AD3d 1182, 1184 [3d Dept 2021], *lv denied* 37 NY3d 956 [2021]).

Contrary to defendant's additional contention, he validly waived his right to appeal (see *People v Bundscho*, 239 AD3d 1261, 1261 [4th Dept 2025], *lv dismissed* 44 NY3d 1064 [2026]; *People v Simpson*, 232 AD3d 1266, 1266 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]; *People v Roberto*, 224 AD3d 1367, 1367-1368 [4th Dept 2024]), and that valid waiver of the right to appeal encompasses his contention that his sentence is unduly harsh and severe.

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

410

KA 25-00137

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JACOB FELDT, DEFENDANT-APPELLANT.

NATHANIEL L. BARONE, II, PUBLIC DEFENDER, MAYVILLE (LYNN S. SCHAFER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (MICHAEL J. PISKO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered January 23, 2025. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (SORA) (Correction Law § 168 *et seq.*). We affirm.

We reject the contention of defendant that Supreme Court's assessment of 20 points against him under risk factor 7, relationship between defendant and the victim, is not supported by clear and convincing evidence (see Correction Law § 168-n [3]; *People v Pettigrew*, 14 NY3d 406, 408 [2010]). Pursuant to the Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (2006) (Guidelines), 20 points are assessed "if the offender's crime . . . arose in the context of a professional or avocational relationship between the offender and the victim and was an abuse of such relationship. [In that] situation[] . . . there is a heightened concern for public safety and need for community notification" (Guidelines at 12; see generally *People v Cook*, 29 NY3d 121, 125-126 [2017]). "[F]actor 7 . . . is meant to focus on the relationship, or absence of a relationship, between the offender and [the] victim before the crime was committed" (*People v Johnson*, 11 NY3d 416, 420 [2008]; see *Cook*, 29 NY3d at 126). Although not specifically defined, we note that "professional relationships under [risk f]actor 7 are not limited to those involving learned or licensed professions" (*People v Robinson*, 242 AD3d 1130, 1131 [2d Dept 2025], *lv denied* 45 NY3d 907 [2026] [internal quotation marks omitted]; see *People v Wallace*, 231

AD3d 600, 600 [1st Dept 2024], *lv denied* 43 NY3d 907 [2025]; *People v Suazo-Lopez*, 203 AD3d 615, 615-616 [1st Dept 2022], *lv denied* 38 NY3d 912 [2022]).

Here, we conclude that the People's evidence at the SORA hearing established that the relationship between the 37-year-old defendant and the 16-year-old victim, prior to the offense conduct, was professional in nature, inasmuch as defendant was the manager of the movie theater where the victim worked and was her supervisor (see generally *People v Bellinger*, 233 AD3d 1331, 1333 [3d Dept 2024]; *People v Somodi*, 170 AD3d 1056, 1057-1058 [2d Dept 2019]; *People v Carlton*, 78 AD3d 1654, 1655 [4th Dept 2010]). Notwithstanding the fact that defendant and the victim later developed a personal relationship where the victim sought out defendant's advice, that relationship was nevertheless preceded by an established supervisor-employee relationship between defendant and the victim, and the trust between them was initially formed in that professional capacity. Defendant's offense conduct against the victim, some of which occurred in the movie theater during the victim's work shifts, constituted a breach of that trust by defendant (see *Bellinger*, 233 AD3d at 1333). Given the evidence in the record establishing that the personal relationship between defendant and the victim formed *after* the professional relationship started, we reject defendant's contention that his relationship with the victim was familial in nature (see generally *Cook*, 29 NY3d at 129-130; *People v Stein*, 63 AD3d 99, 101-102 [4th Dept 2009]). Consequently, we conclude that the court was justified in assessing 20 points with respect to risk factor 7 (see *Carlton*, 78 AD3d at 1655).

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

415

CAF 24-02008

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

IN THE MATTER OF MARISSA BULKLEY,
PETITIONER-RESPONDENT-RESPONDENT,

V

MEMORANDUM AND ORDER

ELLEN BULKLEY, RESPONDENT-PETITIONER-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-PETITIONER-APPELLANT.

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

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

Appeal from an order of the Family Court, Steuben County (Chauncey J. Watches, J.), entered December 10, 2024, in a proceeding pursuant to Family Court Act article 6. The order, *inter alia*, continued joint custody and shared physical residency with respect to the subject children.

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

Memorandum: Petitioner-respondent and respondent-petitioner (respondent) are the parents of three children. Respondent appeals from an order that, *inter alia*, continued the parties' joint custody arrangement whereby they share joint physical residency of the children.

Preliminarily, we note that the parties do not dispute that there has been a change in circumstances sufficient to warrant an inquiry into whether a modification of their prior stipulated custody order is in the children's best interests, inasmuch as the parties filed competing petitions alleging such a change in circumstances (see *Matter of Hernandez v McGowan*, 246 AD3d 1482, 1483 [4th Dept 2026]; see generally *Matter of Cooley v Roloson*, 201 AD3d 1299, 1299-1300 [4th Dept 2022]).

With respect to the merits, we conclude that Family Court's determination is supported by a sound and substantial basis in the record. "The court's determination in a custody matter is entitled to great deference and will not be disturbed where . . . it is based on a careful weighing of appropriate factors . . . Those factors include: (1) the continuity and stability of the existing custodial

arrangement, including the relative fitness of the parents and the length of time the present custodial arrangement has continued; (2) the relative quality of each parent's home environment; (3) each parent's ability to provide for the child[ren]'s emotional and intellectual development; (4) the parents' relative financial status and ability to provide for the child[ren]; (5) the child[ren]'s wishes; and (6) the need of the child[ren] to live with siblings" (*Matter of Krier v Krier*, 178 AD3d 1372, 1373 [4th Dept 2019] [internal quotation marks omitted]; see *Matter of Torres v Pfeiffer*, 235 AD3d 1261, 1262 [4th Dept 2025]).

Here, while neither parent is perfect, both love the children and provide a safe home for them, and the attorney for the children supports the custodial arrangement ordered by the court. Moreover, neither parent presents a threat to the children, all of whom enjoy spending time with both parents and benefit in different ways from the time spent with them. Inasmuch as we generally defer to custody determinations made by courts following evidentiary hearings (see *Matter of Werner v Kenney*, – AD3d –, –, 2026 NY Slip Op 02754, *2 [4th Dept 2026]), we perceive no basis to disturb the order in this case.

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

416

CAF 24-01923

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

IN THE MATTER OF DWIGHT JONES, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TONYA SERNA, RESPONDENT-RESPONDENT.

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

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered October 2, 2024, in a proceeding pursuant to Family Court Act article 6. The order, *inter alia*, awarded respondent sole legal and sole physical custody with respect to the subject children and suspended petitioner's parenting time and other access to the children.

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

Memorandum: In this Family Court Act article 6 proceeding, petitioner father appeals, as limited by his brief, from an order insofar as it suspended his parenting time and other access to the parties' younger child. We affirm.

Initially, we note that the parties do not dispute that there has been a sufficient change in circumstances to warrant an inquiry into whether modification of the parties' existing custody and visitation arrangement would be in the child's best interests (*see Matter of Cronin v Cronin*, 243 AD3d 1317, 1317 [4th Dept 2025]; *Matter of Wilson v Cheves*, 240 AD3d 1433, 1433-1434 [4th Dept 2025]). Here, the father, *inter alia*, filed a petition seeking modification of the parties' custody and visitation arrangement, pursuant to which the mother has sole legal and physical custody of the child, with supervised parenting time to the father, and respondent mother moved by order to show cause for an order suspending the father's parenting time.

Although visitation with a noncustodial parent is presumed to be in the best interests of the child (*see Matter of Granger v Misercola*, 21 NY3d 86, 90 [2013]; *Matter of Fowler v Jones*, 225 AD3d 1162, 1162

[4th Dept 2024], *lv denied* 42 NY3d 903 [2024]; *Guy v Guy*, 147 AD3d 1305, 1306 [4th Dept 2017]), "the presumption may be rebutted when it is shown, 'by a preponderance of the evidence, that visitation would be harmful to the child' " (*Matter of Fewell v Ratzel*, 121 AD3d 1542, 1542 [4th Dept 2014], quoting *Granger*, 21 NY3d at 92; see *Matter of Brown v Ruperto*, 243 AD3d 1371, 1371 [4th Dept 2025], *lv denied* 45 NY3d 904 [2026]; *Fowler*, 225 AD3d at 1162). "[T]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record" (*Matter of Brown v Terwilliger*, 108 AD3d 1047, 1048 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013] [internal quotation marks omitted]; see *Fowler*, 225 AD3d at 1162).

Here, contrary to the father's contention, the court's determination that visitation and other access to the child would not be in the child's best interests has a sound and substantial basis in the record (see *Matter of Grayson v Lopez*, 178 AD3d 1427, 1428 [4th Dept 2019]; *Matter of Bloom v Mancuso*, 175 AD3d 924, 926 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]). A parent's failure to exercise visitation for a prolonged period of time is a relevant factor when determining whether visitation is warranted (see *Brown*, 108 AD3d at 1048), and here the evidence at the hearing established that the father did not make a meaningful effort to nurture a relationship with the child (see *Fowler*, 225 AD3d at 1162-1163). Specifically, we note that the record shows that the father did not exercise any visitation with the child for approximately five years between 2018 and 2023. There was also testimony that, since 2018, the child never received a single gift from the father for holidays or her birthday. Although, in 2023, the father made some efforts to reconnect with the child, including participating in some supervised visitation, there was nevertheless a sound and substantial basis in the record to show that those efforts were insincere. For one thing, the record shows that the father engaged the child in inappropriate conversations during the visits that occurred during that time, informing her that the state profited from his child support and was the reason she did not get to see him. Moreover, the evidence in the record established that the father ceased visits in October 2023, and had not seen the child in person since. The father asserted that he ceased visits at that time because he could not afford to pay for supervision; however, we note that he did not supply any evidence, besides his own bare assertions, to substantiate his claim that he could not afford to participate in any supervised visitation.

Also supporting the court's determination that it is in the best interests of the child to suspend the father's visitation and access is evidence establishing that the father did not comply with certain court directives (see *Matter of Morrissey v Morrissey*, 124 AD3d 1367, 1367 [4th Dept 2015], *lv denied* 25 NY3d 902 [2015]). In particular, the father did not comply with the court's directive that he download a specific application to facilitate communication between himself and the mother. According to the father, he did not think there was any point in downloading the communication application when he did not plan to participate in supervised visits. We also reject the father's

contention that the court should not have suspended his visitation and access to the child inasmuch as the mother did not foster or encourage the child's relationship with the father (*cf. Matter of Saunders v Stull*, 133 AD3d 1383, 1384 [4th Dept 2015]). Although there were some prior instances where the mother cut short or missed the child's visits with the father, there was evidence at the hearing establishing that she nevertheless encouraged the child to attend visitation, and reminded her, when she would send text messages to the mother during those visits, that it was the father's time to visit with her.

Finally, the father contends that the court erred in disclosing information that the child shared during the *Lincoln* hearing. Even assuming, *arguendo*, that the court did improperly share such information (*see Matter of Faes v Coulson*, 247 AD3d 1524, 1525 [4th Dept 2026]; *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 any such error does not justify disturbing the court's determination here (*see Faes*, 247 AD3d at 1525; *Carter*, 100 AD3d at 1558; *see also Matter of John M. v Tashina N.*, 218 AD3d 935, 938-939 [3d Dept 2023]).

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

428

KA 23-01795

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARKUS J. DIBRANGO, DEFENDANT-APPELLANT.

ADAM AMIRAUT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered November 1, 2022. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his motion to withdraw his plea (see *People v Hoose*, 236 AD3d 1294, 1294 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]). "[A] court does not abuse its discretion in denying a motion to withdraw a guilty plea where the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding" (*id.* [internal quotation marks omitted]; see *People v Fox*, 204 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]).

We agree with defendant that his waiver of the right to appeal is invalid inasmuch as the 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]; *People v Henderson*, 247 AD3d 1495, 1496 [4th Dept 2026]; see generally *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* 589 US 1302 [2020]). We nonetheless conclude that the sentence is not unduly harsh or severe.

We have considered defendant's remaining contention and conclude that it does not warrant reversal or modification of the judgment.

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

430

KA 24-01281

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAMELL WASHINGTON, 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 Supreme Court, Erie County (Betty Calvo-Torres, A.J.), rendered February 1, 2024. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 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: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

436

CA 24-01620

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

COUNTY OF ERIE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SELECTIVE INSURANCE COMPANY OF AMERICA,
DEFENDANT-APPELLANT,
AND ZURICH AMERICAN INSURANCE COMPANY, DEFENDANT.
(APPEAL NO. 1.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MATTHEW C. RONAN OF
COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 17, 2024. The order denied the motion of defendant Selective Insurance Company of America to strike the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff, County of Erie (County), commenced this declaratory judgment and breach of contract action seeking, inter alia, a declaration that defendant insurers, Selective Insurance Company of America (Selective) and Zurich American Insurance Company (Zurich), who issued commercial general liability policies naming the County as an additional insured, must provide coverage to the County in an underlying personal injury lawsuit. The County hired Destro & Brothers Concrete Company, Inc. (Destro) as a contractor and hired LiRo Engineers, Inc. (LiRo) to provide construction management services in connection with a paving project. Selective insured Destro, and Zurich insured LiRo.

The plaintiff in the underlying action sought damages for personal injuries she sustained when she fell off her bicycle at a park owned by the County when she transitioned from the pavement edge to the grass. She named as defendants the County, Destro, and LiRo.

After defendants refused to provide insurance coverage for the County, the County commenced this declaratory judgment and breach of contract action against them. In appeal No. 1, Selective appeals from an order denying its motion for an order striking the County's

complaint against it or, alternatively, compelling the County to provide deposition testimony or, alternatively, prohibiting the County from offering any testimony or other evidence related to the coverage issue (motion to compel). In appeal No. 2, defendants appeal from an order and judgment granting the County's motion for summary judgment, denying Selective's cross-motion for summary judgment, and declaring that defendants were obligated to defend the County in the underlying lawsuit and reimburse the County for reasonable costs incurred to date in defending the underlying lawsuit.

Addressing first Zurich's appeal in appeal No. 2, we reject its contention that Supreme Court erred in granting that part of the County's motion seeking summary judgment against Zurich and declaring that Zurich must defend the County and reimburse it for reasonable defense costs. Zurich does not dispute that the County met its initial burden of establishing its entitlement to coverage under the Zurich policy, but Zurich contends that it established the applicability of the professional services exclusion in the policy, which provides that "[t]his insurance does not apply to . . . '[b]odily injury' . . . arising out of the rendering of, or failure to render, any professional architectural, engineering or surveying services." Zurich contends that inasmuch as LiRo was hired as an engineering consultant and the injuries to the plaintiff in the underlying action allegedly arose from those engineering services, the professional services exclusion in the policy applies.

It is well settled that an insurance company's "duty to defend is 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest . . . a reasonable possibility of coverage' " (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). Thus, an insurer has a duty to defend "whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]). "To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*id.*; see *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]; *Georgetown Capital Group, Inc. v Everest Natl. Ins. Co.*, 104 AD3d 1150, 1152 [4th Dept 2013]).

Here, the plaintiff in the underlying action alleged that her injuries were the result of the negligent conduct of the County, Destro, and LiRo "in the ownership, operation, maintenance, management, construction, control and design of the . . . pavement." We conclude that Zurich failed to demonstrate that the allegations in the underlying action fell "solely and entirely within the policy exclusion[]" (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137 [internal quotation marks omitted]; see *Mscichowski v MLMIC Ins. Co.*, 227 AD3d 1372, 1374-1375 [4th Dept 2024]; *Georgetown Capital Group*,

Inc., 104 AD3d at 1153).

Addressing next Selective's appeal in appeal No. 2, although we disagree with Selective that the court erred in denying its cross-motion for summary judgment, we agree with Selective that the court erred in granting that part of the County's motion for summary judgment against Selective and declaring that Selective must defend the County and reimburse it for reasonable defense costs. There is no dispute that Destro did paving work at the park where the underlying accident occurred and that the contract between the County and Destro required Destro to name the County as an additional insured on its insurance policy. Selective contends, however, that the contract did not unambiguously include the paving work at the park.

"A[n agreement] is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Conversely, ambiguity in an agreement arises "when specific language is 'susceptible of two reasonable interpretations' " (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]; see *University Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]; *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]).

We reject Selective's contention that the addenda to the bids for the paving project were not part of the contract between the County and Destro inasmuch as the addenda were expressly incorporated into the contract. Moreover, those addenda specifically referenced work in parks, and Destro's bid included that work. However, the contract set forth a specific bid amount for the paving project, which was an amount that *excluded* work in the parks. We therefore conclude that there was an ambiguity in the contract as to whether work in the parks was included in the scope of the paving project (see generally *Greenfield*, 98 NY2d at 569).

Where, as here, "contract language is reasonably susceptible of more than one interpretation, . . . extrinsic or parol evidence may then be permitted to determine the parties' intent as to the meaning of that language" (*Matter of Panella* [appeal No. 2], 218 AD3d 1198, 1201 [4th Dept 2023] [internal quotation marks omitted]; see generally *Greenfield*, 98 NY2d at 569-570). To be entitled to summary judgment, "the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon" (*Kowalak v Keystone Med. Servs. of N.Y., P.C.*, 197 AD3d 893, 894 [4th Dept 2021] [internal quotation marks omitted]). Summary judgment is not appropriate when 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" (*id.* at 895 [internal quotation marks omitted]; see generally *Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880-881 [1985]). We conclude that neither the County nor Selective met the burden on their respective motion and cross-motion of establishing that their construction of the contract regarding the

scope of the paving project is the only fair construction, and thus neither party is currently entitled to summary judgment with respect to Selective's obligation to defend the County and reimburse it for reasonable defense costs (see generally *Corter-Longwell v Juliano*, 200 AD3d 1578, 1583-1584 [4th Dept 2021]; *Kowalak*, 197 AD3d at 894).

Regarding appeal No. 1, we agree with Selective that the court erred in determining that its motion to compel was "moot" because Selective took the "inconsistent" action of cross-moving for summary judgment after it filed the motion to compel. It is well settled that a party may move to compel discovery or, in the alternative, for summary judgment (see e.g. *R&D Elecs., Inc. v NYP Mgt., Co., Inc.*, 162 AD3d 1513, 1514 [4th Dept 2018]; *Gustke v Nickerson*, 159 AD3d 1573, 1574 [4th Dept 2018], *lv denied in part & dismissed in part* 32 NY3d 1048 [2018]; *Weichert v Plumadore*, 152 AD3d 1190, 1191 [4th Dept 2017], *lv dismissed* 30 NY3d 1010 [2017]). Inasmuch as discovery is still outstanding, including Selective's demand for deposition testimony from the County that is the subject of Selective's motion to compel, we remit the matter to Supreme Court to determine the motion in appeal No. 1 and thereafter determine anew the County's motion with respect to Selective and the cross-motion in appeal No. 2 (see generally *Lundy Dev. & Prop. Mgt., LLC v Cor Real Prop. Co., LLC*, 181 AD3d 1180, 1181 [4th Dept 2020]).

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

437

CA 24-01621

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

COUNTY OF ERIE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SELECTIVE INSURANCE COMPANY OF AMERICA AND
ZURICH AMERICAN INSURANCE COMPANY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MATTHEW C. RONAN OF
COUNSEL), FOR DEFENDANT-APPELLANT SELECTIVE INSURANCE COMPANY OF
AMERICA.

COUGHLIN MIDLIGE & GARLAND LLP, NEW YORK CITY (NOAH M. WIESNER OF
COUNSEL), FOR DEFENDANT-APPELLANT ZURICH AMERICAN INSURANCE COMPANY.

BOND, SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeals from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 17, 2024. The order and judgment, among other things, granted the motion of plaintiff for summary judgment, denied the cross-motion of defendant Selective Insurance Company of America for summary judgment and declared that defendants are obligated to defend plaintiff in an underlying action.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying plaintiff's motion insofar as it sought summary judgment against defendant Selective Insurance Company of America and vacating the declarations against that defendant, and as modified the order and judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same memorandum as in *County of Erie v Selective Ins. Co. of Am.* ([appeal No. 1] – AD3d – [June 26, 2026] [4th Dept 2026]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

445

KA 25-00058

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

JONATHAN SMITH, DEFENDANT-RESPONDENT.

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

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

Appeal from an oral order of the Erie County Court (Suzanne Maxwell Barnes, J.), dated December 11, 2024. The oral order granted the motion of defendant to dismiss the indictment.

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

Memorandum: The People appeal from an oral order (see generally *People v Elmer*, 19 NY3d 501, 507-508 [2012]) granting defendant's motion insofar as it sought dismissal of the indictment as a sanction for a discovery violation. We reverse.

As part of their discovery obligations, the People turned over to defendant screenshots of text messages between defendant and the complainant that the People had in their possession. Just prior to trial, the People learned from the complainant that, before taking the screenshots, she had deleted some of the text messages between her and defendant. The People promptly notified defense counsel of that revelation. Defendant then moved for, inter alia, dismissal of the indictment or, alternatively, preclusion of all the text messages and any reference to them as a discovery sanction pursuant to CPL 245.80 (1) (b). County Court determined that the People did not exercise due diligence or make reasonable efforts to discover the deleted messages and that the belated discovery warranted a sanction pursuant to CPL 245.80 (1) (b). Although the court initially imposed the sanction of preclusion, it dismissed the indictment upon reargument.

Initially, defendant asserts that the appeal should be dismissed for lack of jurisdiction because the People sought dismissal of the indictment instead of preclusion so that they could appeal from the

order, and thus they are not aggrieved by the order. We reject that contention inasmuch as the People are aggrieved by an order dismissing the indictment (see CPL 450.20 [12]).

With respect to the merits, CPL 245.80 (1) (b) provides in relevant part that "[w]hen material or information is discoverable under this article but cannot be disclosed because it has been lost or destroyed, the court shall impose an appropriate remedy or sanction if the party entitled to disclosure shows that the lost or destroyed material may have contained some information relevant to a contested issue." We agree with the People that they did not violate their discovery obligations and that the court thus erred in granting the motion insofar as it sought the imposition of a sanction.

CPL 245.20 requires the People to turn over certain material and information "in the possession, custody or control of the prosecution or persons under the prosecution's direction or control" (CPL 245.20 [former (1)]; see *People v Bay*, 41 NY3d 200, 208 [2023]; *People v Walker*, 232 AD3d 1214, 1217 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]). Here, the People established that the deleted text messages did not meet the possessory prong of CPL 245.20 (former [1]) (see *People v Walker*, 248 AD3d 1708, 1708 [4th Dept 2026]; *Walker*, 232 AD3d at 1217). Inasmuch as the records were "neither 'in the possession, custody or control of the prosecution,' nor 'in the possession, custody or control of . . . persons under the prosecution's direction or control' (CPL 245.20 [former (1)]) . . . , the records were not part of the 'discovery required by [CPL 245.20 (former [1])]' " (*Walker*, 232 AD3d at 1217; see *People v Dibble*, 247 AD3d 1566, 1568 [4th Dept 2026]; *People v Radford*, 237 AD3d 1511, 1512 [4th Dept 2025], *lv denied* 43 NY3d 1048 [2025]), and the People were not required to " 'make a diligent, good faith effort to ascertain the existence' of [the text messages] and cause them to be made available for discovery" (*Walker*, 248 AD3d at 1709). The People did not violate their continuing obligation to ascertain the existence of discovery material (see CPL 245.20 [2]). Once the People discovered that certain text messages had been deleted, they promptly notified defense counsel.

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

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KA 22-01414

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEITH J. WILLIAMS, DEFENDANT-APPELLANT.

CRIMINAL APPEALS ADVOCATES P.C., NEW YORK CITY (GREGORY SALMON OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 8, 2022. The judgment convicted defendant upon a jury verdict of attempted aggravated murder, attempted murder in the second degree, aggravated assault upon a police officer or a peace officer and assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted aggravated murder (Penal Law §§ 110.00, 125.26 [1] [a] [i]; [b]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), aggravated assault upon a police officer or a peace officer (§ 120.11), and assault in the first degree (§ 120.10 [1]). The conviction arises from an incident in which defendant's grandmother called 911 to have defendant removed from a residence and taken to the hospital due to his abnormal behavior and mental health concerns. The responding police officer initially coaxed defendant out from underneath a bed in the home, but defendant subsequently attacked the officer without warning, repeatedly punching and stabbing him with a knife and causing severe injuries, including permanent loss of vision.

We reject defendant's contention that Supreme Court erred in determining after a hearing that defendant was not an incapacitated person (see CPL 730.10 [1]). The record establishes that the court properly determined that the People met their burden of establishing by a preponderance of the evidence that defendant possessed the capacity to understand the nature of the proceedings against him and that he was capable of assisting in his own defense (see *People v Mendez*, 1 NY3d 15, 19-20 [2003]; *People v Wright*, 107 AD3d 1398, 1399 [4th Dept 2013], *lv denied* 23 NY3d 1026 [2014]). Defendant failed to

preserve for our review his related contentions that the court, through its questioning of defendant's witness at the hearing, exceeded its role as a neutral arbiter and became an advocate for the People (see *People v Charleston*, 56 NY2d 886, 887 [1982]; *People v Valle*, 70 AD3d 1386, 1387 [4th Dept 2010], *lv denied* 15 NY3d 758 [2010]) and that the court exhibited bias and a predisposition to find him competent to stand trial (see *People v Prado*, 4 NY3d 725, 726 [2004], *rearg denied* 4 NY3d 795 [2005]; *People v Tricic*, 34 AD3d 1319, 1320 [4th Dept 2006], *lv denied* 8 NY3d 850 [2007]). In any event, those contentions lack merit (see *Valle*, 70 AD3d at 1387; *Tricic*, 34 AD3d at 1320).

Defendant further contends that the court committed reversible error by granting the People's pretrial motion to preclude the testimony of defendant's proposed psychiatric witness, asserting that the ruling constituted a violation of defendant's constitutional rights to present a defense and to due process. We agree.

By way of background, it is undisputed that defendant provided the People with timely and sufficient notice pursuant to CPL 250.10 of his intent to offer psychiatric evidence of a mental disease or defect in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect (see Penal Law § 40.15). In response, the People made a motion in limine to preclude the testimony of defendant's proposed witness, a psychiatrist who treated defendant during a restoration of competency admission approximately 1½ years after the underlying criminal incident and diagnosed him with "bipolar disorder, type 1, most recent episode . . . manic with psychotic features." The People argued that the psychiatrist's post-crime diagnosis of defendant was irrelevant to the affirmative defense because the psychiatrist could not testify to defendant's mental disease or defect or state of mind at the time of the crimes. Defense counsel countered that the psychiatrist would not offer an opinion on the ultimate question of whether defendant met the legal standard on the affirmative defense. Rather, the psychiatrist would testify to the mental disease or defect element of that defense, specifically that, based on, among other things, the psychiatrist's post-crime observations of defendant and his review of medical records predating the crimes, defendant suffered from bipolar disorder. Defense counsel argued that defendant was entitled to present evidence that he had been diagnosed with a mental disease or defect and that it was ultimately for the jury, taking into account the psychiatrist's testimony and other evidence in the case, to infer if it so chose that defendant was suffering from a mental disease or defect at the time of the crimes that made him unable to appreciate the nature and consequences of his actions. After the court initially vacillated between suggesting both that it was inclined to deny and to grant preclusion of the psychiatrist's testimony, it determined that defendant would be required to make an offer of proof.

During the offer of proof, the psychiatrist testified about his diagnosis of defendant, which was based on his observations of defendant and his review of medical records of treatment that occurred not long before the incident. The psychiatrist also described the

characteristics and manifestations of bipolar disorder. The psychiatrist further testified that, during a mental health admission prior to the incident, defendant had exhibited behavioral problems that were similar to those observed by the psychiatrist and noted that such prior behavior played a role in the psychiatrist's diagnosis of defendant. The psychiatrist nonetheless acknowledged that he had not evaluated defendant in order to form an opinion about whether defendant met the legal standard for the subject affirmative defense and that he could not say what defendant's diagnosis was on the date of the incident. The psychiatrist further testified, among other things, that bipolar disorder can develop over a course of years before it is diagnosed and that because bipolar disorder is a cyclical disease, there are times when people with that disorder are asymptomatic.

Defense counsel, citing applicable case law and distinguishing case law relied on by the People, urged the court to deny the People's motion to preclude the psychiatrist's testimony, pointing out in particular that preclusion would constitute reversible error inasmuch as it would deprive defendant of any means to present his affirmative defense and would thus violate his constitutional rights to present a defense and to due process. The court credited the psychiatrist's testimony with respect to the diagnosis and the similarities between the features of defendant's pre-crime mental health admission and the post-crime observations of the psychiatrist. Nevertheless, the court concluded that the psychiatrist's post-crime diagnosis was "not relevant" to whether defendant had a mental disease or defect at the time of the crimes approximately 1½ years earlier. The court additionally reasoned that the psychiatrist's testimony about his diagnosis of defendant would lead the jury to speculate about defendant's condition at the time of the crimes. The court thus granted the People's motion to preclude the prospective testimony of the psychiatrist and noted defense counsel's exception to the ruling for the record.

"Criminal defendants must be afforded a meaningful opportunity to present a complete defense" (*People v Deverow*, 38 NY3d 157, 164 [2022] [internal quotation marks omitted]; see *Crane v Kentucky*, 476 US 683, 690 [1986]). "That right, which encompasses the right to offer the testimony of witnesses, is 'a fundamental element of due process of law' " (*People v Dixon*, 42 NY3d 609, 616 [2024], cert denied – US –, 145 S Ct 1460 [2025], quoting *Washington v Texas*, 388 US 14, 19 [1967]; see *People v Sidbury*, 42 NY3d 497, 507 [2024]; *Deverow*, 38 NY3d at 164; see generally US Const Sixth, Fourteenth Amends). "Although th[e] right to present a defense does not give criminal defendants carte blanche to circumvent the rules of evidence . . . , a trial court must not apply the rules mechanistically to defeat the ends of justice" (*Deverow*, 38 NY3d at 164 [internal quotation marks omitted]; see *Chambers v Mississippi*, 410 US 284, 302 [1973]). Thus, " '[a] court's discretion in evidentiary rulings is circumscribed by' the defendant's constitutional right to present a defense" (*Deverow*, 38 NY3d at 164, quoting *People v Carroll*, 95 NY2d 375, 385 [2000]). Indeed, "[w]hile a defendant's right to call witnesses on [their] behalf is not absolute, a state's interest in restricting who may be

called will be scrutinized closely where maximum truth gathering, rather than arbitrary limitation, is the favored goal" (*Sidbury*, 42 NY3d at 507 [internal quotation marks omitted]).

Defendant sought to advance at trial the affirmative defense of lack of criminal responsibility by reason of mental disease or defect (Penal Law § 40.15). A defendant will be absolved of criminal liability pursuant to that affirmative defense if, "at the time of [the criminal] conduct, as a result of mental disease or defect, [the defendant] lacked substantial capacity to know or appreciate either . . . [t]he nature and consequences of such conduct[] or . . . [t]hat such conduct was wrong" (*id.*; see *People v Hills*, 243 AD3d 1241, 1241 [4th Dept 2025]). "While the People are required to prove the elements of the charged crimes beyond a reasonable doubt, the defendant has the burden of proving the elements of the affirmative defense by a preponderance of the evidence" (*Hills*, 243 AD3d at 1241; see § 25.00 [2]; *People v Kohl*, 72 NY2d 191, 193-194 [1988]). "When there is conflicting expert evidence on the issue of criminal responsibility, the jury is generally free to accept or reject, in whole or in part, the opinion of any expert, at least in the absence of a serious flaw in the expert's testimony" (*People v Gillie*, 185 AD3d 1539, 1540 [4th Dept 2020], *lv denied* 35 NY3d 1094 [2020] [internal quotation marks omitted]; see *Hills*, 243 AD3d at 1241-1242).

We agree with defendant that the court abused its discretion by granting the People's motion to preclude defendant from calling his proposed psychiatric witness at trial on the ground that the psychiatrist's prospective testimony was not relevant (see *People v Osman*, 213 AD3d 1256, 1257 [4th Dept 2023]; *People v Morales*, 125 AD2d 605, 606 [2d Dept 1986], *lv denied* 70 NY2d 651 [1987]). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (*People v Davis*, 43 NY2d 17, 27 [1977], *cert denied* 435 US 998 [1978] [internal quotation marks omitted]; see *Morales*, 125 AD2d at 607).

Here, the court erred in its primary determination—which the People notably do not defend on appeal—that the psychiatrist's prospective testimony was not relevant. We conclude that "[i]nasmuch as the psychiatrist's [prospective] testimony that defendant was suffering from [bipolar disorder, type 1, most recent episode manic with psychotic features] would render a finding of lack of criminal responsibility more probable than it would be without such evidence, the [psychiatrist's] diagnosis [was] . . . relevant" (*People v McKinley*, 72 AD2d 470, 474 [4th Dept 1980]). More particularly, although the psychiatrist did not treat, observe, and diagnose defendant until approximately 1½ years after the incident, the psychiatrist's diagnosis was not based solely on his observations; rather, it was based on a comprehensive review of defendant's medical history, including a prior mental health admission that occurred not long before the crimes and during which defendant exhibited behavioral problems similar to those observed by the psychiatrist. The psychiatrist specified that defendant's past medical records and behaviors all played a role in his diagnosis of defendant. It is

true, as defense counsel acknowledged and the court recognized, that the psychiatrist's prospective testimony would not include "any [overall] opinion [whether] . . . defendant was, at the time of the crime[s], suffering from a mental disease or defect which caused him to lack substantial capacity to know or appreciate the nature and consequence or the wrongfulness of his conduct" (*Morales*, 125 AD2d at 607). However, even in the absence of an opinion on the affirmative defense as a whole, we conclude that "the prospective testimony was, in general terms, relevant to the material issue of . . . defendant's [mental disease or defect]" at the time of the crimes (*id.*).

We also agree with defendant that, contrary to the People's assertion, the court abused its discretion in further determining that the psychiatrist's testimony about his diagnosis of defendant would lead the jury to speculate about defendant's condition at the time of the crimes. Even relevant evidence "may be [excluded] if its probative value is outweighed by the danger that its admission would confuse the main issue and mislead the jury" (*McKinley*, 72 AD2d at 474; see *People v Cerda*, 40 NY3d 369, 377 [2023]). Here, although the psychiatrist did not evaluate defendant prior to the crimes and thus could not render a medical opinion that defendant had bipolar disorder on the date of the crimes, "there were indications in [his] testimony that the mental disease from which defendant was suffering could take [years] to develop [before diagnosis] and [that] . . . the [prior medical] records . . . suggest[ed] the existence of some mental disorder a considerable time before the crime[s]" (*People v Brown*, 19 AD2d 599, 599 [1st Dept 1963]). Consequently, the record does not support the court's determination that the jury would be misled or called on to speculate. Instead, as defense counsel argued before the court, defendant, in seeking to establish his affirmative defense, would merely ask the jury to infer from all the available evidence—including his medical evaluations both before and after the incident and his behavior during it—that, at the time of the crimes, he was suffering from a manic and psychotic episode of his subsequently diagnosed mental disease or defect. Rather than precluding the jury from hearing the psychiatrist's testimony, the court "should have . . . permitted [the psychiatrist] to testify, subject to the . . . court's right to rule on the propriety of particular answers upon proper objection" (*Morales*, 125 AD2d at 607; cf. *McKinley*, 72 AD2d at 472-474), and the weight to be afforded to his testimony and the rational inferences to be drawn therefrom "ought to have been left open to the jury's resolution" (*Brown*, 19 AD2d at 599).

Finally, we conclude that the error is not harmless (see *Osman*, 213 AD3d at 1257; see generally *People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Irizarry*, 248 AD2d 928, 929 [4th Dept 1998], *lv denied* 92 NY2d 853 [1998]). The preclusion of the psychiatrist's testimony effectively prevented defendant from mounting his affirmative defense (see Penal Law § 40.15) and severely undermined his ability to separately argue that he lacked the requisite mental state to commit the charged offenses (see generally *People v Segal*, 54 NY2d 58, 66 [1981]). Inasmuch as " 'it cannot be said that there is no reasonable possibility that the error contributed to the verdict,

the error cannot be deemed harmless beyond a reasonable doubt and reversal therefore is required' " (*People v Vo*, 166 AD3d 1587, 1588 [4th Dept 2018]; see *Deverow*, 38 NY3d at 168).

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

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CAF 25-00389

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

IN THE MATTER OF JEREMY P. BILLETT,
PETITIONER-RESPONDENT-RESPONDENT,

V

MEMORANDUM AND ORDER

SHARRON C. GORDON,
RESPONDENT-PETITIONER-APPELLANT.

GARY MULDOON, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

TYSON BLUE, MACEDON, FOR RESPONDENT-PETITIONER-APPELLANT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

CLARK PESHKIN, ROCHESTER (CYNTHIA J. CARROLL OF COUNSEL), FOR
PETITIONER-RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Wayne County (John L. Grow, J.), entered January 31, 2025, in a proceeding pursuant to Family Court Act article 6. The order, *inter alia*, granted petitioner-respondent primary physical residence of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner mother and the Attorney for the Child (AFC) each appeal from an order that, *inter alia*, modified the parties' prior order of custody and visitation by awarding primary physical residence of the subject child to petitioner-respondent father. We affirm.

Preliminarily, we note that the mother and the AFC do not dispute that there has been a change in circumstances sufficient to warrant an inquiry into whether a modification of the prior order is in the child's best interests (*see generally Matter of Cooley v Roloson*, 201 AD3d 1299, 1299-1300 [4th Dept 2022]; *Matter of Muriel v Muriel*, 179 AD3d 1529, 1529 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]; *Matter of Nordee v Nordee*, 170 AD3d 1636, 1636-1637 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]), and thus the issue before us is whether Family Court properly determined that the best interests of the child would be served by a change in primary physical residence (*see Matter of Fenton v Smith*, 240 AD3d 1242, 1243 [4th Dept 2025]; *Matter of Manioci v Schreiber*, 210 AD3d 1523, 1523 [4th Dept 2022], *lv denied* 39

NY3d 907 [2023])).

Contrary to the contentions of the mother and the AFC, we conclude that the court did not err in modifying the prior order. Although the court did not specify the factors it relied on in conducting its best interests analysis (see *Matter of Howell v Lovell*, 103 AD3d 1229, 1231 [4th Dept 2013]), “[o]ur authority in determinations of custody is as broad as that of Family Court . . . and where, as here, the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child” (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450 [4th Dept 2007]; see *Howell*, 103 AD3d at 1231). Among the factors for the court to consider are the “quality of the child’s home environment and that of the parent seeking custody; . . . the ability of each parent to provide for the child’s emotional and intellectual development; [and] the financial status and ability of each parent to provide for the child” (*Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]; see *Matter of Torres v Pfeiffer*, 235 AD3d 1261, 1262 [4th Dept 2025]; *Matter of Dinoff v Knechtel*, 224 AD3d 1288, 1290 [4th Dept 2024])).

Here, after reviewing the appropriate factors, we conclude that the totality of the circumstances supports the determination that it is in the best interests of the child to have primary residence with the father and to be enrolled in the school district in which the father lives (see *Matter of Hernandez v McGowan*, 246 AD3d 1482, 1483 [4th Dept 2026]; *Matter of Verne v Hamilton*, 191 AD3d 1433, 1434 [4th Dept 2021])).

We have considered the remaining contentions of the mother and the AFC on their respective appeals and conclude that none warrants modification or reversal of the order.

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CAF 25-01386

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

IN THE MATTER OF KAL-EL F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAMON H., RESPONDENT-APPELLANT.

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO
(JORDYN E. PRINCIPALE OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Shannon E. Filbert, J.), entered July 29, 2025, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect. We affirm.

Contrary to the father's contention, petitioner established that it exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[] to overcome problems that prevent the discharge of the child into [the parent's] care, and informing the parent[] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; see § 384-b [7] [f]). The petitioning agency is not required, however, to "guarantee that the parent succeed in overcoming [their] predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]; see *Matter of Jamie M.*, 63 NY2d 388, 393 [1984]). Rather, the parent must "assume a measure of initiative and responsibility" (*Jamie M.*, 63 NY2d at 393). Here, petitioner established by clear and convincing evidence (see § 384-b [3] [g] [i]) that it exercised diligent efforts to encourage and strengthen the

father's relationship with the child (see *Matter of Janette G. [Julie G.]*, 181 AD3d 1308, 1308-1309 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]). Petitioner developed a plan for services that was designed to address the specific issues that led to the removal of the child from the father's care (see *Matter of Ahren B.-N. [Gary B.-N.]*, 243 AD3d 1295, 1295 [4th Dept 2025]). Among other things, petitioner communicated with the father by sending him monthly diligence letters, which contained referrals to various agencies for court-ordered services; provided a transportation stipend to facilitate the father's visitation with the child, who resided several hours away with the maternal grandfather; arranged for the father to have virtual video visits with the child; conducted service plan reviews; and notified the father of the child's medical appointments (see *Matter of Briana S.-S. [Emily S.]* [appeal No. 2], 210 AD3d 1390, 1392 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023]; see generally *Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]; *Matter of Hannah W. [William W.]*, 182 AD3d 1032, 1033 [4th Dept 2020]). We note that petitioner made those efforts despite evidence that the father was uncooperative with the agency, which frustrated petitioner's meaningful efforts to assist him (see *Ahren B.-N.*, 243 AD3d at 1296; *Matter of Kiara F. [Evan F.]*, 231 AD3d 1489, 1491 [4th Dept 2024]; see generally *Star Leslie W.*, 63 NY2d at 144).

Contrary to the father's further contention, petitioner established that, despite its diligent efforts, the father "failed to plan appropriately for the child's future" (*Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]). In order to "plan substantially for a child's future, 'the parent must take meaningful steps to correct the conditions that led to the child's removal' " (*id.*; see *Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]). Here, the evidence at the fact-finding hearing established that the father did not successfully complete or even participate in any of the court-ordered services to which petitioner had referred him (see Social Services Law § 384-b [7] [c]). The father incorrectly thought that his successful completion of similar services ordered in connection with another of his children—which occurred *before* the subject child was even born—satisfied his obligation to participate in services ordered in connection with the subject child. Furthermore, the evidence established that the father almost completely failed to participate in visitation with the child, despite the efforts of petitioner (see *Matter of Cheyenne C. [James M.]* [appeal No. 2], 185 AD3d 1517, 1519-1520 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]; see generally *Matter of Noah P. [Anthony F.]*, 246 AD3d 1398, 1400 [4th Dept 2026]). The father did not visit the child in person in Elmira, even though petitioner provided him with transportation vouchers to ease the cost of such visits. He also failed to visit with the child in person when the maternal grandfather brought the child to Buffalo for a medical appointment. In addition, the father participated in only one virtual visit with the child and was generally indifferent to participating in any additional virtual visits. Consequently, petitioner established that the father "failed to address successfully the problems that led to the removal of the child[] and continued to prevent the [child's] safe return" (*Matter*

of *Kelsey R.K. [John J.K.]*, 113 AD3d 1139, 1140 [4th Dept 2014], *lv denied* 22 NY3d 866 [2014] [internal quotation marks omitted]).

We reject the father's contention that the court abused its discretion in terminating his parental rights and declining to enter a suspended judgment (see *Matter of Jewels J. [Justin J.]*, 180 AD3d 1346, 1347 [4th Dept 2020]). A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; see Family Ct Act § 633) and is not warranted where the parent has not made sufficient progress in addressing the issues that led to the child's removal from their custody (see *Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], *lv denied* 29 NY3d 908 [2017]; *Matter of Sapphire A.J. [Angelica J.]*, 122 AD3d 1296, 1297 [4th Dept 2014], *lv denied* 24 NY3d 916 [2015]). Here, as noted above, the record establishes that the father made inadequate efforts to exercise visitation with the child despite the efforts of petitioner and the maternal grandfather to facilitate visits, both in person and virtually. Indeed, the father has not seen the child in person in five years and has participated in only one virtual visitation. Moreover, we note that the child has lived with the maternal grandfather for practically his entire life and has "developed a strong and loving bond" with the maternal grandfather, who wants to adopt him (*Jewels J.*, 180 AD3d at 1347 [internal quotation marks omitted]; see *Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1502 [4th Dept 2015]). Ultimately, the court's findings are entitled to great deference (see *Matter of Matthew S., Jr. [Matthew S.]*, 169 AD3d 1456, 1456 [4th Dept 2019]; *Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]), and we conclude that the evidence supports the court's determination that termination of the father's parental rights is in the best interests of the child (see *Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]).

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

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CAF 25-00914

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

IN THE MATTER OF MEILANI M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MAYA M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

ALICIA ARTIS, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO
(RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 13, 2025, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the denial of her attorney's request for an adjournment and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals in appeal Nos. 1 and 2 from orders of fact-finding and disposition that, inter alia, terminated her parental rights with respect to the subject children on the ground of permanent neglect. The orders were entered following a fact-finding hearing at which the mother failed to appear and in which her attorney, although present, elected not to participate (see *Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]; *Matter of Makia S. [Catherine S.]*, 134 AD3d 1445, 1445-1446 [4th Dept 2015]). Where, as here, the orders appealed from were made upon the mother's default, "review is limited to matters which were the subject of contest below" (*Ramere D.*, 177 AD3d at 1386 [internal quotation marks omitted]). Thus, in both appeals, review is limited to Family Court's denial of the request of the mother's attorney for an adjournment (see *id.* at 1386-1387).

"Whether to grant or deny an adjournment rests within the trial court's sound discretion, and such requests should be granted only upon a showing of good cause" (*Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1413 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022])

[internal quotation marks omitted]; see *Matter of Jayden M. [Carlos M.]*, 237 AD3d 1560, 1563 [4th Dept 2025], lv denied 44 NY3d 902 [2025]). We reject the mother's contention that the court abused its discretion in denying the request for an adjournment inasmuch as counsel offered no good cause for the adjournment. Moreover, the mother had a history of failing to appear, and a significant amount of time had passed since the children were placed outside of the mother's care (see *Matter of Tyrone O. [Lillian G.]*, 199 AD3d 1386, 1387 [4th Dept 2021], lv denied 38 NY3d 904 [2022]; *Matter of Ca'leb R.D. [Mary D.S.]*, 121 AD3d 890, 891 [2d Dept 2014]).

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

454

CAF 25-00915

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

IN THE MATTER OF MELODY M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MAYA M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

ALICIA ARTIS, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO
(RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 13, 2025, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the denial of her attorney's request for an adjournment and the order is affirmed without costs.

Same memorandum as in *Matter of Meilani M. (Maya M.)* ([appeal No. 1] – AD3d – [June 26, 2026] [4th Dept 2026]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

464

KA 24-01367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KHALIL BURNEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered May 10, 2023. The judgment convicted defendant, upon his plea of guilty, of strangulation in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of strangulation in the second degree (Penal Law § 121.12). We agree with defendant that, as the People correctly concede, the waiver of the right to appeal is invalid. Initially, the written waiver form signed by defendant improperly portrayed the waiver as an absolute bar to the taking of a direct appeal (*see People v Zukic*, 240 AD3d 1192, 1193 [4th Dept 2025], *lv denied* 44 NY3d 995 [2025]). In light of the additional misstatement of Supreme Court during the oral colloquy that a challenge to the severity of the sentence would survive the waiver, it cannot be concluded that the totality of the circumstances reveals that defendant “understood the nature of the appellate rights being waived” (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]; *see People v Mason*, 236 AD3d 1354, 1355 [4th Dept 2025], *lv denied* 43 NY3d 1010 [2025]). We nonetheless conclude that the sentence is not unduly harsh or severe.

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

465

KA 24-01368

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KHALIL BURNEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered February 10, 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 modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing.

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]). We note at the outset that there is a discrepancy between the transcript of the sentencing proceeding, during which County Court pronounced a prison sentence of "twelve years," and the certificate of conviction, which reflects a two-year prison sentence. It is well settled that courts have the " 'inherent power to correct their records, where the correction relates to mistakes, or errors, which may be termed clerical in their nature, or where it is made in order to conform the record to the truth' " (*People v Minaya*, 54 NY2d 360, 364 [1981], cert denied 455 US 1024 [1982]; see *People v Gammon*, 19 NY3d 893, 895 [2012]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing (see *People v Vanderbilt*, 238 AD3d 1483, 1489-1490 [4th Dept 2025], lv denied 43 NY3d 1059 [2025]; *People v Kratz*, 231 AD3d 1529, 1530 [4th Dept 2024], lv denied 42 NY3d 1053 [2024]). In light of our determination, defendant's contentions are academic.

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

468

KA 24-02011

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CURTIS W. ZOLNER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered September 5, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree, attempted promoting prison contraband in the first degree and criminal possession of stolen property 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 guilty plea, of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), attempted promoting prison contraband in the first degree (§§ 110.00, 205.25 [1]), and criminal possession of stolen property in the fourth degree (§ 165.45 [1]).

Even assuming, *arguendo*, that defendant did not validly waive his right to appeal (*see People v Langdon*, 240 AD3d 1412, 1412 [4th Dept 2025], *lv denied* 44 NY3d 994 [2025]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* 589 US 1302 [2020]), we nevertheless conclude that defendant's sentence is not unduly harsh or severe.

To the extent that defendant contends on appeal that he was unaware of his potential sentencing exposure if he was unsuccessful in completing inpatient treatment and therefore his plea was involuntary (*see e.g. People v Barnes*, 238 AD3d 1509, 1509 [4th Dept 2025]; *People v Ford*, 234 AD3d 1054, 1055-1056 [3d Dept 2025], *lv denied* 43 NY3d 963 [2025]), we note that defendant did not move to withdraw his guilty plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see Barnes*, 238 AD3d at 1509).

Finally, we note that the Cattaraugus County District Attorney did not file a brief in opposition to defendant's appeal and therefore failed " 'to perform [her] duty to the people of [her] county' "

(*People v Maull*, 218 AD3d 1236, 1243 [4th Dept 2023], quoting *People v Coger*, 2 AD3d 1279, 1280 [4th Dept 2003], *lv denied* 2 NY3d 738 [2004]; see generally County Law § 700 [1]). The District Attorney is obligated to file a brief in opposition unless the appeal is from a judgment that the District Attorney concedes should be reversed (see *Coger*, 2 AD3d at 1280); and we emphasize that the District Attorney's "duty . . . is in no way diminished or excused by reason of the fact that we have affirmed the conviction after a careful consideration of the record and law" (*id.* [internal quotation marks omitted]; see *People v Vullo*, 153 AD3d 1630, 1631 [4th Dept 2023], *lv denied* 30 NY3d 1064 [2017]).

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

470

KA 18-02217

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JUSTIN M. SEWEL, DEFENDANT-APPELLANT.

ANNE LABARBERA, P.C., NEW YORK CITY (ANNE LABARBERA OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Daniel G. Barrett, A.J.), rendered April 3, 2017. The judgment convicted defendant upon a jury verdict of robbery in the first degree, criminal use of a firearm 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 a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]) and criminal use of a firearm in the first degree (§ 265.09 [1] [b]). Defendant's conviction stems from his participation in the robbery of a victim with whom defendant had arranged a drug deal.

Defendant contends that the evidence is legally insufficient to support the conviction because he was merely present when a codefendant robbed the victim at gunpoint and the testimony of that codefendant with respect to defendant's intent to commit the robbery was not sufficiently corroborated. We reject that contention inasmuch as the other evidence at trial "tend[ed] to connect . . . defendant with the commission of the crime[s] in such a way as [could] reasonably satisfy the jury that the [codefendant was] telling the truth" (*People v Reome*, 15 NY3d 188, 192 [2010] [internal quotation marks omitted]; see *People v Gause*, 230 AD3d 1573, 1575 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]). Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant had "a shared intent, or 'community of purpose' with the principal" (*People v Carpenter*, 138 AD3d 1130, 1131 [2d Dept 2016], *lv denied* 28 NY3d 928

[2016]) and that he "intentionally aided the principal in bringing forth [the] result" (*People v Kaplan*, 76 NY2d 140, 146 [1990] [emphasis omitted]; see *Gause*, 230 AD3d at 1574-1575). Contrary to defendant's further contention, neither the robbery victim nor the passenger in her vehicle was an accomplice for the purpose of CPL 60.22 inasmuch as any intent on the part of those individuals to participate in the sale of narcotics was " 'necessarily incidental' " to the commission of the crimes by defendant and the codefendant (*People v Manini*, 79 NY2d 561, 569 [1992]; see Penal Law § 20.10; *People v Gray* [appeal No. 2], 284 AD2d 1012, 1013 [4th Dept 2001], *lv denied* 97 NY2d 682 [2001]; cf. *People v Forsythe*, 115 AD3d 1361, 1364 [4th Dept 2014]).

With respect to defendant's contention that the verdict is against the weight of the evidence, we conclude that "a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings with respect to the testimony of the [codefendant] and the People's other witnesses" (*People v Harrell*, 235 AD3d 1294, 1297 [4th Dept 2025], *lv denied* 43 NY3d 1009 [2025] [internal quotation marks omitted]; see *People v Jones*, 246 AD3d 1375, 1378-1379 [4th Dept 2026]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Nevertheless, 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]) and "affording the requisite 'great deference to the jury given its opportunity to view the witnesses' " (*People v Roman*, 107 AD3d 1441, 1442 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

We reject defendant's contention that Supreme Court (Winslow, J.) erred in refusing to suppress evidence obtained as the result of a warrantless search of the common areas in the home in which defendant resided. "It is well established that the police need not procure a warrant in order to conduct a lawful search when they have obtained the voluntary consent of a party possessing the requisite authority or control over the premises or property to be inspected" (*People v Adams*, 53 NY2d 1, 8 [1981], *rearg denied* 54 NY2d 832 [1981], *cert denied* 454 US 854 [1981]). Here, the testimony at the suppression hearing established that "the primary resident" of the home "read the form containing the consent to search the premises, indicated that [she] understood it, and signed it" (*People v Colon*, 151 AD3d 1915, 1918 [4th Dept 2017]). We conclude, under the totality of the circumstances, that an individual possessing the requisite authority or control over the premises provided voluntary consent to the search (see *People v McLaughlin*, 193 AD3d 1338, 1339 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]; *Colon*, 151 AD3d at 1918).

Defendant failed to preserve for our review his contention that the United States Supreme Court's holding in *Erlinger v United States* (602 US 821 [2024]) renders unconstitutional the sentencing procedure pursuant to which he was adjudicated a persistent violent felony offender (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 Dibble*, 247 AD3d 1566, 1569 [4th Dept 2026]). We reject defendant's remaining challenges to the sentence, which was the statutory minimum for defendant's conviction in light of his persistent violent felony offender status (see Penal Law § 70.08 [3] [a-1], [b]; *People v McKinney*, 302 AD2d 993, 994 [4th Dept 2003], *lv denied* 100 NY2d 584 [2003]; see also *People v Espinal*, 123 AD3d 499, 500 [1st Dept 2014], *lv denied* 25 NY3d 1163 [2015]).

We have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Finally, we note that the uniform sentence and commitment form incorrectly states that defendant was convicted and sentenced in Supreme Court, Monroe County, and it must be amended to reflect that defendant was convicted and sentenced in Monroe County Court (see *People v Savino*, 239 AD3d 1452, 1454 [4th Dept 2025]).

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

471

KA 24-00884

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KAMERON P., DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Monroe County Court (Meredith A. Vacca, J.), rendered April 30, 2024. Defendant was adjudicated a youthful offender upon his plea of guilty of robbery in the second degree.

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

Memorandum: Defendant appeals from a youthful offender adjudication based upon his plea of guilty as a juvenile offender of robbery in the second degree (Penal Law § 160.10 [2] [a]). We reject defendant's contention that County Court abused its discretion in refusing to remove the case to Family Court in the interests of justice (see CPL 722.22 [1] [a]; [3]). The decision whether to remove a juvenile offender's case to Family Court is "discretionary and is proper only in exceptional cases" (*People v Woods*, 143 AD2d 1068, 1068 [2d Dept 1988], *lv denied* 73 NY2d 898 [1989]; see *People v Jacobs*, 244 AD3d 1711, 1715 [4th Dept 2025]; see generally *Matter of Vega v Bell*, 47 NY2d 543, 550-553 [1979]; *People v Charles M.*, 286 AD2d 942, 942-943 [4th Dept 2001]).

Although some of the factors set forth in CPL 722.22 (2) weigh in favor of removal, others do not. We note that defendant forcibly stole a motor vehicle from its owner, who was injured during the course of the robbery, and that defendant led the police on a chase that culminated in a collision and foot chase. Based on our review of the record, we cannot conclude that this is an "exceptional" case warranting removal to Family Court (*Woods*, 143 AD2d at 1068; see *Jacobs*, 244 AD3d at 1715).

Defendant further contends that his plea was involuntarily entered and therefore should be vacated because the court did not

provide him with the terms and conditions of interim probation during the plea proceeding. Defendant failed to preserve that contention for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (*see generally People v Richardson*, 219 AD3d 1697, 1697-1698 [4th Dept 2023], *lv denied* 40 NY3d 1082 [2023]; *People v Morrow*, 167 AD3d 1516, 1517 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]). In any event, we note that, while a defendant must receive a written copy of the conditions of interim probation "at the time [the defendant] is placed on interim probation supervision" (CPL 390.30 [6]), there is no requirement that the defendant be provided with the written conditions prior to a guilty plea. Here, the court conditionally promised to place defendant on interim probation when he pleaded guilty, but defendant violated the conditions of his release by being arrested on new charges and the court sentenced him to incarceration instead. Thus, the fact that the court failed to provide defendant with the conditions of interim probation is of no moment.

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

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

474

CAF 24-02039

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

IN THE MATTER OF ROMEO C. AND JADEN C.

COMMISSIONER OF THE ONTARIO COUNTY DEPARTMENT
OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GREG C. AND JACQUELINE C.,
RESPONDENTS-APPELLANTS.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT GREG C.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR RESPONDENT-APPELLANT
JACQUELINE C.

HOLLY J. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (SANDRA J. PACKARD OF
COUNSEL), FOR PETITIONER-RESPONDENT.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

SHARON ALLEN, KEUKA PARK, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Ontario County
(Jacqueline E. Sisson, A.J.), entered December 11, 2024, in a
proceeding pursuant to Social Services Law § 384-b. The order
terminated the parental rights of respondents with respect to the
subject children.

It is hereby ORDERED that said appeal by respondent Jacqueline C.
is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act
article 6 and Social Services Law § 384-b, respondents mother and
father separately appeal from an order that, upon remittal (*see Matter
of Noah C. [Greg C.]*, 225 AD3d 1178 [4th Dept 2024]), inter alia,
terminated respondents' parental rights.

Contrary to the mother's contention, Family Court did not err in
determining that she was in default. The court warned the mother that
if she failed to appear at the dispositional hearing, it would proceed
in her absence, which could result in the termination of her parental
rights. Nevertheless, the mother did not appear at the hearing and,
although her attorney was present on both days, the attorney declined
to participate. Thus, we conclude that the mother was in default (*see
Matter of De'Shaun H. [Cierra S.]*, 243 AD3d 1362, 1362-1363 [4th Dept
2025]; *Matter of Jayden M. [Carlos M.]*, 237 AD3d 1560, 1562 [4th Dept

2025], *lv denied* 44 NY3d 902 [2025]). Inasmuch as " 'it is well settled that no appeal lies from an order that is entered upon the default of the appealing party' " (*Matter of Roache v Hughes-Roache*, 153 AD3d 1653, 1653 [4th Dept 2017]; see CPLR 5511; *De' Shaun H.*, 243 AD3d at 1363), we dismiss the mother's appeal (see *Matter of Jemma M. [Ashley M.]*, 237 AD3d 1569, 1569 [4th Dept 2025], *lv denied* 44 NY3d 908 [2025]).

With respect to the father's appeal, we affirm. We conclude that there is a sound and substantial basis in the record to support the court's determination that petitioner established by a preponderance of the evidence that the father failed to engage in services and violated numerous terms of the suspended judgment and that, given the facts and circumstances at the time of the hearing, it was in the subject children's best interests to terminate his parental rights. "[A] parent's noncompliance with the terms of [a] suspended judgment constitutes strong evidence that termination of parental rights is in a child's best interests" (*Matter of Dominic T.M. [Cassie M.]*, 169 AD3d 1469, 1470 [4th Dept 2019], *lv denied* 33 NY3d 902 [2019]), and a court's determination that a parent is "not likely to change sufficiently to enable [them] to parent the child[ren] is entitled to great deference" (*Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1619 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]). In light of the overwhelming evidence of the father's noncompliance, we conclude that "any improperly admitted hearsay is harmless" (*Matter of Neveah G. [Anthony G.]*, 156 AD3d 1342, 1342 [4th Dept 2017]; see *Matter of Akayla M. [Marie M.]*, 151 AD3d 1684, 1685 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]).

Finally, we note that, even if the subject children are not seeking to be adopted at this time, termination of respondents' parental rights preserves that possibility in the future as well as their placements and the normalcy they have achieved.

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

477

CA 25-00387

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

JEFFREY L. POLISOTO AND TRACY E. POLISOTO,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH,
KALEIDA HEALTH, AND GROUNDHOG LANDSCAPING
AND LAWNCARE, INC., DEFENDANTS-RESPONDENTS.

ANDREWS, BERNSTEIN & MARANTO, PLLC, BUFFALO (THOMAS P. KOTRYS OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (HEDWIG M. AULETTA OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS ST. GREGORY THE GREAT ROMAN
CATHOLIC CHURCH AND KALEIDA HEALTH.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (THOMAS A. DIGATI OF
COUNSEL), FOR DEFENDANT-RESPONDENT GROUNDHOG LANDSCAPING AND
LAWNCARE, INC.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 5, 2025. The order, insofar as appealed from, granted that part of the motion of defendant Groundhog Landscaping and Lawncare, Inc., for summary judgment dismissing the amended complaint against it and denied the cross-motion of plaintiffs insofar as it sought to disqualify counsel for defendants St. Gregory the Great Roman Catholic Church and Kaleida Health.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of defendant Groundhog Landscaping and Lawncare, Inc., for summary judgment dismissing the amended complaint against it and reinstating the amended complaint against it, and as modified the order is affirmed without costs.

Memorandum: Jeffrey L. Polisoto (plaintiff) allegedly slipped and fell on ice on premises owned by defendant St. Gregory the Great Roman Catholic Church (St. Gregory) and leased to defendant Kaleida Health (Kaleida). Kaleida had entered into an agreement with defendant Groundhog Landscaping and Lawncare, Inc. (Groundhog Landscaping) concerning maintenance of Kaleida-owned entities as well as the parking lot at issue on this appeal. After the accident, plaintiffs commenced this action to recover damages for injuries sustained by plaintiff. Groundhog Landscaping moved for, inter alia,

summary judgment dismissing the amended complaint against it and any cross-claims against it. Plaintiffs cross-moved for, inter alia, an order disqualifying an attorney and law firm from representing both Kaleida and St. Gregory because of an alleged "concurrent conflict of interest" pursuant to rule 1.7 of the Rules of Professional Conduct (22 NYCRR 1200). Supreme Court, inter alia, granted that part of Groundhog Landscaping's motion seeking summary judgment dismissing the amended complaint against it and denied plaintiffs' cross-motion insofar as it sought disqualification. Plaintiffs appeal.

As relevant here, St. Gregory and Kaleida had entered into a five-year lease—which was in effect at the time of the incident—whereby St. Gregory provided 325 parking spots in its parking lot for use by the nearby hospital owned by Kaleida in exchange for Kaleida "[p]rovid[ing], at its sole cost . . . , snow plowing services for all the parking areas of [the premises]." As noted above, Kaleida and Groundhog Landscaping had an agreement that covered the parking lot at issue.

It is well established that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Here, inasmuch as plaintiffs' amended complaint and bill of particulars did not allege facts establishing the applicability of one of the three exceptions set forth in *Espinal* (98 NY2d at 140), Groundhog Landscaping met its initial burden on the motion by establishing that plaintiff was not a party to the agreement between it and Kaleida and therefore Groundhog Landscaping did not owe a duty of care to plaintiff (see *Kuznik-DeFranco v Cushman & Wakefield, Inc.*, 195 AD3d 1406, 1407-1408 [4th Dept 2021]). The burden thus shifted to plaintiffs to raise a triable issue of fact as to the applicability of any of the three exceptions (see *Crockett v Home Depot U.S.A., Inc.*, 237 AD3d 1604, 1606 [4th Dept 2025]; *Brathwaite v New York City Hous. Auth.*, 92 AD3d 821, 824 [2d Dept 2012], lv denied 19 NY3d 804 [2012]; see also *Kuznik-DeFranco*, 195 AD3d at 1408).

We conclude that, viewing the evidence in the light most favorable to plaintiffs, the nonmoving parties, a question of fact exists whether the agreement between Groundhog Landscaping and Kaleida completely displaced Kaleida's and St. Gregory's obligation to maintain the parking lot with respect to salting in winter (cf. *Espinal*, 98 NY2d at 141; see generally *Barnes v Astoria Fed. Sav. & Loan Assn.*, 220 AD3d 725, 726-727 [2d Dept 2023]). Although the terms of the agreement did not require Groundhog Landscaping to salt the parking lot, the owner and president of Groundhog Landscaping testified that the "services" included both plowing and salting of the parking lot. The record also reveals that Groundhog Landscaping salted the lot on the day of plaintiff's alleged fall. We conclude that the court erred in granting that part of Groundhog Landscaping's motion seeking summary judgment dismissing the amended complaint against it, and thus we modify the order by denying that part of Groundhog Landscaping's motion and reinstating the amended complaint against it.

With respect to the cross-motion, we conclude that plaintiffs lacked standing to move to disqualify counsel for Kaleida and St. Gregory because they did not establish "the existence of a current or prior attorney-client relationship between [them] and opposing counsel" (*McGuire v McGuire Group, Inc.*, 237 AD3d 1535, 1537 [4th Dept 2025]). Therefore, the court did not err in denying plaintiffs' request for disqualification.

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

499

CA 25-01347

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

JAMES KLOBUSNIK, PLAINTIFF-RESPONDENT,

V

ORDER

GREENPAC MILL, LLC, DEFENDANT-APPELLANT.

MULHOLLAND MINION DAVEY MCNIFF & BEYRER, WILLISTON PARK (MORGANN MCCARTHY OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF.

BROWN CHIARI LLP, BUFFALO (DAVID W. OLSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered June 19, 2025, in a personal injury action. The order appointed an arbitrator.

Now, upon reading and filing the stipulation of discontinuance by the attorneys for the parties on April 16, 2026,

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

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

508

KA 22-01211

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CODY O'NEILL, DEFENDANT-APPELLANT.

LELAND D. MCCORMAC, III, PUBLIC DEFENDER, UTICA (JAMES P. GODEMANN 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 July 29, 2021. The judgment convicted defendant, upon a nonjury verdict, of aggravated harassment of an employee by an incarcerated individual.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of aggravated harassment of an employee by an incarcerated individual (Penal Law § 240.32), defendant contends that the evidence is legally insufficient to establish that he intended to throw a cup full of urine and feces at a correction officer, as opposed to at a fellow incarcerated individual who was standing near the officer and serving as a porter while meal trays were being collected. We reject that contention. Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that a " 'valid line of reasoning and permissible inferences could lead a rational person to the conclusion' " that defendant intended to harass or annoy the officer by throwing bodily fluids at him (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

We may presume that defendant intended the "natural and probable consequences" of his actions (*People v McGuire*, 227 AD3d 1499, 1499 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024] [internal quotation marks omitted]; see *People v Meacham*, 151 AD3d 1666, 1668 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]), and, accepted as true, the officer's testimony established that, after defendant handed his meal tray to the porter through the unlocked metal slot of his cell, defendant reached one of his hands out of the slot and threw the

contents of his cup to the right, where the officer was approaching, striking him in the face, neck and chest. Defendant did not throw the contents of the cup straight ahead, i.e., in the direction of the porter. If defendant had intended to strike the porter instead of the officer, he could easily have done so given that the porter was standing directly in front of the open slot.

Defendant further contends that the verdict is against the weight of the evidence with respect to the element of intent. Viewing the evidence in light of the elements of the crime in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that County Court "failed to give the evidence the weight it should be accorded" (*People v Cobb*, 246 AD3d 1384, 1385 [4th Dept 2026], lv denied 45 NY3d 969 [2026]; see generally *Bleakley*, 69 NY2d at 495).

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

512

CAF 25-00488

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

IN THE MATTER OF KELLY M. PAULSON,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DOUGLAS P. PAULSON, SR., RESPONDENT-RESPONDENT.

IN THE MATTER OF DOUGLAS P. PAULSON, SR.,
PETITIONER-RESPONDENT,

V

KELLY M. PAULSON, RESPONDENT-APPELLANT.

VERA A. VENKOVA, WILLIAMSVILLE, FOR PETITIONER-APPELLANT AND
RESPONDENT-APPELLANT.

SCOTT T. GODKIN, WHITESBORO, FOR RESPONDENT-RESPONDENT AND PETITIONER-
RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered January 24, 2025, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint legal custody with respect to the subject children, and granted primary physical residence to respondent-petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent mother appeals from an order that, inter alia, denied her petition seeking primary physical custody of the parties' two children. While this appeal was pending, Family Court entered an order upon consent of the parties that modified the custody and visitation arrangement set forth in the order on appeal by, inter alia, granting the parties joint physical custody of their younger child. We conclude that the order upon consent renders the appeal moot, and the exception to the mootness doctrine does not apply (see generally *Matter of Common v Pirro*, 184 AD3d 1087, 1088 [4th Dept

2020]; *Matter of Thomas v Thomas*, 151 AD3d 1919, 1920 [4th Dept
2017]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

524

KA 25-00438

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRICK FICKLIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 13, 2024. The judgment convicted defendant upon his plea of guilty of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]). We affirm. As the People correctly concede, defendant's waiver of the right to appeal is invalid (see *People v Small*, – AD3d –, –, 2026 NY Slip Op 03560, *1 [4th Dept 2026]; see generally *People v Thomas*, 34 NY3d 545, 565-566 [2019], cert denied 589 US 1302 [2020]; *People v Anderson*, 243 AD3d 1286, 1286-1287 [4th Dept 2025], lv denied 44 NY3d 1064 [2026]), and therefore does not preclude our review of his challenge to the severity of the sentence (see *People v Mendoza*, 37 NY3d 1075, 1076 [2021]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

533

CA 25-00888

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

STEPHEN CASSIDY, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

LIVINGSTON COUNTY AND LIVINGSTON COUNTY SHERIFF'S
DEPARTMENT, DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (RYAN A. LEMA OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

HERMAN LAW, NEW YORK CITY (CRAIG BERNHARDT OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Deborah A. Chimes, J.), entered May 19, 2025. The order directed defendants to produce unredacted documents to Supreme Court for in camera review.

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

Memorandum: In an action to recover damages for personal injuries pursuant to the Child Victims Act (see CPLR 214-g), defendants appeal from an order that directed the in camera review of unredacted documents sought by plaintiff in a motion to compel discovery. We conclude that the appeal must be dismissed. "Inasmuch as the order effectively defe[rs] the determination of the . . . motion [until] the completion of [Supreme Court's] in camera review, it does not affect a substantial right of defendant[s], and thus no appeal lies as of right therefrom" (*Schwartz v Schwartz* [appeal No. 2], 238 AD3d 1514, 1516 [4th Dept 2025] [internal quotation marks omitted]; see CPLR 5701 [a] [2] [v]; *H.M. v Roman Catholic Diocese of Brooklyn*, 242 AD3d 735, 736 [2d Dept 2025]; *Buhler v Sheridan*, 134 AD2d 822, 822 [4th Dept 1987]).

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

535

CAF 25-00769

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

IN THE MATTER OF BRENDA L. M.,
PETITIONER-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

JAMES R. K., RESPONDENT-PETITIONER-RESPONDENT.

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

TODD D. BENNETT, HERKIMER, FOR RESPONDENT-PETITIONER-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Herkimer County (Thaddeus J. Luke, J.), entered December 6, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued primary physical custody of the subject children with respondent-petitioner.

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

Memorandum: In this Family Court Act article 6 proceeding, petitioner-respondent mother appeals from an order that, among other things, continued primary physical custody of the subject children with respondent-petitioner father. We affirm.

We conclude that Family Court did not abuse its discretion in continuing the father's primary physical custody of the children, and denying the mother's petitions seeking primary physical custody. Preliminarily, we note that the parties do not dispute that there has been a change in circumstances sufficient to warrant an inquiry into whether a modification of the prior custody order is in the children's best interests (see generally *Matter of Cooley v Roloson*, 201 AD3d 1299, 1299-1300 [4th Dept 2022]), inasmuch as they filed competing petitions alleging such a change in circumstances (see *Matter of Muriel v Muriel*, 179 AD3d 1529, 1529 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]; *Matter of Nordee v Nordee*, 170 AD3d 1636, 1636-1637 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]).

"Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an

evidentiary basis in the record" (*Matter of Krug v Krug*, 55 AD3d 1373, 1374 [4th Dept 2008] [internal quotation marks omitted]; see *Matter of Hernandez v McGowan*, 246 AD3d 1482, 1483 [4th Dept 2026]; *Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744 [4th Dept 2010]). We see "no basis to disturb the court's determination inasmuch as it was based on the court's credibility assessments of the witnesses and 'is supported by a sound and substantial basis in the record' " (*Krug*, 55 AD3d at 1374; see *Hernandez*, 246 AD3d at 1483; *Dubuque*, 79 AD3d at 1744). To the contrary, after reviewing the appropriate factors (see generally *Fox v Fox*, 177 AD2d 209, 210-211 [4th Dept 1992]), we conclude that the totality of the circumstances supports the court's determination that it is in the best interests of the children to continue primary physical residence with the father (see *Eschbach v Eschbach*, 56 NY2d 167, 174 [1982]; *Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]).

Specifically, we note that the evidence in the record established, among other things, that the father provided a safer home environment for the children than the mother, particularly in light of the multiple recent injuries that the children sustained when they were at the mother's home. For example, the evidence at the hearing established a recent incident where one of the subject children, who was *unsupervised* at the time, was bitten (for the second time) by one of the mother's dogs after that child hit the dog with a baseball bat. In a similar vein, the evidence adduced at the hearing also raised concerns about whether the mother would allow the subject children's half-brother—who had allegedly sexually abused the subject children—near the subject children again. Evidence of those incidents supports the court's conclusion that, if the children were to reside with her, the mother could not adequately protect and supervise them.

The mother's contention that the court erred in not appointing a separate attorney for the child for one of the subject children is unpreserved for our review inasmuch as she did not request that relief at the fact-finding hearing and raises that contention for the first time on appeal (see generally *Matter of Angelina M. [Marilyn O.]*, 224 AD3d 1223, 1224 [4th Dept 2024], *lv denied* 41 NY3d 909 [2024]; *Muriel*, 179 AD3d at 1530; *Matter of Mason v Mason*, 103 AD3d 1207, 1208 [4th Dept 2013]), and we decline to exercise our power to review the mother's contention in the interest of justice.

The mother also contends that the court erred in admitting in evidence certain child protective services (CPS) notes containing allegedly hearsay statements by the children that were not included as part of a prehearing stipulation agreed to by both parties. Initially, we note that "[t]here is no indication that the court considered, credited, or relied upon [CPS notes that were outside of the stipulation] in reaching its determination" (*Matter of Adorno v Vaillant*, 177 AD3d 1275, 1276 [4th Dept 2019] [internal quotation marks omitted]; see *Matter of Merle C.C.*, 222 AD2d 1061, 1062 [4th Dept 1995], *lv denied* 88 NY2d 802 [1996]). The parties stipulated to the introduction in evidence of CPS notes made after April 27, 2023, and here the court's decision referred only to notes made after that time. Although the mother focuses on the fact that the court may have

admitted in evidence, at the fact-finding hearing, CPS notes from February 2023, there is no evidence that the court relied on those notes in rendering its decision.

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court

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

565

KAH 25-01816

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DAMION SAULTERS, PETITIONER-APPELLANT,

V

ORDER

JULIE WOLCOTT, SUPERINTENDENT OF ATTICA
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF
COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from a judgment of the Supreme Court, Wyoming County
(Donald G. O'Geen, A.J.), dated May 14, 2025, in a habeas corpus
proceeding. The judgment denied the petition.

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

Entered: June 26, 2026

Ann Dillon Flynn
Clerk of the Court