



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

DECISIONS FILED

JANUARY 31, 2025

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

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. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

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

986/23

CA 22-01627

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

CHERYL STEPHENS, PLAINTIFF-RESPONDENT,

V

ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROSENTHAL, KOOSHOIAN & LENNON, LLP, BUFFALO (PETER M. KOOSHOIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered March 29, 2022. The order granted the motion of plaintiff for a default judgment against defendant City of Buffalo.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 30, 2024,

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

987/23

CA 22-01888

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

CHERYL STEPHENS, PLAINTIFF-RESPONDENT,

V

ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROSENTHAL, KOOSHOIAN & LENNON, LLP, BUFFALO (PETER M. KOOSHOIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered November 9, 2022. The order denied the motion of defendant City of Buffalo to vacate a default judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 30, 2024,

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

368

KA 23-00183

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CLYDE PURCELL, DEFENDANT-APPELLANT.

NATHANIEL L. BARONE, II, PUBLIC DEFENDER, MAYVILLE (HEATHER BURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Chautauqua County Court (David W. Foley, J.), dated December 21, 2022. The order, insofar as appealed from, designated defendant a sexually violent offender.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

369

KA 23-00181

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ROBERT BROWN, DEFENDANT-APPELLANT.

NATHANIEL L. BARONE, II, PUBLIC DEFENDER, MAYVILLE (HEATHER BURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Chautauqua County Court (David W. Foley, J.), dated December 21, 2022. The order, insofar as appealed from, designated defendant a sexually violent offender.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

557

KA 22-01785

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN EXFORD, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

JEFFREY G. TOMPKINS, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered April 22, 2022. The judgment convicted defendant upon a jury verdict of arson in the first degree (two counts), murder in the second degree (four counts), arson in the second degree and reckless endangerment in the first degree (six counts).

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 two counts of arson in the first degree (Penal Law § 150.20 [1]), four counts of murder in the second degree (§ 125.25 [2], [3]), one count of arson in the second degree (§ 150.15), and six counts of reckless endangerment in the first degree (§ 120.25).

The conviction arises from a fire that destroyed an apartment building, killing two people. The evidence at trial included, inter alia, surveillance videos from businesses in the vicinity establishing that defendant had the opportunity to set the fire because, at the time the fire became visible in the building's entryway, defendant was exiting the premises. It also included the testimony of a fire investigator that he had ruled out electrical, chemical, and natural causes for the fire and, given the elimination of those other sources, the "probable cause" of the fire in his opinion was "intentional open flame" and "human involvement."

Contrary to defendant's contention, County Court did not abuse its discretion in allowing the fire investigator to testify to his opinion that the fire was intentionally set (*see generally People v Wisniewski*, 191 AD3d 1435, 1436 [4th Dept 2021], *lv denied* 36 NY3d 1125 [2021]). Such testimony did not invade the province of the jury

(see *People v Rivers*, 18 NY3d 222, 227 [2011]). We have reviewed defendant's remaining contentions concerning that testimony and conclude that they are either unpreserved or lack merit.

Defendant next contends that the evidence of intent with respect to the arson in the first and second degree counts is legally insufficient. Viewing the evidence in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish the element of intent as to those counts (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant failed to preserve his contention that the evidence is legally insufficient to establish the element of depraved indifference in the depraved indifference murder and the reckless endangerment counts (see generally *People v Gray*, 86 NY2d 10, 19 [1995]).

Defendant also contends, however, that the verdict is against the weight of the evidence with respect to all counts, and "we necessarily review the evidence adduced as to [that element] [as well as] to each of the [other] elements of the crimes in the context of our review of [defendant's contention]" (*People v Arroyo*, 111 AD3d 1299, 1299 [4th Dept 2013], lv denied 23 NY3d 960 [2014] [internal quotation marks omitted]). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is 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 the jury "failed to give the evidence the weight it should be accorded" (*id.*; see generally *People v Bague*, - NY3d -, 2024 NY Slip Op 05244, *2-3 [2024]).

We nevertheless agree with defendant and conclude that the court erred in denying defendant's request for a circumstantial evidence instruction. "It is well settled that a trial court must grant a defendant's request for a circumstantial evidence charge when the proof of the defendant's guilt rests solely on circumstantial evidence . . . By contrast, where there is both direct and circumstantial evidence of the defendant's guilt, such a charge need not be given" (*People v Hardy*, 26 NY3d 245, 249 [2015]). Contrary to the People's assertion, this was not a case with " 'both direct and circumstantial evidence of . . . defendant's guilt,' " which would negate the need for a circumstantial evidence charge (*People v Lathrop*, 227 AD3d 1503, 1506 [4th Dept 2024], lv denied 42 NY3d 939 [2024]; see *People v Barnes*, 50 NY2d 375, 380 [1980]). Indeed, none of the evidence presented at trial "prove[d] directly a disputed fact without requiring an inference to be made" (*Hardy*, 26 NY3d at 251).

Further, this is not "the exceptional case where the failure to give the circumstantial evidence charge was harmless error" (*People v Brian*, 84 NY2d 887, 889 [1994]; see *People v Swem*, 182 AD3d 1050, 1052 [4th Dept 2020]). Although " 'overwhelming proof of guilt' cannot be defined with mathematical precision" (*People v Crimmins*, 36 NY2d 230, 241 [1975]), it necessarily requires more evidence of guilt than proof beyond a reasonable doubt. If that were not so, all errors would be

harmless in cases where the verdict is not against the weight of the evidence (*see generally People v Levy*, 202 AD2d 242, 246 [1st Dept 1994]; *People v Williams*, 62 AD2d 1026, 1026 [2d Dept 1978]).

Here, the strongest evidence linking defendant to the crime is the video surveillance recording. As noted, that video, which is grainy and shot from a distance, depicts a flickering or glow as defendant exits the premises, which promptly grows into a blaze as defendant walks away. There is no way to discern from the video the exact moment that the fire is set or precisely how the fire began. "In order for the jury to find defendant guilty it had to make a number of logical leaps connecting defendant to the crimes charged. Had the trial court given the circumstantial evidence charge, alerting the jury of the need to exclude to a moral certainty every other reasonable hypothesis of innocence," we conclude that the verdict may have been different (*People v Carter*, 97 AD3d 492, 496 [1st Dept 2012]; *see Swem*, 182 AD3d at 1051-1052).

We thus reverse the judgment and a new trial is granted. 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

573

KA 21-01583

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LASHAWN MILLER HENDERSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered September 2, 2021. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree (two counts) and criminally using drug paraphernalia in the second degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), and four counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]).

Defendant contends that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. We reject those contentions. In reviewing the legal sufficiency of the evidence, we must "determine whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Williams*, 84 NY2d 925, 926 [1994]; see *People v Torrance*, 206 AD3d 1722, 1723 [4th Dept 2022]). To meet their burden of proving that defendant had constructive possession of the drugs and drug paraphernalia, the People were required to establish that defendant "exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband [was] found" (*People v Manini*, 79 NY2d 561, 573 [1992]; see Penal Law § 10.00 [8]; *People v Ponder*, 191 AD3d 1409, 1410-1411 [4th Dept 2021]). Viewing the evidence in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that "the

circumstances here provided the jury with a sufficient basis . . . to conclude that . . . defendant [was] guilty of constructive possession of the drugs and drug paraphernalia" (*Torrance*, 206 AD3d at 1723 [internal quotation marks omitted]; see *People v Farmer*, 136 AD3d 1410, 1412 [4th Dept 2016], *lv denied* 28 NY3d 1027 [2016]). Here, at the time defendant was found, he was undressed and in a bedroom in which he appeared to have been sleeping. In the bedroom the police found "some new and unused baggies, which [were] typically utilized for packaging narcotics for sale" and three plastic vials "of what appeared to be crack cocaine packaged for sale" in a men's sneaker hanging above the bed. In the bedroom the police also found male clothing, which defendant put on before he was removed from the bedroom, as well as mail addressed to defendant, a photograph of defendant, and keys to the apartment. Cocaine was also located in a separate bedroom occupied by defendant's father, and additional cocaine and paraphernalia were located in the living room. The evidence is thus legally sufficient to establish defendant's constructive possession of the cocaine and drug paraphernalia (see *Torrance*, 206 AD3d at 1723; *People v Tucker*, 173 AD3d 1817, 1818 [4th Dept 2019], *lv denied* 34 NY3d 938 [2019]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that he was denied effective assistance of counsel as a result of defense counsel's failure to make a motion to dismiss the indictment based on the denial of his statutory right to a speedy trial (see CPL 30.30 [1] [a]) and defense counsel's failure to object to the sentence. A failure of defense counsel to assert a meritorious statutory speedy trial claim "is, by itself, a sufficiently egregious error to render a defendant's representation ineffective" (*People v Sweet*, 79 AD3d 1772, 1772 [4th Dept 2010] [internal quotation marks omitted]; see *People v Bailey*, 195 AD3d 1486, 1487 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]; see generally *People v Caban*, 5 NY3d 143, 152 [2005]). We conclude, however, that "[t]he record on appeal is inadequate to enable us to determine whether [a CPL 30.30] motion would have been successful and whether defense counsel's failure to make that motion deprived defendant of meaningful representation" (*Bailey*, 195 AD3d at 1487 [internal quotation marks omitted]; see *People v Youngs*, 101 AD3d 1589, 1589 [4th Dept 2012], *lv denied* 20 NY3d 1105 [2013]). Thus, defendant's contention "is appropriately raised by way of a motion pursuant to CPL article 440" (*People v Alverado*, 178 AD3d 1465, 1466 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020] [internal quotation marks omitted]; see *Bailey*, 195 AD3d at 1487; *Youngs*, 101 AD3d at 1589).

Additionally, defense counsel's failure to object to the sentence did not deprive him of effective assistance of counsel. Although the sentence imposed after trial is greater than the sentence proposed in connection with a plea offer before trial, it is well established that

"[g]iven that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater, it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea" (*People v Martinez*, 26 NY3d 196, 200 [2015]). Thus, inasmuch as "[t]here is no evidence that defendant was given the lengthier sentence solely as a punishment for exercising his right to a trial" (*People v Huddleston*, 160 AD3d 1359, 1362 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]), any objection to the sentence would have been unsuccessful and "there can be no denial of effective assistance of counsel arising from counsel's failure to raise an objection or argument that had little or no chance of success" (*People v Healy*, 182 AD3d 1014, 1016 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]).

We reject defendant's contention that Supreme Court abused its discretion in granting the People's *Molineux* application and permitting the People to introduce evidence of defendant's prior conviction for attempted criminal possession of a controlled substance in the third degree, as well as the underlying facts of that conviction. Preliminarily, we note that, to the extent defendant's contention is based upon the testimony of one of the law enforcement officers that the area in which defendant was arrested was an "open air drug market," that contention is unpreserved inasmuch as defendant did not object to the testimony or ask that the response—which was elicited by defense counsel during cross-examination—be struck from the record (see generally *People v Britt*, 34 NY3d 607, 616 [2019]; *People v Ackerman*, 173 AD3d 1346, 1350 [3d Dept 2019], *lv denied* 34 NY3d 949 [2019]).

"In reviewing [the court's] *Molineux* ruling, we must first assess whether the People have identified some issue, *other than mere criminal propensity*, to which the evidence is relevant" (*People v Telfair*, 41 NY3d 107, 114 [2023] [internal quotation marks omitted]). " 'This is a question of law, not discretion and [appellate courts] review it de novo' " (*People v Gamble*, 229 AD3d 1290, 1291 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024], quoting *People v Weinstein*, 42 NY3d 439, 458 [2024]). Here, the testimony regarding defendant's prior conviction is relevant and "admissible with respect to the issue of defendant's intent to sell drugs" (*People v Whitfield*, 115 AD3d 1181, 1182 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]) inasmuch as it is probative of defendant's "knowing possession of . . . and . . . intent to sell" the cocaine located throughout the apartment (*People v Chavis*, 218 AD3d 1368, 1370 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]; see *People v Echavarria*, 53 AD3d 859, 863 [3d Dept 2008], *lv denied* 11 NY3d 832 [2008]).

Next, inasmuch as "the evidence is relevant to an issue aside from propensity, [we must] determine[] whether its probative value exceeds the potential for prejudice resulting to the defendant" (*Gamble*, 229 AD3d at 1291 [internal quotation marks omitted]). "[T]he trial court's decision to admit the evidence may not be disturbed simply because a contrary determination could have been made or would have been reasonable. Rather, it must constitute an abuse of

discretion as a matter of law" (*id.* [internal quotation marks omitted]). Here, contrary to defendant's contention, the court did not abuse its discretion in concluding that the probative value of the evidence outweighed its prejudicial effect (*see People v Lawrence*, 141 AD3d 1079, 1081 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). In any event, by giving appropriate limiting instructions both before and after the testimony that the *Molineux* evidence was being offered only for the limited purpose "on the question of knowing possession and intent," and reiterating its limiting instruction during the jury charge, "the court mitigated any prejudice to defendant" (*People v Smith*, 224 AD3d 1221, 1222 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]; *see People v Hu Sin*, 217 AD3d 1439, 1440 [4th Dept 2023]). Any claim of prejudice "necessarily relies on the assumption that the jury ignored the court's limiting instructions, and 'the law does not permit such an assumption' " (*Smith*, 224 AD3d at 1222; *see People v Cutaia*, 167 AD3d 1534, 1535 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]).

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

All concur except MONTOUR and NOWAK, JJ., who dissent and vote to reverse in accordance with the following memorandum: Inasmuch as we agree with defendant that Supreme Court erred in permitting the People to introduce evidence of defendant's prior conviction of attempted criminal possession of a controlled substance in the third degree arising from a March 2017 incident where narcotics were found in defendant's vehicle, we respectfully dissent and would reverse the judgment and grant a new trial on counts 3 through 8 of the indictment.

Under the well-established *Molineux* rule, "evidence of a defendant's . . . prior misconduct is not admissible if it cannot logically be connected to some specific issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged" (*People v Cass*, 18 NY3d 553, 559 [2012]). Such evidence may "be relevant to show: (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant" (*People v Leonard*, 29 NY3d 1, 7 [2017]). However, even evidence that is "technically relevant for one of these or some other legitimate purpose . . . will not be admitted if it 'is actually of slight value when compared to the possible prejudice to the accused' " (*People v Arafet*, 13 NY3d 460, 465 [2009]).

"In reviewing a *Molineux* ruling, we must first assess whether the People have identif[ied] some issue, *other than mere criminal propensity*, to which the evidence is relevant" (*People v Telfair*, 41 NY3d 107, 114 [2023] [internal quotation marks omitted]). Here, in their initial application, the People asserted that the proffered *Molineux* evidence would "enable the jury to fully comprehend the circumstances of the events that occurred on October 29, 2019," show that defendant "used the same *modus operandi*," demonstrate the absence of mistake, and establish defendant's *mens rea*. In its ruling, the

court granted the People's request to introduce evidence of defendant's conviction for attempted criminal possession of a controlled substance in the third degree, as well as the underlying facts of that conviction. Prior to the testimony, the court instructed the jury that the evidence was being offered for the limited purpose "on the question of knowing possession and intent." That instruction was repeated after the testimony.

With respect to the instant conviction, a "person is guilty of criminal possession of a controlled substance in the third degree when [they] knowingly and unlawfully possess . . . a narcotic drug with intent to sell" (Penal Law § 220.16 [1]). Here, the key dispute at trial was the element of knowledge: whether defendant knew that the contraband was in the south bedroom, i.e., the bedroom in which the police found defendant and the contraband during the execution of a search warrant. We conclude that the evidence regarding the March 2017 incident "did not increase the possibility" that defendant knew there was contraband in the bedroom in October 2019 (*Telfair*, 41 NY3d at 115). "In other cases where [the Court of Appeals] has permitted *Molineux* evidence to prove a subjective element of the crime, or to rebut a defendant's defense as to that element, the prior acts were . . . proximate in time and quite similar to the alleged crime" (*id.* at 116; see e.g. *People v Bradley*, 20 NY3d 128, 133 [2012]; *Cass*, 18 NY3d at 563-564; *People v Caban*, 14 NY3d 369, 375 [2010]; *People v Alvino*, 71 NY2d 233, 243-245 [1987]). Here, the March 2017 incident is not very similar or close in time to the October 2019 incident inasmuch as the two incidents involve different contraband and a different set of circumstances, and they occurred more than two years apart (see *Telfair*, 41 NY3d at 116). Further, there is no evidence that defendant attempted to use the same argument as here with respect to the March 2017 incident—i.e., that he did not know that the drugs were in his vehicle—indeed, he admitted guilt in that instance. Rather, the evidence of defendant's prior arrest and conviction is "essentially evidence of prior wrongdoing that 'tend[s] to show that if defendant did it once . . . he would do it again' " (*id.*, quoting *People v Vargas*, 88 NY2d 856, 858 [1996]). Nothing about defendant's prior possession of a controlled substance found in a vehicle registered in his name shows that defendant had knowledge of the contraband concealed inside a shoe box and a shoe in the south bedroom (see e.g. *id.* at 117; cf. *People v Lawrence*, 141 AD3d 1079, 1080-1081 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]).

We must next consider whether the March 2017 incident is relevant because it has "any tendency in reason to prove" the element of intent to sell a narcotic drug (*Alvino*, 71 NY2d at 241 [internal quotation marks omitted]). On the one hand, evidence that defendant possessed 53 baggies of cocaine over a year and a half earlier and pleaded guilty to attempted criminal possession of a controlled substance in the third degree under a subdivision of Penal Law § 220.16 that does not have an element of intent to sell and instead prohibits knowing possession of a narcotic with an "aggregate weight of one-half ounce or more" (§ 220.16 [12]) does not necessarily establish that he intended to sell the small amount of crack cocaine found within the bedroom two-and-a-half years later, rather than use it himself. On

the other hand, in light of the relatively small amount of narcotics in the instant case, evidence that defendant had previously been in possession of 53 individually wrapped baggies, and admitted to attempting to possess a narcotic weighing "one-half ounce or more" (*id.*) may have been at least marginally relevant to the jury's determination that, in this instance, defendant possessed the narcotics with the intent to sell.

Thus, inasmuch as the proffered *Molineux* evidence was arguably offered because it is "probative of a legally relevant and material issue before the court," this Court must determine whether the evidence's "probative value exceed[ed] the potential for prejudice resulting to the defendant" (*Alvino*, 71 NY2d at 242). "[T]he trial court's decision to admit the evidence may not be disturbed simply because a contrary determination could have been made or would have been reasonable. Rather, it must constitute an abuse of discretion as a matter of law" (*People v Morris*, 21 NY3d 588, 597 [2013], citing *Cass*, 18 NY3d at 560 n 3).

"Evidence of prior criminal acts to prove intent will often be unnecessary, and therefore should be precluded even though marginally relevant, where intent may be easily inferred from the commission of the act itself" (*Alvino*, 71 NY2d at 242). "It may be admitted to prove intent, however, when proof of the act falls short of demonstrating that the defendant acted with a particular state of mind and where proof of a prior act is relevant to that issue" (*id.*). Here, as defendant notes, he did not contest that the drugs were packaged for sale and not for personal use. In his opening statement, defense counsel referred to the drugs as "the product;" in his motion for a trial order of dismissal, defense counsel challenged only whether the People had established his knowing possession of the contraband; and in his closing statement, defense counsel argued that the People failed to establish that defendant knowingly possessed the contraband (see e.g. *People v Mhina*, 110 AD3d 1445, 1446-1447 [4th Dept 2013]; cf. *People v Palin*, 158 AD3d 936, 941 [3d Dept 2018], *lv denied* 31 NY3d 1016 [2018]). Further, "*Molineux* and later cases rest on the proposition that in circumstances where 'intent is not to be inferred from the commission of the act,' 'proof of intent is often unobtainable except by evidence of successive repetitions of the act' " (*Telfair*, 41 NY3d at 115, quoting *People v Molineux*, 168 NY 264, 297-298 [1901]). Here, however, proof of intent was readily discernable from the testimony that the cocaine was prepared as a "cookie" from which smaller portions could be shaved off and packaged for sale, as well as from the paraphernalia found within the bedroom, i.e., scales and a razor blade (cf. *People v Dean*, 214 AD3d 1398, 1399 [4th Dept 2023], *lv denied* 40 NY3d 928 [2023]). Thus, to the extent that the March 2017 incident is marginally relevant to the issue of intent, we nevertheless conclude that the probative value of the evidence did not outweigh its prejudicial effect and thus it was an abuse of discretion to admit it (see *People v Weinstein*, 42 NY3d 439, 458 [2024]).

We further conclude that the error is not harmless (see

Weinstein, 42 NY3d at 469-470; *Telfair*, 41 NY3d at 118-119; see generally *People v Frankline*, 27 NY3d 1113, 1115 [2016]). "A *Molineux* error may be found harmless where the proof of the defendant's guilt, without reference to the error, is overwhelming and where there is no significant probability . . . that the jury would have acquitted the defendant had it not been for the error" (*Weinstein*, 42 NY3d at 469-470 [internal quotation marks omitted]; see *Arafet*, 13 NY3d at 467; *People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Here, defendant was acquitted of several of the charges and the evidence tying him to the contraband found in the south bedroom, although legally sufficient, is not overwhelming (*cf.* *Arafet*, 13 NY3d at 467). Further, "[t]here is an obvious danger that the evidence of [the March 2017 incident] tainted the jury's assessment of the trial evidence as to the respective charges by portraying defendant as an individual with a propensity for engaging in [narcotics-related] criminal activity" (*People v Bryant*, 200 AD3d 1483, 1489 [3d Dept 2021], *appeal dismissed* 38 NY3d 1158 [2022] [internal quotation marks omitted]).

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

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CA 23-01544

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

JACKIE MYLAR, AS POWER OF ATTORNEY FOR
TEAIRRA MASON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NIAGARA FALLS MEMORIAL MEDICAL CENTER,
ET AL., DEFENDANTS,
FDR MEDICAL SERVICES AND LEE CHALUPKA, M.D.,
DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (COLLEEN P. FAHEY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 18, 2023. The order, insofar as appealed from, denied in part the motion of defendants FDR Medical Services and Lee Chalupka, M.D., for summary judgment.

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

Memorandum: On January 16, 2012, 13-year-old Teairra Mason presented at the emergency department at defendant Niagara Falls Memorial Medical Center (hospital), accompanied by plaintiff, her mother, complaining of bilateral eye pain that was constant and burning in nature, with a pain level of 8 out of 10. Plaintiff informed staff at the hospital that Mason had experienced a three-week history of eye redness that had started in her left eye and progressed to the right eye. Indeed, Mason had already been diagnosed with pink eye and was being treated with an increasing dose of eye drops. Mason's vision had deteriorated to the point that she was walking into walls. Nursing staff at the hospital observed that Mason had significantly decreased vision, was experiencing drainage from her right eye, and reported visual changes and blurred vision.

While at the emergency room, defendant Lee Chalupka, M.D., evaluated Mason and also diagnosed her with conjunctivitis, i.e., pink eye. Following her examination, Chalupka, according to her deposition testimony, informed Mason and plaintiff that Mason needed to be seen by an ophthalmologist the next day. Plaintiff disputes that this verbal communication occurred. It is undisputed, however, that

plaintiff received after-care instructions from the hospital's emergency department listing the name, address, and telephone number of an ophthalmologist, with instructions to call the next day to schedule an appointment. It is equally undisputed that Chalupka herself never called an ophthalmologist on Mason's behalf.

Ultimately, Mason was not seen by an ophthalmologist until February 6, 2012, at which time she was diagnosed with a serous retinal detachment in her left eye. Within a month, she also sustained a retinal detachment in her right eye. Eventually, Mason suffered permanent, complete blindness in her left eye and severely limited vision in her right eye and was diagnosed with the rare autoimmune disorder Vogt-Koyanagi-Harada disease (VKH).

Thereafter, plaintiff, individually and as power of attorney for Mason, commenced this action against, among others, Chalupka and her employer, defendant FDR Medical Services (collectively, defendants), asserting a single cause of action for medical malpractice, which included, but was not limited to, defendants' "failure to properly and timely diagnose . . . [Mason's] eye condition," which allegedly resulted in Mason's injuries. Defendants moved for summary judgment dismissing the complaint and all cross-claims against them. Supreme Court granted the motion in part by dismissing the cause of action insofar as it was asserted by plaintiff, individually, and otherwise denied the motion. Defendants appeal from the order to the extent that it denied the motion and we affirm.

"[A] defendant moving for summary judgment in a medical malpractice action has the [initial] burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; see *Campbell v Bell-Thomson*, 189 AD3d 2149, 2150 [4th Dept 2020]). "To meet that burden, a defendant must submit in admissible form factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [the defendant] complied with the accepted standard of care or did not cause any injury to the patient" (*Edwards v Myers*, 180 AD3d 1350, 1352 [4th Dept 2020] [internal quotation marks omitted]; see *Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]). " '[T]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact only after the defendant . . . meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden' " (*Bubar*, 177 AD3d at 1359).

Defendants contend that the court erred in failing to dismiss the complaint in its entirety, because they met their initial burden on the motion and plaintiff failed to raise a triable issue of fact in opposition with respect to the element of proximate cause. We reject that contention. We conclude that defendants failed to meet their initial burden on the motion with respect to proximate cause inasmuch as they did not establish, as a matter of law, that their alleged negligence by omission was not a substantial factor in depriving Mason of a substantial possibility of a better outcome (see *Simko v*

Rochester Gen. Hosp., 199 AD3d 1408, 1409 [4th Dept 2022]; *Clune v Moore*, 142 AD3d 1330, 1331-1332 [4th Dept 2016]; *Wolf v Persaud*, 130 AD3d 1523, 1525 [4th Dept 2015]; see generally PJI 2:150.1; 1B NY PJI3d 2:150, at 91-96 [2024]). The main theory of causation alleged by plaintiff in this case is that defendants negligently caused Mason to lose a substantial chance of a better outcome, inasmuch as Chalupka failed to directly contact the recommended ophthalmologist herself, and instead indirectly relied on plaintiff's compliance with the after-care instructions to call for an appointment. Plaintiff further alleges that Chalupka's erroneous initial diagnosis of conjunctivitis during the emergency room visit caused Mason to lose a chance of a better outcome because it minimized the urgency of calling the ophthalmologist. Specifically, according to plaintiff, Chalupka's diagnosis was of such a non-emergent condition that even had plaintiff herself contacted the ophthalmologist in conformance with the after-care instructions, that act would not have resulted in an urgent response by the specialist's office sufficient to provide her with a better chance. In short, plaintiff's allegation is essentially that *only Chalupka's* direct contact with the specialist about Mason's condition would have ensured that Mason received an immediate appointment, resulting in a substantial chance of a better outcome (see *Wild v Catholic Health Sys.*, 85 AD3d 1715, 1717 [4th Dept 2011], *affd* 21 NY3d 951 [2013]; *Simko*, 199 AD3d at 1409; *Clune*, 142 AD3d at 1331-1332).

In support of the motion, defendants submitted the affirmations of two expert witnesses, an emergency medicine physician and a pediatric ophthalmologist. We conclude that defendants did not meet their initial burden through reliance on the emergency medicine physician's affirmation, inasmuch as that expert "mentioned causation only in a fleeting and conclusory manner" (*Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020]). Similarly, defendants did not meet their initial burden through reliance on the pediatric ophthalmologist's affirmation inasmuch as that expert merely conclusorily asserted that there was "no causal connection" or "no causal relationship" between Chalupka's emergency room treatment of Mason and her resulting injuries. Such conclusory statements are insufficient for defendants to carry their burden on the motion with respect to proximate cause (see *Heinrich v Serens*, 217 AD3d 1320, 1324 [4th Dept 2023]; *Fargnoli*, 186 AD3d at 1005). Specifically, we note that, in his affirmation, the pediatric ophthalmologist opined that "there is no causal relationship between [Chalupka's] *proper and thorough evaluation and recommendations* . . . and [Mason's] alleged injuries from VKH." That assertion, however, sheds no light on the issue of causation here because it assumes—at all times—that Chalupka's *treatment* of Mason was not negligent. The expert's burden here was to show "that, even if [Chalupka] was negligent, [her] negligence was not a proximate cause of the [injuries]" (*Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept 2018]; see e.g. *Stefanski v Huntress*, 224 AD3d 1362, 1363 [4th Dept 2024]; *Burnett v Allen*, 218 AD3d 1190, 1191 [4th Dept 2023]). However, by assuming that Chalupka's treatment and diagnosis of Mason was correct in every respect, the pediatric ophthalmologist's opinion that any delay in directly contacting the specialist did not have any significant impact on the outcome is conclusory inasmuch as it assumes

that Mason was *not* suffering from an emergent condition—i.e., VKH—at the time of the emergency room visit. Therefore, the pediatric ophthalmologist's affirmation failed to establish that the "alleged departure did not proximately cause . . . [Mason's] injuries" (*Simko*, 199 AD3d at 1409 [emphasis added]; see generally *Heinrich*, 217 AD3d at 1321-1322, 1324).

Because defendants failed to meet their initial burden on the motion with respect to proximate cause, the burden never shifted to plaintiff with respect to that element, and denial of the motion was required "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Harbinger v Kato*, 221 AD3d 1510, 1511 [4th Dept 2023]; *Heinrich*, 217 AD3d at 1324). We have considered defendants' remaining contentions and conclude that none warrants reversal or modification of the order.

All concur except SMITH, J.P., and MONTOUR, J., who dissent and vote to reverse the order insofar as appealed from in accordance with the following memorandum: We respectfully dissent and would reverse the order insofar as appealed from, grant the motion in its entirety, and dismiss the complaint against defendants FDR Medical Services and Lee Chalupka, M.D. (collectively, defendants). We disagree with the majority's conclusion that defendants failed to meet their initial burden on the motion on the issue of proximate cause.

"On a motion for summary judgment in a medical malpractice action, a defendant has the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Lewis v Sulaiman*, 217 AD3d 1443, 1444 [4th Dept 2023] [internal quotation marks omitted]). "Once a defendant meets the initial burden, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact . . . only as to the elements on which the defendant met the prima facie burden" (*id.* [internal quotation marks omitted]). Generally, a medical malpractice defendant meets their initial burden "by presenting 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" (*Pasek v Catholic Health Sys., Inc.*, 186 AD3d 1035, 1036 [4th Dept 2020] [internal quotation marks omitted]).

Initially, we agree with the majority that plaintiff's theory of causation is that defendants negligently caused Teairra Mason to lose a substantial chance of a better outcome. Plaintiff's contention is premised on Chalupka's failure to contact the recommended ophthalmologist and decision to rely, instead, on plaintiff's compliance with the after-care instructions to contact the ophthalmologist the next day for an emergency appointment and on Chalupka's diagnosis of conjunctivitis. The majority concludes, however, that defendants failed to meet their burden on the element of proximate cause because the affirmations of the emergency medical physician and the pediatric ophthalmologist only conclusorily asserted that there was no causal connection between Chalupka's treatment of

Mason and her resulting injuries. We reject the majority's conclusion. Although the pediatric ophthalmologist opined that there was "no causal relationship between [Chalupka's] *proper and thorough evaluation and recommendations* . . . and [Mason's] alleged injuries from" Vogt-Koyanagi-Harada (VKH) disease (emphasis added), he also explicitly opined on Chalupka's failure to reach out to the specialist to schedule a next-day appointment. According to the expert, "even if [Chalupka] had contacted [the specialist's] after-hours service . . . while the patient was in the emergency department, the patient likely would not have been seen by [the specialist] or any ophthalmologist until the next day at the earliest given the circumstances, including the chronicity of the patient's condition, her vision on the evening of [her emergency department visit], her visual acuity of 20/200, the normal fundoscopic exam and the normal fluorescein exam. The alleged delay of one day that would have occurred if the patient had seen an ophthalmologist the next day as [Chalupka] directed, would not have had and did not have any significant impact on the outcome." Further, in response to plaintiff's contention that Chalupka's initial diagnosis of conjunctivitis lulled her into believing that this was not an urgent condition, defendants submitted evidence that Chalupka informed plaintiff "that there were a number of concerning features in [Mason's] presentation, that [Chalupka] was concerned about [Mason's] visual acuity and about her pain," and that Mason's symptoms were "beyond what an emergency medicine physician was going to be able to treat her for." Chalupka told plaintiff that Mason "needed to see the ophthalmologist the next day" and, when plaintiff appeared "frustrated or . . . annoyed," Chalupka discussed with her "why it was important for [Mason] to see an ophthalmologist because conjunctivitis, in and of itself, does not cause a decrease in . . . vision" or typically cause the pain described by Mason, or last for three weeks. Chalupka explicitly informed plaintiff that she "did not think that this was a simple conjunctivitis."

On this record, we would conclude that defendants met their initial burden on the issues of deviation from the applicable standard of care and proximate cause, and thus the burden shifted to plaintiff to raise triable issues of fact by submitting an expert's affidavit "attesting to a departure from the accepted standard of care and that defendants' departure from that standard of care was a proximate cause of the injur[ies]" (*Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1470 [4th Dept 2020] [internal quotation marks omitted]; see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). Here, even assuming, arguendo, that plaintiff raised a triable issue of fact with respect to Chalupka's departure from the accepted standard of care, we would conclude that plaintiff failed to raise a triable issue of fact with respect to proximate cause. Although plaintiff submitted the affidavit of a pediatric emergency room physician, the expert did not explain how an earlier referral would have altered the outcome in this case (see *Poblocki v Todoro*, 49 AD3d 1239, 1240 [4th Dept 2008]). Rather, the expert, in conclusory form, merely speculated that Chalupka's alleged deviations from the applicable standard of care contributed to Mason's injuries, and thus the affidavit was insufficient to raise a triable issue of fact with respect to proximate cause (see *Humbolt v Parmeter*, 196 AD3d 1185,

1188 [4th Dept 2021]; *Mosezhnik v Berenstein*, 33 AD3d 895, 897 [2d Dept 2006]; see generally *Pigut v Leary*, 64 AD3d 1182, 1183 [4th Dept 2009]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-01073

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAWANZA ALEXANDER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered January 28, 2019. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted on count 1 of the indictment, and count 3 of the indictment is dismissed.

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 [1] [b]) and criminal possession of a weapon in the fourth degree (§ 265.01 [1]).

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

We agree with defendant, however, that Supreme Court's *Molineux* ruling constitutes reversible error, and we therefore reverse the judgment and grant a new trial on count 1 of the indictment. "[A]llegations of prior bad acts may not be admitted against [a defendant] for the sole purpose of establishing their propensity for criminality" (*People v Weinstein*, 42 NY3d 439, 444 [2024], citing *People v Molineux*, 168 NY 264 [1901]). "*Molineux* recognized exceptions by which evidence of other crimes could be used to prove the charged crime when such evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan . . . ; [or] (5) the identity of the person charged

with the commission of the crime on trial" (*Weinstein*, 42 NY3d at 457 [internal quotation marks omitted]). "In order to be admissible, *Molineux* evidence must logically be connected to some specific material issue in the case and be directly relevant to it" (*id.* [internal quotation marks omitted]; see *People v Denson*, 26 NY3d 179, 185 [2015]). "The prosecution has the burden of showing this direct relevance" (*Weinstein*, 42 NY3d at 457). "In reviewing a *Molineux* ruling, [an appellate court] [f]irst . . . evaluates whether the prosecution has identif[ied] some issue, *other than mere criminal propensity*, to which the evidence is relevant" (*id.* at 458 [internal quotation marks omitted]). "This is a question of law, not discretion and [appellate courts] review it *de novo*" (*id.* [internal quotation marks omitted]). "Second, if the evidence is relevant to an issue aside from propensity, the [appellate court] determines whether its probative value exceeds the potential for prejudice resulting to the defendant" (*id.* [internal quotation marks omitted]). "[T]he trial court's decision to admit the evidence may not be disturbed simply because a contrary determination could have been made or would have been reasonable. Rather, it must constitute an abuse of discretion as a matter of law" (*id.* [internal quotation marks omitted]).

Here, the charge of criminal possession of a weapon in the second degree is based on allegations that defendant possessed a handgun with the intent to use it unlawfully against his stepchildren, and the People sought to admit the evidence of defendant's "systematic abuse" of his wife to show defendant's motive, intent, absence of mistake, and identity in this case. The evidence, however, is not directly relevant to motive. The evidence of defendant's past conduct demonstrated a pattern of threatening his wife with the gun for perceived infidelity, but it did not complete a narrative that would explain or support defendant's sudden aggression against his stepchildren (see *People v Gamble*, 229 AD3d 1290, 1291 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024]). The evidence also is entirely unnecessary to establish defendant's intent. Mere possession of a firearm is "presumptive evidence of intent to use [it] unlawfully against another" (Penal Law § 265.15 [4]). Further, there is no question whether defendant's alleged actions were the result of accident or mistake (see *People v Telfair*, 41 NY3d 107, 113 [2023]), and defendant's identity is not at issue.

Moreover, even if the evidence is relevant to an exception under *Molineux*, the court abused its discretion in determining that its probative value outweighed its potential for prejudice (see *Gamble*, 229 AD3d at 1291-1292). Evidence that defendant previously threatened his wife with a gun showed that defendant " 'had allegedly engaged in similar behavior on a prior occasion . . . -classic propensity evidence' " (*id.* at 1292, quoting *People v Leonard*, 29 NY3d 1, 8 [2017]). It is " 'of slight value when compared to the possible prejudice to [defendant]' and therefore should not have been admitted" (*People v Mhina*, 110 AD3d 1445, 1447 [4th Dept 2013], quoting *People v Allweiss*, 48 NY2d 40, 47 [1979]).

Finally, we conclude that the error in admitting the evidence is

not harmless (see *People v Mountzouros*, 206 AD3d 1706, 1708 [4th Dept 2022]; see generally *People v Crimmins*, 36 NY2d 230, 241-242 [1975]), even in light of the court's limiting instruction (see *Mhina*, 110 AD3d at 1447). "Under the standard applicable for nonconstitutional errors, an error is harmless if the proof of defendant's guilt is overwhelming and there is no significant probability that the jury would have acquitted defendant had the error not occurred" (*People v Williams*, 25 NY3d 185, 194 [2015]), and here, "it cannot be said that the proof of guilt, which turned primarily on an assessment of the credibility of testimony, was overwhelming" (*Mountzouros*, 206 AD3d at 1708). In light of our determination to grant a new trial, we do not address defendant's remaining contentions.

Finally, we note that, before jury selection and at the People's request, the court reduced the charge in count 3 of the indictment from criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) to criminal possession of a weapon in the fourth degree (§ 265.01 [1]) (see CPL 200.70). The People thereafter failed to file a reduced or amended accusatory instrument. Inasmuch as "[a] valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution" (*People v Dumay*, 23 NY3d 518, 522 [2014], quoting *People v Dreyden*, 15 NY3d 100, 103 [2010]; see generally CPL 200.10), count 3 of the indictment must be dismissed (see *People v Chadick*, 122 AD3d 1258, 1259 [4th Dept 2014]).

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

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TP 24-00334

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

IN THE MATTER OF LUCIANNE LAPIERRE, AGENT
UNDER POWER OF ATTORNEY FOR LORETTA LANZIONE,
PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH AND
NEW YORK STATE OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE, RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (TIMOTHY N. MCMAHON OF
COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL),
FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Jefferson County [William F. Ramseier, J.], entered February 16, 2024) to review a determination of respondent New York State Department of Health. The determination, among other things, determined that petitioner's application for Medical Assistance for nursing facility services with limited coverage was effective December 1, 2018 and that petitioner had transferred property on September 27, 2017 for uncompensated value.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling the determination insofar as it found that Loretta Lanzione was ineligible for nursing facility services for a penalty period of 8.23 months and that uncompensated transfers were made for amounts related to the transfer of the parcels of land with Tax ID 20.11-1-52, 31.06-1-11, and 20.11-1-52.203, and as modified the determination is confirmed without costs, and the matter is remitted to respondent New York State Department of Health to recalculate the penalty period.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Department of Health (DOH), which upheld after a fair hearing the finding of the Jefferson County Department of Social Services (DSS) that Loretta Lanzione (mother) made uncompensated transfers during the look-back period (see Social Services Law § 366 [5] [a], [e] [1] [vi]), but modified the finding as to the amount of uncompensated transfers and the resulting penalty period during which the mother was

ineligible for Medicaid nursing facility services.

On September 27, 2017, the mother transferred by quitclaim deed to her son any interest she had in four parcels of land owned by the son on which he operated a motel and mobile home park (Tax ID 20.11-1-52, 20.11-1-52.201, 20.11-1-52.202, 20.11-1-52.203), thereby extinguishing her life estate with respect to a one-half interest in those parcels (life estate). The mother also executed a warranty deed transferring certain property owned by her (Tax ID 20.11-1-64 [separate property]) to Lanzione Properties, LLC, of which her son is a member. On December 21, 2018, the mother, who was 85 years old, was unexpectedly hospitalized. Approximately one week later, petitioner applied to DSS for Medicaid on the mother's behalf, including Supplemental A for individuals seeking coverage for nursing home care.

About two weeks after submitting the application, the mother was transferred to a nursing home, where she has resided ever since.

Initially, as petitioner contends, and respondents correctly concede, the DOH erred in including the value of a parcel of land with Tax ID 31.06-1-11 in its penalty period calculation inasmuch as that parcel was never owned by the mother. We therefore modify the determination accordingly. With respect to the remaining relevant parcels, i.e., two of the four parcels on which the motel and mobile home park were located (Tax ID 20.11-1-52, 20.11-1-52.203 [motel properties]) and the separate property, we agree with petitioner that the determination insofar as it concluded that the mother's transfer of the life estate with respect to the motel properties was an uncompensated transfer is affected by an error of law. We therefore further modify the determination accordingly.

"When reviewing a Medicaid eligibility determination made after a fair hearing, th[is] [C]ourt must review the record, as a whole, to determine if the agency's decisions are supported by substantial evidence and are not affected by an error of law" (*Matter of Albino v Shah*, 111 AD3d 1352, 1354 [4th Dept 2013] [internal quotation marks omitted]; see *Matter of Mallery v Shah*, 93 AD3d 936, 937 [3d Dept 2012]). The petitioner bears the burden of demonstrating eligibility (see *Matter of Flannery v Zucker*, 136 AD3d 1385, 1385 [4th Dept 2016]). "[T]he agency's determination should be upheld when it is 'premised upon a reasonable interpretation of the relevant statutory provisions and is consistent with the underlying policy of the Medicaid statute' " (*Matter of Peterson v Daines*, 77 AD3d 1391, 1392 [4th Dept 2010]).

With respect to the motel properties, we agree with petitioner that the DOH made an error of law in relying exclusively on Social Services Law § 366 (5) (e) (3) (ii) in concluding that the transfer of the mother's life estate interest constituted an uncompensated transfer inasmuch as that provision is inapplicable. Social Services Law § 366 (5) (e) (3) (ii) applies when there is an attempt to dissipate funds through the purchase of a life estate. Here, however, the mother never purchased a life estate but instead transferred any interest she had in the motel properties, thereby terminating her life

estate. Thus, the mother did not try to dissipate funds with the purchase of a life estate (see *id.*; cf. *Albino*, 111 AD3d at 1354-1355). The DOH's conclusion that the mother transferred her life estate for less than fair market value was made applying the wrong statute and that part of the determination is therefore affected by an error of law (see generally *Matter of Waterfront Ctr. for Rehabilitation & Healthcare v New York State Dept. of Health*, 162 AD3d 1717, 1718 [4th Dept 2018]; *Matter of Niagara v Daines*, 96 AD3d 1433, 1435 [4th Dept 2012]).

Even assuming, arguendo, that the DOH did not rely exclusively on Social Services Law § 366 (5) (e) (3) (ii) in concluding that the transfer of the mother's life estate constituted an uncompensated transfer, we agree with petitioner that any separate determination that the life estate in the motel properties was transferred for less than fair market value is not supported by substantial evidence. "Substantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Albino*, 111 AD3d at 1354 [internal quotation marks omitted]). At the hearing, petitioner presented testimony and a real property transfer agreement executed by, among others, the mother demonstrating that the son paid the mother \$10,000 per year from 1991 to 2016, for a total of \$250,000 (payments), in exchange for the mother's agreement to not interfere with the operation of the motel properties, i.e., to not exercise her rights under the life estate. The single piece of evidence relied upon by the DOH to determine that the transfer of the mother's life estate was for less than fair market value was her 2017 federal income tax return, wherein the mother claimed rental income in the amount of \$12,000. Based on that tax return, DSS argued, and the DOH agreed, that the payments to the mother over 25 years were rent payments and did not constitute fair consideration for the mother extinguishing her life estate. The determination to that extent is based upon conjecture and surmise and is not supported by substantial evidence (see *Matter of Underwood v Zucker*, 191 AD3d 1438, 1441 [4th Dept 2021]). Indeed, petitioner's attorney explained during the hearing that the only reason the mother claimed rental income on her tax return was because there was no other way to account for the payments on the tax return.

Additionally, the evidence established that since his father's death in 1986, the son owned, and the mother had a life estate interest in, a one-half interest of the four parcels on which the motel and mobile homes were located and that such interests were recorded by executrix deed dated May 21, 2007. In 2003, the son bought from his aunt the other half interest in those four parcels for \$230,000. Inasmuch as the son purchased a half interest in the four parcels for \$230,000, that evidence further undercuts any conclusion that the transfer of the mother's life estate for \$250,000 was for less than fair market value.

We reject petitioner's contention, however, that the mother was paid fair market value for the separate property. The transfer of the separate property occurred in September 2017, and there is no evidence

that the payments from 1991 to 2016 were for the transfer of that property.

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

631

CA 23-01551

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

BONITA POWERS, AS ADMINISTRATOR OF THE
ESTATE OF JAMES POWERS, M.D., DECEASED,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CANANDAIGUA MEDICAL GROUP, P.C.,
DEFENDANT-RESPONDENT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (ASHLEY RAE WESTBROOK OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

HARTER SECREST & EMERY LLP, BUFFALO (DANIEL J. ALTIERI OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, J.), entered July 24, 2023. The order, inter alia, granted the motion of defendant insofar as it sought to enforce a settlement.

It is hereby ORDERED that said appeal is unanimously dismissed insofar as it concerns the motion for a directed verdict and the order is affirmed without costs.

Memorandum: James Powers, M.D. (decedent) commenced this action alleging, inter alia, that defendant, a professional corporation, breached the parties' contract when it undervalued the purchase price of his shares of stock in defendant upon his retirement. Plaintiff, who is decedent's wife and the administrator of his estate, was substituted as plaintiff before the matter went to trial. At trial, following the close of plaintiff's case, Supreme Court granted defendant's motion for a directed verdict dismissing the breach of contract cause of action. Shortly thereafter, the parties entered into a stipulation in open court settling the action (see CPLR 2104).

After further disputes arose between the parties over the plaintiff's failure to execute a mutual release and stipulation of discontinuance, defendant moved to, inter alia, enforce the terms of the oral stipulation and compel plaintiff to execute those documents. Plaintiff cross-moved to, among other things, vacate the oral stipulation. Plaintiff now appeals from an order that denied the cross-motion and granted the motion insofar as it sought to enforce the terms of the oral stipulation and compel plaintiff to execute a mutual release and stipulation of discontinuance.

We note at the outset that the appeal must be dismissed to the extent that plaintiff contends that, at trial, the court erred in granting defendant's motion for a directed verdict on the breach of contract cause of action inasmuch as plaintiff's challenge to that "trial ruling . . . is reviewable only on an appeal from the final judgment," and no final judgment has been entered (*Wojcik v Kent*, 21 AD3d 1410, 1411 [4th Dept 2005] [internal quotation marks omitted]; see *Corrado v Davuluri*, 122 AD3d 1390, 1390 [4th Dept 2014]; see generally CPLR 5501 [a] [3]).

We reject plaintiff's contention that the court erred in granting defendant's motion to enforce the settlement agreement and in denying the cross-motion to vacate that agreement. "Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]; see *Gay v Gay*, 118 AD3d 1331, 1332 [4th Dept 2014], *lv dismissed* 25 NY3d 1015 [2015]). Here, nothing in the record supports plaintiff's contention that the stipulation should be set aside, and plaintiff's assertion that her trial counsel's representation was "less than satisfactory and allegedly negligent does not establish a ground to set aside the stipulation" under the circumstances (*Rainone v Davenport*, 121 AD3d 1444, 1445 [3d Dept 2014]).

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

678

KA 23-01284

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CAMERON COLEMAN, ALSO KNOWN AS CHASE,
DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (MINDY F.
VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered May 31, 2023. The judgment convicted defendant upon a plea of guilty of intimidating a witness in the third degree and 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: Defendant appeals from a judgment convicting him upon his plea of guilty of intimidating a witness in the third degree (Penal Law § 215.15 [1]) and attempted criminal possession of a controlled substance in the third degree (§§ 110.00, 220.16 [1]). We affirm. Defendant contends that his plea was not knowingly, voluntarily, and intelligently entered because County Court did not properly advise him of all the constitutional rights he would be forfeiting upon pleading guilty (*see generally Boykin v Alabama*, 395 US 238, 243 [1969]). Defendant failed to preserve that contention for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Rodgers*, 162 AD3d 1500, 1501 [4th Dept 2018], *lv denied* 32 NY3d 940 [2018]; *People v Irby*, 158 AD3d 1050, 1051 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]; *People v Hampton*, 142 AD3d 1305, 1306 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]). Contrary to defendant's contention, the narrow exception to the preservation requirement does not apply under the circumstances of this case (*see People v Landry*, 132 AD3d 1351, 1351-1352 [4th Dept 2015], *lv denied* 26 NY3d 1089 [2015]; *cf. People v*

Tyrell, 22 NY3d 359, 364 [2013]; see generally *People v Conceicao*, 26 NY3d 375, 381-382 [2015]).

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

705

CA 23-01662

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

GREGORY M. KWIATKOWSKI, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CARIOL J. HORNE, DEFENDANT-APPELLANT.

KIRKLAND & ELLIS LLP, NEW YORK CITY (KEVIN DECKER OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered September 14, 2023. The order denied the motion of defendant to vacate, inter alia, a 2011 judgment.

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

Memorandum: Defendant appeals from an order that denied her motion to vacate, inter alia, a 2011 judgment entered against her in this action. We note that, before defendant filed her motion, plaintiff commenced a separate action on the 2011 judgment pursuant to CPLR 5014 and obtained a renewal judgment. CPLR 5014 provides for an action on a money judgment that " 'enables the judgment creditor to sue on the old judgment and thereby acquire a *new judgment* and a fresh 10 year lien' " (*Gletzer v Harris*, 12 NY3d 468, 475 [2009] [emphasis added]; see CPLR 5203 [a]). Assuming, arguendo, that the entry of the renewal judgment did not extinguish the original judgment (see generally *Platinum Funding Corp. v Blue Ocean Lines*, 249 AD2d 19, 19 [1st Dept 1998]), we conclude that Supreme Court did not abuse its discretion in denying the motion after considering each of the factors raised by defendant (see generally *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *Ladd v Stevenson*, 112 NY 325, 332 [1889]; *Quinn v Guerra*, 26 AD3d 872, 873 [4th Dept 2006], appeal dismissed 7 NY3d 741 [2006]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

709

CA 23-01071

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

PROVIDENCE STATE STREET HOUSING DEVELOPMENT
FUND COMPANY, INC., AND EAST HOUSE STATE
STREET APARTMENTS, L.P.,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

MEMORANDUM AND ORDER

BUCKINGHAM CONSTRUCTION, LLC,
DEFENDANT-RESPONDENT,
CAPSTONE CONSTRUCTION SERVICES, LLC,
DEFENDANT-RESPONDENT-APPELLANT,
AND PARDI PARTNERSHIP ARCHITECTS, P.C.,
DEFENDANT-APPELLANT-RESPONDENT.

BYRNE & O'NEILL, LLP, NEW YORK CITY (MARK R. MCCAULEY OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT.

PHILLIPS LYTTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (ASHLEY RAE WESTBROOK OF
COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

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

Appeal and cross-appeals from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered June 12, 2023. The order, inter alia, granted the motion of plaintiff Providence State Street Housing Development Fund Company, Inc., seeking leave to amend the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part the motion of plaintiff Providence State Street Housing Development Fund Company, Inc., insofar as it sought leave to amend the amended complaint to add East House State Street Apartments, L.P. as a plaintiff; granting defendant Pardi Partnership Architects, P.C.'s cross-motion and dismissing the amended complaint and all cross-claims against it; granting those parts of defendant Capstone Construction Services, LLC's cross-motion seeking summary judgment dismissing the fourth cause of action and the cross-claims of Pardi Partnership Architects, P.C. against it and seeking severance of defendant Buckingham Construction, LLC's cross-claim for contractual indemnification

against it; and as modified the order is affirmed without costs.

Memorandum: Defendant Pardi Partnership Architects, P.C. (Pardi) appeals and defendant Capstone Construction Services, LLC (Capstone) and plaintiffs, Providence State Street Housing Development Fund Company, Inc. (Providence) and East House State Street Apartments, L.P. (East House), cross-appeal from an order that, as relevant on appeal, granted Providence's motion for leave to amend its amended complaint, denied in part Capstone's cross-motion to the extent it sought summary judgment dismissing the amended complaint and Pardi's cross-claims against it, denied Pardi's cross-motion for summary judgment dismissing the amended complaint and all cross-claims against it, and granted the cross-motion of defendant Buckingham Construction, LLC (Buckingham) insofar as it sought summary judgment dismissing the amended complaint against it.

The action arises from alleged construction defects resulting in water infiltration at an affordable housing renovation project (Project). Prior to the renovations, nonparty Providence Housing Development Corporation was awarded affordable housing tax credits by the State of New York for the Project. Providence Housing Development Corporation then formed multiple entities, including Providence and East House, in furtherance of the State's legal requirements for the tax credits. Pursuant to the declaration of interest agreement between Providence and East House, Providence would "hold legal title to the [p]roperty as nominee for and on behalf of [East House]," and East House would in turn "retain[] all of the equitable and beneficial ownership of the Project." Providence had no interest in "any item of income, gain, loss, deduction, credit, [etc.]" of the property or Project, while East House had "sole control of and responsibility for the [p]roperty and the Project" and was to "be identified as the principal and sole beneficial owner of the [p]roperty and the Project" in "all dealings" with others. Additionally, East House, not Providence, had the "unconditional obligation to bear the economic risk of depreciation and diminution in value of the Project . . . and shall bear the risk of loss if the Project is destroyed or damaged." The declaration of interest agreement further stated that "any third party may rely on this [a]greement with respect to the rights and obligations of [East House] and [Providence] hereunder."

East House contracted with Pardi for the architectural design work on the Project, and later, with Providence, separately contracted with Buckingham to serve as the Project's general contractor. Buckingham, in turn, contracted with Capstone to serve as the construction manager. Substantial completion occurred, and a certification of occupancy was issued, in June 2012. Upon taking occupancy, East House noticed water leaks and infiltration in the finished construction, which plaintiffs allege was caused by negligent design or construction. In 2015, Providence commenced the instant lawsuit, asserting causes of action for breach of contract and breach of warranty against defendants, as well as architectural malpractice against Pardi. In 2019, the complaint was amended to include a cause of action for property damage based upon mold growth against

defendants.

In September 2022, Providence moved for leave to amend the amended complaint to, *inter alia*, add East House as a plaintiff. Buckingham cross-moved for, among other things, summary judgment dismissing the amended complaint against it, Pardi cross-moved for summary judgment dismissing the amended complaint and cross-claims against it, and Capstone cross-moved for summary judgment dismissing the amended complaint and Pardi's cross-claims against it and to sever Buckingham's cross-claims against it. Buckingham did not oppose that part of Capstone's cross-motion seeking to sever Buckingham's cross-claims against Capstone. Supreme Court granted Providence's motion, granted Buckingham's cross-motion insofar as it sought summary judgment dismissing the amended complaint against it, denied Pardi's cross-motion, denied Capstone's cross-motion with respect to the fourth cause of action for property damage and Pardi's cross-claims against it and denied, as moot, Capstone's cross-motion with respect to severance of Buckingham's cross-claims inasmuch as the amended complaint was dismissed against Buckingham.

With respect to Pardi's appeal, we agree with Pardi that the court erred in granting that part of Providence's motion to amend the amended complaint to add East House as a plaintiff inasmuch as East House's claims are untimely. We therefore modify the order accordingly. The causes of action asserted by East House against Pardi arise from allegations of architectural malpractice and thus are governed by the three-year statute of limitations pursuant to CPLR 214 (6) (*see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 541-542 [2004]; *Gelmac Quality Feeds, Inc. v Ronning*, 23 AD3d 1019, 1020-1021 [4th Dept 2005]). Those causes of action accrued, at the latest, upon "the actual completion of the work" and issuance of the certificate of occupancy in 2012 (*Anderson v Pinn*, 185 AD3d 534, 535 [2d Dept 2020]; *see Town of W. Seneca v Kideney Architects, P.C.*, 187 AD3d 1509, 1511 [4th Dept 2020]; *Cross Dev., Inc. v Travelers Cas. & Sur. Co. of Am.*, 32 AD3d 1191, 1192 [4th Dept 2006]), 10 years prior to Providence's motion for leave to amend the amended complaint. We further agree with Pardi that East House's claims cannot be saved pursuant to CPLR 203 (f) by relating back to the filing of the original or amended complaints inasmuch as "there was no valid pre-existing action to which the [second] amended complaint could relate back" (*Truty v Federal Bakers Supply Corp.*, 217 AD2d 951, 952 [4th Dept 1995] [internal quotation marks omitted]; *see U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 33 NY3d 84, 90-91 [2019]; *Goldberg v Camp Mikan-Recro*, 42 NY2d 1029, 1029-1030 [1977]).

We also agree with Pardi on its appeal that the court erred in denying that part of its cross-motion for summary judgment dismissing the amended complaint against it for lack of privity (*see generally Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 94 AD3d 1466, 1468 [4th Dept 2012]; *Melnick v Parlato*, 296 AD2d 443, 443 [2d Dept 2002]). Providence was not a third-party beneficiary to the contract between East House and Pardi. To assert rights as a third-party beneficiary

under a contract, a plaintiff must establish: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [the third-party's] benefit and (3) that the benefit to [the third-party] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the third-party] if the benefit is lost" (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006] [internal quotation marks omitted]; see *Logan-Baldwin*, 94 AD3d at 1468). Here, in order to take advantage of beneficial tax credits, plaintiffs intentionally organized themselves in a manner in which Providence could not benefit from the Project inasmuch as it held only record title with no equitable or beneficial interest in the property or its improvements, and the corporate "structure [that plaintiffs] created should not lightly be ignored at their behest" (*Mertz v Seibel Realty*, 265 AD2d 925, 926 [4th Dept 1999] [internal quotation marks omitted]). We therefore further modify the order by granting that part of Pardi's cross-motion for summary judgment dismissing the amended complaint against it.

In light of our determination dismissing the amended complaint against Pardi, we conclude that the court erred in denying that part of Pardi's cross-motion with respect to the cross-claims of Buckingham and Capstone against it for contribution and common-law indemnification inasmuch as those cross-claims are now moot (see *Allington v Templeton Found.*, 167 AD3d 1437, 1440 [4th Dept 2018]; *Mayer v UVI Holdings*, 280 AD2d 153, 159 [1st Dept 2001]). The court also erred in denying that part of Pardi's cross-motion with respect to Capstone's cross-claim for contractual indemnification inasmuch as "there is simply no contract [between Pardi and Capstone] to support that cross[-]claim" (*Hastedt v Bovis Lend Lease Holdings, Inc.*, 152 AD3d 1159, 1163 [4th Dept 2017]). We therefore further modify the order by granting that part of Pardi's cross-motion seeking summary judgment dismissing the cross-claims against it.

With respect to Capstone's cross-appeal, we agree with Capstone that the court erred in denying that part of its cross-motion seeking summary judgment dismissing the fourth cause of action, for property damage based on mold growth, against it. Providence's fourth cause of action sounds in contract inasmuch as it arises from Capstone's alleged "failure to exercise due care in its performance of the contract" (*Gallup v Summerset Homes, LLC*, 82 AD3d 1658, 1660 [4th Dept 2011]). "[M]erely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort" (*id.* [internal quotation marks omitted]; see generally *Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 140 [2002]). There is no legal basis for a contract cause of action by Providence against Capstone because Providence was not in privity with Capstone nor was it a third-party beneficiary of the construction management agreement between Buckingham and Capstone (see generally *Logan-Baldwin*, 94 AD3d at 1468).

We further agree with Capstone that the court erred in denying that part of its cross-motion seeking summary judgment dismissing

Pardi's cross-claims against it for the same reasons the court erred in denying that part of Pardi's cross-motion seeking summary judgment dismissing the cross-claims of Capstone against Pardi. Additionally, inasmuch as Buckingham's cross-claim against Capstone for contractual indemnification was not rendered moot by the dismissal of the amended complaint against Buckingham (*see Zanghi v Laborers' Intl. Union of N. Am., AFL-CIO*, 21 AD3d 1370, 1371-1372 [4th Dept 2005]), we agree with Capstone that the unopposed cross-motion insofar as it seeks to sever that cross-claim must be granted (*see A to Z Applique Die Cutting v 319 McKibbin St. Corp.*, 242 AD2d 642, 643 [2d Dept 1997]). We therefore further modify the order by granting those parts of the cross-motion of Capstone for summary judgment dismissing the fourth cause of action and Pardi's cross-claims against it and for severance of Buckingham's cross-claim against Capstone for contractual indemnification.

Finally, with respect to plaintiffs' cross-appeal, we reject plaintiffs' contention that the court erred in granting Buckingham's cross-motion insofar as it sought summary judgment dismissing the amended complaint against it. There is no dispute that neither Providence nor East House complied with the conditions precedent in the AIA general form construction contract with Buckingham that required, *inter alia*, written notice of any claims within 21 days of their occurrence and mediation of all claims. Contrary to plaintiffs' contention, Buckingham's " 'failure to plead that defense in its answer . . . does not preclude an award of summary judgment based on that defense' . . . [inasmuch as] '[a] court may grant summary judgment based upon an unpleaded defense where . . . reliance upon that defense neither surprises nor prejudices the plaintiff' " (*D&M Concrete, Inc. v Wegmans Food Mkts., Inc.*, 133 AD3d 1329, 1330 [4th Dept 2015], *lv denied* 27 NY3d 901 [2016]). The defense of failure to satisfy conditions precedent could not have surprised or prejudiced plaintiffs inasmuch as they were " 'already aware of the facts which constituted the defense' . . . , i.e., the dispute resolution procedures contained in the contract executed by" plaintiffs and specifically referenced in the complaint and amended complaint (*id.*; *see generally Penn Hydro, Inc. v B.V.R. Constr. Co.*, 218 AD3d 1253, 1256 [4th Dept 2023]). Plaintiffs' contention that the defense is barred by the doctrine of laches is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

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

720

KA 24-00376

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

KENNETH TYSON, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Erie County Court (Susan M. Eagan, J.), dated January 29, 2024. The order granted the motion of defendant to dismiss the subject indictment.

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

Memorandum: The People appeal from an order granting the motion of defendant to dismiss the indictment charging him with aggravated harassment of an employee by an incarcerated individual (Penal Law § 240.32) on the ground that he was denied his constitutional right of due process as a result of preindictment delay. Contrary to the People's contention, County Court did not err in granting the motion (*see generally People v Taranovich*, 37 NY2d 442, 444-445 [1975]).

Defendant was arrested on December 25, 2021 after an incident in which he threw urine at a correction officer attempting to enter defendant's cell while defendant was an inmate. He was indicted in February 2023. On November 24, 2023, defendant filed a motion to dismiss the indictment, arguing that his due process rights had been violated due to preindictment delay. On January 29, 2024, the court granted the motion and dismissed the indictment.

"By state and constitutional law, New York guarantees criminal defendants the right to a speedy trial and prompt prosecution" (*People v Regan*, 39 NY3d 459, 464 [2023]; *see* NY Const, art I, § 6; CPL 30.20). "[T]he State due process requirement of a prompt prosecution is broader than . . . the Sixth Amendment . . . [and] [i]n some respects the State rule is less rigid in its application than the right to due process recognized under the Federal Constitution" (*Regan*, 39 NY3d at 464 [internal quotation marks omitted]; *see People v Singer*, 44 NY2d 241, 253-254 [1978]). The Court of Appeals has "long held that unreasonable delay in prosecuting a defendant

constitutes a denial of due process of law" and that "[a]n untimely prosecution may be subject to dismissal even though, in the interim, the defendant was not formally accused, restrained or incarcerated for the offense" (*Singer*, 44 NY2d at 253 [internal quotation marks omitted]). Further, there is no "fine distinction between due process violations based on delay in commencing prosecution[, i.e., preindictment delay,] and speedy trial violations, and the factors utilized to determine if a defendant's rights have been abridged are the same whether the right asserted is a speedy trial right or the due process right to prompt prosecution" (*Regan*, 39 NY3d at 465 [internal quotation marks omitted]). Those factors are: " '(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay' " (*People v Wiggins*, 31 NY3d 1, 9-10 [2018], quoting *Taranovich*, 37 NY2d at 445). " '[N]o one factor or combination of factors . . . is necessarily decisive or determinative of the [prompt prosecution] claim, but rather the particular case must be considered in light of all the factors as they apply to it' " (*id.* at 10, quoting *Taranovich*, 37 NY2d at 445; see *Regan*, 39 NY3d at 465) and, "if the first two factors favor [the] defendant, establishment of prejudice is not required to find a due process violation" (*Regan*, 39 NY3d at 471).

Under the circumstances, we conclude that the delay of 14 months between defendant's arrest and his indictment was unreasonable. The case was not complex and did not involve any unique theories of law. Additionally, the required evidence and witnesses—which consisted of employees of the Department of Corrections and Community Supervision (DOCCS) and evidence within DOCCS's possession—were available to the People at an early date (see e.g. *People v Brown* [appeal No. 2], 117 AD2d 978, 979-980 [4th Dept 1986]). We further reject the People's assertion that the laboratory testing caused a delay in this case. Upon receipt of a "Bioscience Request for Priority Case Status," the testing of the liquid thrown at the correction officer was completed within one month. Further, the People's delay in obtaining an indictment in this matter could not have been based upon the need for the lab report inasmuch as the report was completed before law enforcement filed the paperwork with the People. We reject the People's remaining allegation of delay for good cause (see generally *Regan*, 39 NY3d at 474).

We conclude that the third factor, i.e., the nature of the underlying crime, also weighs in defendant's favor. The legislature has deemed this offense to be a class E felony—the lowest level of felony offense (see Penal Law § 240.32). The third factor also requires that we consider the complexity of the crime and, for the reasons noted above, "the preparation to which the People attribute a delay for the prosecution of this crime was not complex" (*Regan*, 39 NY3d at 470).

We reject the People's contention that the fourth factor—i.e., whether defendant was subjected to a period of incarceration during the delay—weighs in their favor. Although defendant was serving a

sentence on an unrelated charge at the time the incident occurred, defendant was placed in solitary confinement for seven months as a result of this incident. Further, where, as here, the defendant is imprisoned on another crime, that imprisonment "cannot excuse the delay" (*Singer*, 44 NY2d at 254).

Inasmuch as "the first two factors favor defendant, establishment of prejudice is not required to find a due process violation" (*Regan*, 39 NY3d at 471). In any event, the Court of Appeals, in addressing similar facts, has noted that the delay in charging an incarcerated individual with a subsequent crime may prolong their "incarceration, as a practical matter, by foreclosing the possibility of a concurrent sentence" (*Singer*, 44 NY2d at 253), and "may also interfere with [their] rehabilitation, particularly when [they are] already aware that [they are] suspected or 'known' to have committed the other offense" (*id.* at 254). That is exactly the prospect defendant faced here.

All concur except CURRAN and GREENWOOD, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent and vote to reverse, deny the motion to dismiss, and reinstate the indictment because, in our view, defendant was not deprived of due process by unreasonable preindictment delay (see generally NY Const, art I, § 6). As the majority explains, in evaluating whether preindictment delay violates a defendant's constitutional rights, courts must consider the five factors set forth in *People v Taranovich* (37 NY2d 442 [1975]), i.e., "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*id.* at 445; see *People v Regan*, 39 NY3d 459, 465 [2023]). "[N]o one factor or combination of the factors . . . is necessarily decisive or determinative of the [due process] claim, but rather the particular case must be considered in light of all of the factors as they apply to it" (*Regan*, 39 NY3d at 465 [internal quotation marks omitted]; see *Taranovich*, 37 NY2d at 445). Additionally—and quite crucial to the majority's determination—we acknowledge "that if the first two factors favor defendant, establishment of prejudice is not required to find a due process violation" (*Regan*, 39 NY3d at 471; see *People v Singer*, 44 NY2d 241, 254 [1978]). Nonetheless, for the reasons that follow, we conclude that none of the *Taranovich* factors favor defendant and that, therefore, County Court erred in granting defendant's motion to dismiss the indictment.

With respect to the first *Taranovich* factor, i.e., the extent of the delay, we disagree with the majority that the 14-month delay here was unreasonable. Indeed, that conclusion is entirely inconsistent with this Court's voluminous precedent finding "similar periods of delay . . . to be within constitutional limits" (*People v Jenkins*, 2 AD3d 1390, 1390 [4th Dept 2003]; see e.g. *People v Williams*, 120 AD3d 1526, 1527 [4th Dept 2014], *lv denied* 24 NY3d 1090 [2014] [14 months]; *People v Rivera*, 120 AD3d 1602, 1603 [4th Dept 2014], *lv denied* 24

NY3d 1221 [2015] [13 months]; *People v Pulvino*, 115 AD3d 1220, 1222 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014] [21 months]; *People v Perez*, 85 AD3d 1538, 1538-1539 [4th Dept 2011] [11½ months]; *People v Clark*, 42 AD3d 957, 959 [4th Dept 2007], *lv denied* 9 NY3d 960 [2007] [11 months]; *People v Cody*, 30 AD3d 1068, 1068 [4th Dept 2006] [12 months]; *People v Ortiz*, 16 AD3d 1130, 1130 [4th Dept 2005], *lv denied* 5 NY3d 766 [2005] [10 months]; *People v Beyah*, 302 AD2d 981, 981 [4th Dept 2003], *lv denied* 99 NY2d 626 [2003] [12 months]; *People v Lush*, 249 AD2d 896, 896 [4th Dept 1998] [14 months]; *see also People v Hill*, 106 AD3d 1497, 1497 [4th Dept 2013] [15 months]; *People v Robinson*, 49 AD3d 1269, 1269-1270 [4th Dept 2008], *lv denied* 10 NY3d 869 [2008] [16 months]). In concluding that the delay here was unreasonable, the majority fails to acknowledge, let alone distinguish, any of the aforementioned precedent. Indeed, it fails to even cite a single case supporting its conclusion that the 14-month delay here is unreasonable.

With respect to the second *Taranovich* factor, i.e., the reason for the delay, we also conclude that it weighs against defendant. The incident here occurred on December 25, 2021, but due to a laboratory backlog, testing of the brown liquid that was thrown on the correction officer was not completed until May 2, 2022. The majority's assertion that the testing was completed within one month of receipt of the "Bioscience Request for Priority Case Status" is not supported by the record. The People explained that they did not even learn about the December 2021 incident underlying the criminal charge here until August 2022, when the New York State Police delivered paperwork to them, which was after defendant was released on parole in July 2022—about six months prior to his February 2023 indictment. Until defendant was released on parole, he remained in the custody of the Department of Corrections and Community Supervision (DOCCS) serving his sentence of imprisonment on an unrelated crime. In short, it was only after August 2022 that the People could assemble the evidence against defendant to prove him guilty of aggravated harassment of an employee by an incarcerated individual (Penal Law § 240.32). The People's efforts to establish defendant's guilt included identifying multiple fact and expert witnesses, and obtaining video footage, photographs, and laboratory results of the liquid thrown onto the face of the correction officer. Defendant was indicted in February 2023, just six months after the People learned of the charge.

In light of the aforementioned facts, we conclude that the People acted "in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons" (*Singer*, 44 NY2d at 254; *see Regan*, 39 NY3d at 465), and there is no evidence that the delay—once they learned about the underlying incident—"was attributable to the People's inadvertence or a failure to prioritize the case" (*People v Johnson*, 211 AD3d 1633, 1635 [4th Dept 2022], *lv denied* 39 NY3d 1111 [2023]). To the contrary, as set forth above, the delay was largely caused by the efforts of the People "to acquire substantial corroborating evidence in order to prove defendant's guilt beyond a reasonable doubt" (*People v Nazario*, 85 AD3d 577, 577 [1st Dept 2011], *lv denied* 17 NY3d 904 [2011]).

To the extent the majority concludes that the People had no good reason for the delay on the basis that they possessed evidence maintained by DOCCS about the incident *before* they learned of the charge, we respectfully conclude that the majority is simply mistaken inasmuch as DOCCS is not a law enforcement agency and "the People cannot be deemed to be in constructive possession of that which DOCCS possesses" (*People v Jenne*, 224 AD3d 953, 957 [3d Dept 2024], *lv denied* 42 NY3d 927 [2024]; see generally *People v Kelly*, 88 NY2d 248, 253 [1996]; *People v Walker*, 232 AD3d 1214, 1217 [4th Dept 2024]). Consequently, we also cannot agree with the majority that the second factor favors defendant.

We further conclude that the third *Taranovich* factor, i.e., the nature of the underlying charge, also favors the People, and that the majority errs in concluding that the underlying offense here was not serious—contradicting the court's conclusion to the contrary. Specifically, we cannot agree with the majority to the extent that they suggest that the underlying offense is not "serious" inasmuch as it is a class E felony. The majority cites no case law to support that position. Indeed, to the contrary, we note the existence of cases where courts concluded that a class E felony was sufficiently serious for purposes of the third *Taranovich* factor (see e.g. *People v McCollough*, 198 AD3d 1023, 1024 [3d Dept 2021]; *People v Montague*, 130 AD3d 1100, 1101 [3d Dept 2015], *lv denied* 26 NY3d 1090 [2015]). To the extent that the majority focuses its analysis on the class of felony at issue as a proxy for its seriousness, it overlooks other serious aspects of the underlying incident. Specifically, we note that the incident occurred when the victim and other correction officers were entering defendant's cell for a welfare check, at which time defendant charged at the victim and threw brown liquid onto his face. As a result, the victim vomited and was treated with medication designed to flush his system of any diseases he may have come into contact with when he was hit by liquid potentially containing feces or urine.

In our view, the majority's analysis of the third factor fails to consider the underlying purpose of the statute criminalizing the conduct at issue here, which is to provide "special protections" to correction workers (*People v Hernandez*, 198 AD3d 545, 545 [1st Dept 2021], *lv denied* 37 NY3d 1161 [2022]). Indeed, it is clear that, in enacting this Penal Law provision, the legislature sought to curb "vile conduct" that was "particularly degrading in nature," and which "creat[ed] an enhanced health risk for employees" of correction facilities (Assembly Mem in Support, Bill Jacket, L 1996, ch 92). Specifically, the legislative history notes that, in enacting the relevant provision, the legislature sought "to deter and punish the outrageous and potentially life-threatening behavior of inmates or parolees." In other words, "[w]hile being pelted with human waste is inherently degrading and highly noxious, the prevalence of viral and bacterial agents contained in such bodily fluids makes [the underlying crime] a potentially life-threatening act" (Governor's Program Bill Mem, Bill Jacket, L 1996, ch 92). That is precisely the serious risk that the victim here faced when he was hit with the brown liquid that contained defendant's urine. In light of the nature of the crime and

the underlying facts, we conclude that the conduct at issue here was serious such that the third *Taranovich* factor weighs in the People's favor.

Further, as the majority notes, the third *Taranovich* factor also requires courts to consider the complexity of the underlying crime. Contrary to the majority, however, we conclude that the necessary preparation for the prosecution of this crime was complex due to—as discussed above—the scientific testing necessary to precisely establish the contents of the liquid defendant threw at the victim (see generally *Regan*, 39 NY3d at 470; *People v Wiggins*, 31 NY3d 1, 16 [2018]). Indeed, given that the People would be required to prove, beyond a reasonable doubt, that defendant threw bodily fluids at the victim (Penal Law § 240.32), it is understandable that the People would proceed “with far more caution and deliberation” than with respect to a more minor offense, and that they would “be more thorough and precise” to specifically establish the nature of the fluid defendant threw (*Wiggins*, 31 NY3d at 16 [internal quotation marks omitted]).

With respect to the fourth factor, i.e., whether or not there has been an extended period of pretrial incarceration, defendant concedes in his brief that it does not weigh in his favor. We also note that defendant did not contend before the motion court that he was subjected to pretrial incarceration as a result of the underlying charge. Despite defendant's concession, the majority nevertheless theorizes, unsupported by any precedent, that the fourth factor weighs in defendant's favor because his placement in the special housing unit due to the violation of prison rules equates to pretrial incarceration. In reaching that conclusion, however, the majority ignores the fact that there is nothing the People could have done to negate defendant's confinement in the special housing unit, even if they had managed to indict him sooner.

Finally, with respect to the fifth *Taranovich* factor, i.e., whether there is any indication that the defense has been impaired by reason of the delay, the majority primarily concludes that because the first two factors favored defendant, there is no need for defendant to establish prejudice (see *Regan*, 39 NY3d at 471). In our view, however, the fifth factor also does not weigh in defendant's favor. Crucially, nowhere does defendant even assert that the delay impaired or prejudiced his ability to prepare his defense. Instead, he argues that his time spent in “solitary confinement” was prejudicial, as is the possibility defendant will be imprisoned on the subject charge, all of which will interfere with the rehabilitative process. As defendant concedes, that argument is unsupported by precedent. In any event, “ ‘there is a complete lack of any evidence that the defense was impaired by reason of the delay’ ” in this case (*People v Edmead*, 197 AD3d 937, 938 [4th Dept 2021], lv denied 37 NY3d 1096 [2021], reconsideration denied 37 NY3d 1160 [2022]; see *People v Works*, 211 AD3d 1574, 1575 [4th Dept 2022], lv denied 39 NY3d 1114 [2023]; *People v Hewitt*, 144 AD3d 1607, 1608 [4th Dept 2016], lv denied 28 NY3d 1185 [2017]).

The majority asserts—to the extent that it analyzes the fifth *Taranovich* factor—that defendant was prejudiced by the delay because it effectively prolonged his incarceration to the extent it foreclosed any possibility of him receiving a concurrent sentence (see generally *Singer*, 44 NY2d at 253). In our view, however, to the extent the possibility of a concurrent sentence was concerned, the majority ignores the fact that defendant, given his extensive criminal history, was indisputably facing a mandatory prison sentence if he was convicted of the underlying crime, and that any reduction of the charge is precluded by law (see CPL 220.10 [5] [h]). The majority does not explain how a concurrent sentence would be a possibility for defendant, a second felony offender (see Penal Law § 70.25 [2-a]), even if there had been no delay in the prosecution of the underlying offense.

Consequently, because none of the *Taranovich* factors weigh in defendant's favor, we conclude that the court erred in granting defendant's motion to dismiss the indictment (see *Jenkins*, 2 AD3d at 1390-1391).

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

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CAF 23-01049

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

IN THE MATTER OF CINDY A. NAAS,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

GARY P. WURTH, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from an order of the Family Court, Monroe County (Kristin F. Splain, R.), entered March 22, 2023, in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection against respondent.

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

Memorandum: In appeal No. 1, respondent appeals from an order of protection issued in favor of petitioner upon a determination that respondent committed the family offenses (see Family Ct Act § 812 [1]) of harassment in the second degree (Penal Law § 240.26) and disorderly conduct (§ 240.20).

In appeal No. 2, respondent appeals from an order of protection issued in favor of petitioner upon a determination that there were aggravating circumstances warranting an order of protection for a period of five years.

In appeal No. 1, respondent contends that Family Court's findings that he committed the family offenses of harassment in the second degree and disorderly conduct are not supported by a sound and substantial basis in the record. At the outset, we note that, although the court found that respondent had committed certain family offenses and sufficiently "state[d] the facts it deem[ed] essential" to its decision (*Matter of Tin Tin v Thar Kyi*, 92 AD3d 1293, 1293 [4th Dept 2012], *lv denied* 19 NY3d 802 [2012] [internal quotation marks omitted]; see *Matter of Telles v DeWind*, 140 AD3d 1701, 1701 [4th Dept 2016]), it did not specify the subsections of the criminal statutes upon which it based its findings that respondent committed the family offenses of harassment in the second degree and disorderly conduct. Nevertheless, exercising our independent review power, we conclude

that the proof is sufficient to establish, by a preponderance of the evidence, that respondent committed the family offenses of harassment in the second degree under Penal Law § 240.26 (1) and disorderly conduct under section 240.20 (1) (see *Telles*, 140 AD3d at 1701; *Matter of Lynn TT. v Joseph O.*, 129 AD3d 1129, 1130 [3d Dept 2015]; see generally *Matter of Yaddow v Bianco*, 115 AD3d 1338, 1339 [4th Dept 2014]).

We reject respondent's contention that the evidence does not support the finding that he committed the family offense of harassment in the second degree. "A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person . . . [the person] strikes, shoves, kicks or otherwise subjects such other person to physical contact" (Penal Law § 240.26 [1]). Here, the evidence of physical contact was established through petitioner's testimony that respondent grabbed her arm and leg during a struggle inside her car, causing bruising (see *People v Aikey*, 153 AD3d 1603, 1604 [4th Dept 2017], *lv denied* 30 NY3d 1058 [2017]). With respect to respondent's intent, "it is well established that '[i]ntent may be inferred from conduct as well as the surrounding circumstances' " (*id.*, quoting *People v Steinberg*, 79 NY2d 673, 682 [1992]), and here the evidence establishes that respondent repeatedly confronted petitioner at the marina, despite her refusal to engage; that he followed her to her car; and that he attempted to prevent her from leaving the parking lot by trying to take her keys and by grabbing her arm and leg. Thus, there is a " 'valid line of reasoning and permissible inferences which could lead a rational person' to conclude that [respondent] intended to annoy or harass [petitioner]" when he physically grabbed her in an effort to prevent her from leaving the parking lot (*id.*; see *Matter of Carly W. v Mark V.*, 225 AD3d 984, 987 [3d Dept 2024]; *Matter of Washington v Washington*, 158 AD3d 717, 718 [2d Dept 2018], *lv denied* 32 NY3d 912 [2018]). Further, where, as here, "the court was presented with sharply conflicting accounts by the parties regarding the subject events, and chose to credit the testimony of one party over the other, its determination will not be disturbed unless clearly unsupported by the record" (*Matter of Mohammed v Mohammed*, 174 AD3d 615, 615-616 [2d Dept 2019]). The court's determination that respondent committed the family offense of harassment in the second degree was based upon its assessment of the credibility of the parties and is supported by the record (see *Matter of Townes v Diggs*, 216 AD3d 1104, 1105 [2d Dept 2023]).

We likewise reject respondent's contention that the evidence does not support the finding that he committed the family offense of disorderly conduct. Under the Penal Law, a "person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . [the person] engages in fighting or in violent, tumultuous or threatening behavior" (§ 240.20 [1]). Here, the evidence established that respondent ran after petitioner, that he struggled with her for control over her keys, and that, during this struggle, petitioner honked her horn and flashed her high beams. To the extent that respondent relies on the fact that the marina where the incident

occurred is private property, the Family Court Act explicitly provides that " 'disorderly conduct' includes disorderly conduct not in a public place" for purposes of Family Court Act article 8 (Family Ct Act § 812 [1]). In any event, the incident attracted the attention of at least two other people present at the marina, and respondent concedes that there was testimony that it was "common practice for people to sleep on their boats at the marina." Under these circumstances, the finding that respondent committed disorderly conduct by recklessly creating a risk of public inconvenience, annoyance, or alarm by engaging in "fighting or in violent, tumultuous or threatening behavior" (Penal Law § 240.20 [1]) is supported by the record (see *Telles*, 140 AD3d at 1701-1702; *Matter of McLaughlin v McLaughlin*, 104 AD3d 1315, 1315-1316 [4th Dept 2013]; see also *Matter of Dietzman v Dietzman*, 112 AD3d 1370, 1370 [4th Dept 2013]).

Contrary to respondent's contention in appeal No. 2, the court did not err in finding aggravating circumstances warranting the imposition of a five-year order of protection based upon respondent's repeated violations of a prior order of protection (see Family Ct Act §§ 827 [a] [vii]; 842; see generally *Matter of White v Byrd-McGuire*, 163 AD3d 1413, 1414 [4th Dept 2018]).

Respondent's remaining contention is a challenge to the issuance of a temporary order of protection prior to the hearing on the petitions. Inasmuch as the temporary order of protection has expired by its own terms and the court has now issued permanent orders of protection based on its findings of family offenses and aggravating circumstances, that contention is moot (see *Matter of Ellie Jo L.H. [Debra A.M.]* [appeal No. 3], 158 AD3d 1232, 1232 [4th Dept 2018]; see generally *Matter of Senator NN.*, 305 AD2d 819, 820 [3d Dept 2003]).

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

727

CAF 23-01052

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

IN THE MATTER OF CINDY A. NAAS,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

GARY P. WURTH, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Family Court, Monroe County (Kristin F. Splain, R.), entered March 22, 2023, in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection against respondent.

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

Same memorandum as in *Matter of Naas v Wurth* ([appeal No. 1] – AD3d – [Jan. 31, 2025] [4th Dept 2025]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00718

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

THERESA A. SANDERS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RALPH SANDERS AND SANDRA ELLIS, ALSO KNOWN AS
SANDRA ELLIS SANDERS, DEFENDANTS-RESPONDENTS.

HOFFMANN, HUBERT & HOFFMAN, SYRACUSE (TERRENCE J. HOFFMAN OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County
(Robert E. Antonacci, II, J.), entered October 4, 2022. The order
denied the motion of plaintiff for a default judgment and granted the
cross-motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by denying the cross-motion in part
and reinstating the complaint against defendant Ralph Sanders, and as
modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action contesting an open
court stipulation of a settlement agreement (agreement), which was
incorporated but not merged into the judgment of divorce between
plaintiff and defendant Ralph Sanders (Sanders). Plaintiff alleged
that, at the time the agreement was entered into, defendants
intentionally engaged in various deceptive acts designed to conceal
marital assets from plaintiff. Plaintiff thus sought, inter alia,
reformation and modification of the agreement to include all of the
assets allegedly secreted by defendants. Plaintiff appeals from an
order that, in relevant part, granted defendants' cross-motion to
dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), and (7).

Initially, we conclude that Supreme Court properly granted that
part of the cross-motion seeking dismissal of the complaint against
defendant Sandra Ellis, also known as Sandra Ellis Sanders (Ellis).
"[P]arties to a contract cannot, under its terms, impose any liability
upon a stranger to that contract" (*Bartsch v Bartsch*, 54 AD2d 940, 941
[2d Dept 1976]; see *Tema v Tema*, 227 AD3d 930, 932 [2d Dept 2024]; see
generally *Bouley v Bouley*, 19 AD3d 1049, 1050 [4th Dept 2005]).
Inasmuch as Ellis was not a party to the agreement and had therefore
not assumed any duties thereunder, we conclude that defendants

established that she is not a proper defendant (see *Tema*, 227 AD3d at 932; see generally *Matter of Gregory v Gregory*, 109 AD3d 616, 617 [2d Dept 2013]; *Bouley*, 19 AD3d at 1050). In opposition, plaintiff failed to rebut defendants' showing or otherwise establish that Ellis was a party to the agreement.

We agree with plaintiff, however, that the court erred in granting that part of the cross-motion with respect to Sanders, and we therefore modify the order accordingly. When considering a motion to dismiss the complaint pursuant to CPLR 3211, the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiff[] every possible favorable inference" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]; see generally *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). In evaluating whether a complaint should be dismissed pursuant to CPLR 3211 (a) (7) in a case where the court has considered evidentiary material in support of or in opposition to the motion, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon*, 84 NY2d at 88 [internal quotation marks omitted]). Thus, "[a] motion pursuant to CPLR 3211 (a) (7) will be granted if the plaintiff does not have a cause of action" (*Murnane Bldg. Contrs., LLC v Cameron Hill Constr., LLC*, 159 AD3d 1602, 1603 [4th Dept 2018]).

Here, in support of the cross-motion, defendants submitted a copy of the judgment of divorce and a transcript of the agreement. Defendants asserted that the evidence they submitted conclusively demonstrated that plaintiff does not have a claim against Sanders (see generally *Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 88-90 [4th Dept 2015]) to reform or modify the agreement as the product of Sanders's alleged fraudulent actions inasmuch as the agreement establishes that plaintiff expressed satisfaction with the financial disclosure she received from Sanders in connection with the divorce and confirmed that she was satisfied with the agreement's division of marital assets. Defendants thus asserted that plaintiff waived her right to challenge any failure by Sanders to fully disclose assets in connection with the agreement.

We agree with plaintiff that the terms of the agreement do not establish that she waived that right when she entered into the agreement. At most, the record shows that, at the time plaintiff entered into the agreement, she was satisfied with Sanders's disclosure of all marital property. The agreement does not, however, demonstrate that plaintiff expressly and intentionally agreed to waive the right to challenge the agreement in the future if she learned that Sanders had, in fact, secreted marital assets from her during the pendency of the divorce proceedings (cf. *Markovitz v Markovitz*, 29 AD3d 460, 461 [1st Dept 2006]; *Genovese v Genovese*, 243 AD2d 679, 679 [2d Dept 1997]; *DiSalvo v Graff*, 227 AD2d 298, 298 [1st Dept 1996]; see generally *Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 469 [1978]). The agreement contains no "provisions that prohibit [plaintiff] from altering its written terms [or that] undermine her claim of fraud" (*Luftig v Luftig*, 239 AD2d 225, 226 [1st Dept 1997]), such as language establishing that "[e]ach party expressly waive[d]

the right to any future financial disclosure . . . and that neither party properly can or shall subsequently assert that [the] [a]greement should be impaired or invalidated by reason of any lack of financial disclosure or lack of understanding or of fraud, duress or coercion" (*id.*). Consequently, we conclude that the agreement itself does not furnish a basis for granting that part of the motion seeking to dismiss the complaint against Sanders pursuant to CPLR 3211 (a) (7).

We further conclude that defendants did not meet their burden on that part of the cross-motion seeking to dismiss the complaint against Sanders pursuant to CPLR 3211 (a) (7) inasmuch as they submitted no evidence refuting plaintiff's specific and detailed allegations that Sanders secreted marital assets prior to the entry of the agreement. By relying on the terms of the agreement alone and submitting no affidavits or other evidence to refute plaintiff's specific allegations, defendants failed to " 'flatly contradict[]' plaintiff's allegations that she was not provided with complete disclosure regarding the subject assets at the time she executed the agreement" (*Stuber v Stuber*, 209 AD3d 1297, 1297 [4th Dept 2022]; see generally *Simkin v Blank*, 19 NY3d 46, 52 [2012]). As indicated above, at this stage of the proceedings, we "must give the complaint a liberal construction, accept the allegations as true and provide plaintiff[] with the benefit of every favorable inference . . . Whether a plaintiff can ultimately establish [the] allegations is not part of the calculus in determining a motion to dismiss" (*Tower Broadcasting, LLC v Equinox Broadcasting Corp.*, 160 AD3d 1435, 1436 [4th Dept 2018]).

We also conclude that CPLR 3211 (a) (5) furnishes no basis for granting that part of the cross-motion with respect to Sanders. As relevant here, that provision permits a party to "move for judgment dismissing one or more causes of action . . . on the ground that . . . the cause of action may not be maintained because of . . . collateral estoppel [or] . . . res judicata" (*id.*). The agreement at issue is a contract and, inasmuch as it did not merge into the judgment of divorce, its obligations survived the judgment, requiring any party seeking to invalidate the agreement to commence a plenary action (see *Rainbow v Swisher*, 72 NY2d 106, 109 [1988]; *Mancuso v Graham*, 173 AD3d 1808, 1809 [4th Dept 2019]; *Anderson v Anderson*, 153 AD3d 1627, 1628 [4th Dept 2017]). We conclude that, under the circumstances of this case, neither res judicata nor collateral estoppel—to the extent that either flows from the purportedly preclusive effect of the judgment of divorce—applies here to preclude the plenary action "to contest the validity of the separation agreement" (*Washburn v Washburn*, 178 AD2d 991, 991 [4th Dept 1991]; see *Bryant v Carty*, 118 AD3d 1459, 1460 [4th Dept 2014]; see generally *Sacks v Sacks*, 220 AD2d 736, 737 [2d Dept 1995]).

We also conclude that dismissal of the complaint under CPLR 3211 (a) (1) is unjustified. A motion under CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence establishes a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Himmelstein, McConnell, Gribben, Donoghue*

& Joseph, LLP v Matthew Bender & Co., Inc., 37 NY3d 169, 175 [2021], *rearg denied* 37 NY3d 1020 [2021]; *Carbone v Brenizer*, 148 AD3d 1806, 1806 [4th Dept 2017]). Here, we conclude that defendants did not satisfy their burden of providing documentary evidence that utterly refutes plaintiff's claims. As noted above, defendants submitted a copy of the judgment of divorce and the transcript of the agreement to support their argument that plaintiff's complaint did not overcome the presumption of validity attendant to the agreement. We disagree inasmuch as it cannot be the case that plaintiff's challenge to the *validity of the agreement itself*—i.e., her claim that it should be reformed or modified as the product of defendants' fraudulent conduct and misrepresentations at the time it was entered into—can be completely refuted by the mere existence of the agreement (see generally *Bisimwa v St. John Fisher Coll.*, 194 AD3d 1467, 1469 [4th Dept 2021]).

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

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

746

CAF 23-01357

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

IN THE MATTER OF ROWAN A. ALBIN,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

BRETT B. BUSHAW, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

KATHRYN M. FESTINE, UTICA, FOR PETITIONER-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Herkimer County (Thaddeus J. Luke, J.), entered July 6, 2023, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and primary physical custody 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 father appeals from an order that, inter alia, awarded petitioner mother sole legal and primary physical custody of the subject child. We reject the father's contention that Family Court's custody determination lacks a sound and substantial basis in the record.

"In making an initial custody determination, the court is required to consider the best interests of the child by reviewing such factors as maintaining stability for the child, . . . the home environment with each parent, each parent's past performance, relative fitness, ability to guide and provide for the child's overall well-being, and the willingness of each parent to foster a relationship with the other parent" (*Matter of Gilbert v Nunez-Merced*, 181 AD3d 1210, 1210 [4th Dept 2020], *lv denied* 35 NY3d 910, 911 [2020] [internal quotation marks omitted]; see *Matter of Athoe v Goodman*, 170 AD3d 1532, 1533 [4th Dept 2019]). We agree with the court that those factors weigh in the mother's favor, particularly in light of the father's efforts to interfere with the mother's contact with the child, and we thus conclude that the record supports the court's

determination that it is in the best interests of the child to award sole legal and primary physical custody to the mother (*see Gilbert*, 181 AD3d at 1210-1211; *Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]).

Finally, we conclude that the father's challenge to the court's initial temporary order was rendered moot by the entry of the final order of custody (*see Matter of Rodriguez v Feldman*, 126 AD3d 1557, 1558 [4th Dept 2015]; *Matter of Ramirez v Velez*, 78 AD3d 1062, 1062-1063 [2d Dept 2010]).

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

747

CAF 23-01648

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

IN THE MATTER OF ROWAN A. ALBIN,
PETITIONER-RESPONDENT,

V

ORDER

BRETT B. BUSHAW, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

KATHRYN M. FESTINE, UTICA, FOR PETITIONER-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from a corrected order of the Family Court, Herkimer County (Thaddeus J. Luke, J.), entered July 31, 2023, in a proceeding pursuant to Family Court Act article 6. The corrected order, among other things, awarded petitioner sole legal and primary physical custody of the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

748

CAF 23-01808

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

IN THE MATTER OF FRANK O'DELL,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

AYESHA O'DELL, RESPONDENT-APPELLANT.

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

FERN S. ADELSTEIN, OLEAN, FOR PETITIONER-RESPONDENT.

JAY D. CARR, OLEAN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cattaraugus County (Deborah J. Scinta, R.), entered October 10, 2023, in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that petitioner's supervised visitation with the subject child shall take place at the locations the supervisor deems appropriate.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by striking from the fifth ordering paragraph the phrase "at the locations the supervisor deems appropriate" and substituting therefor the phrase "either in the supervisor's home or in a public location" and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, designated a family friend to supervise petitioner father's access with the subject child and directed that access would take place at locations the supervisor deemed appropriate. The mother contends that Family Court erred in designating the family friend to supervise access and in permitting the supervisor to determine the location for that access.

"Although, as a general rule, the custody determination of the trial court is entitled to great deference . . . , '[s]uch deference is not warranted . . . where the custody determination lacks a sound and substantial basis in the record' " (*Matter of Cole v Nofri*, 107 AD3d 1510, 1511 [4th Dept 2013], *appeal dismissed* 22 NY3d 1083 [2014]; *see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]; *Matter of Edmonds v Lewis*, 175 AD3d 1040, 1042 [4th Dept 2019], *lv denied* 34

NY3d 909 [2020])). In addition, " '[o]ur authority in determinations of custody [and visitation] is as broad as that of Family Court' " (Cole, 107 AD3d at 1511; see also *Matter of Boyer v Boyer*, 281 AD2d 953, 953 [4th Dept 2001]). Here, we conclude that the court's determination to appoint the supervisor is supported by a sound and substantial basis in the record, but we exercise our discretion to modify the order by directing that the father's access take place either in public or at the supervisor's house (see *Matter of Darlene A. v Carl C.*, 222 AD3d 1276, 1278 [3d Dept 2023]; *Cesario v Cesario*, 168 AD2d 911, 911 [4th Dept 1990]).

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

750

CA 23-01436

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

JANICE M. HUNTER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MOTOR VEHICLE ACCIDENT INDEMNIFICATION
CORPORATION, DEFENDANT-RESPONDENT.

TOWEY LAW, PLLC, BUFFALO (BRIAN K. TOWEY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

KORNFELD, REW, NEWMAN & SIMEONE, SUFFERN (SCOTT A. DOW OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 17, 2023. The order denied the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action pursuant to Insurance Law § 5218 seeking damages for injuries that she allegedly sustained in an alleged hit-and-run accident. The complaint, as amplified by the bill of particulars, alleges that the accident occurred when plaintiff was walking in a roadway at 1:30 a.m. During her deposition, plaintiff testified that an unidentified vehicle struck her left shoulder, back and neck, causing her to fly in the air and land on the hood of the vehicle. Plaintiff further testified that the unidentified driver of the vehicle initially stopped and said that she would call the police, but then got back into her vehicle and drove away. Plaintiff walked home after the accident and went to the hospital the following day. The medical records from plaintiff's emergency room visit indicate that she informed medical personnel that a car struck her on the right side of her body when she was crossing the street.

Following discovery, plaintiff moved for summary judgment on the issues of negligence and serious injury within the meaning of Insurance Law § 5102 (d). Supreme Court denied the motion in its entirety, concluding, inter alia, that plaintiff's own submissions, including her medical records, raised "a triable issue of fact as to the happening of the accident with the unidentified motor vehicle." On appeal, plaintiff contends that the court erred in denying her motion with respect to the issue of negligence. We affirm.

Plaintiff failed to preserve for our review her contention that her statements in the medical records about the happening of the accident are inadmissible hearsay evidence that should not have been considered by the court (*see Deal v Wood*, 48 AD3d 1093, 1094 [4th Dept 2008]). In any event, plaintiff's contention lacks merit. Statements of a patient contained in medical records are admissible if they are "germane to plaintiff's diagnosis and treatment or . . . directly attributable to plaintiff" (*Greca v Choice Assoc. LLC*, 200 AD3d 415, 416 [1st Dept 2021] [emphasis added]; *see Musaid v Mercy Hosp. of Buffalo*, 249 AD2d 958, 959 [4th Dept 1998]; *see generally People v Ortega*, 15 NY3d 610, 616-618 [2010]; *Williams v Alexander*, 309 NY 283, 287 [1955]). Here, plaintiff's statements to medical personnel regarding how she was allegedly struck and where on her body she was allegedly struck are germane to the diagnosis, and thus are admissible (*see Kamolov v BIA Group, LLC*, 79 AD3d 1101, 1101 [2d Dept 2010]; *cf. Cafisi v L&L Holding Co., LLC*, 219 AD3d 1215, 1217 [1st Dept 2023]; *Sermos v Gruppuso*, 95 AD3d 985, 986-987 [2d Dept 2012]). Moreover, "[a] hearsay entry in a hospital record as to the happening of an injury is admissible evidence, even if not germane to diagnosis or treatment, where, as here, it is inconsistent with another account provided by that party" (*Barris v One Beard St., LLC*, 126 AD3d 831, 833 [2d Dept 2015]; *see Smolinski v Smolinski*, 78 AD3d 1642, 1644 [4th Dept 2010]).

Plaintiff further contends that the court erred in denying her motion inasmuch as she established as a matter of law that the unidentified driver was negligent. We reject that contention. As a preliminary matter, we note that "[n]egligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979]). "Indeed, the jury is often faced with the question whether a party's conduct is reasonable" (*Huff v Rodriguez*, 45 AD3d 1430, 1431 [4th Dept 2007]).

Here, plaintiff failed to establish as a matter of law that there was negligence per se, i.e., that an unidentified driver had an " 'unexcused' " violation of a traffic law (*Lowes v Anas*, 195 AD3d 1579, 1581 [4th Dept 2021]; *see Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392 [4th Dept 2011]) because the driver did not exercise due care in the operation of a vehicle (*see Vehicle and Traffic Law* § 1146 [a]; *Sauter v Calabretta*, 90 AD3d 1702, 1703 [4th Dept 2011]). Other than her assertion that she was struck by a vehicle, plaintiff submitted nothing to establish that the driver of that vehicle did not exercise due care or committed an unexcused violation of the Vehicle and Traffic Law (*cf. Amerman v Reeves*, 148 AD3d 1632, 1633 [4th Dept 2017]).

Moreover, there are triable issues of fact whether the alleged conduct of the driver of the vehicle amounted to ordinary negligence inasmuch as there are triable issues of fact whether, at the time of the accident, plaintiff violated Vehicle and Traffic Law § 1156 (a) and (b) by walking in the street in the wrong direction or was

crossing a dark street in dark clothes in the middle of the night. Plaintiff testified at her deposition that there were sidewalks but she was walking on the edge of the street, and also that she was walking with the flow of traffic instead of "facing traffic" (§ 1156 [b]; see § 1156 [a]; see generally *Savage v Evans*, 46 AD2d 979, 980 [3d Dept 1974]). Plaintiff also testified that, although the area was lit by street lamps, she was wearing dark clothing, and the driver was able to avoid striking plaintiff's friend, who was either crossing the street with her or walking behind her and, in that case, would have been the first pedestrian the driver passed.

Although "a plaintiff's comparative negligence is no longer a complete defense and its absence need not be pleaded and proved by the plaintiff" (*Rodriguez v City of New York*, 31 NY3d 312, 321 [2018]), and plaintiffs need not "demonstrate the absence of [their] own comparative fault" in order to obtain partial summary judgment on a driver's negligence (*id.* at 323; see *Lowes*, 195 AD3d at 1582), in light of the questions of fact regarding plaintiff's conduct at the time of the accident, she has not established as a matter of law that the driver was negligent (see *Shaw v Rosha Enters., Inc.*, 129 AD3d 1574, 1575 [4th Dept 2015]; cf. *Miller v Silvarole Trucking Inc.*, 211 AD3d 1544, 1545 [4th Dept 2022]; *Strassburg v Merchants Auto. Group, Inc.*, 203 AD3d 1735, 1736 [4th Dept 2022]; see generally *Savage*, 46 AD2d at 980).

"Only in the most unusual or extraordinary case," involving an unidentified driver will "summary judgment be warranted in favor of a plaintiff" (*Torres v O'Keefe*, 35 Misc 2d 347, 348 [Sup Ct App Term, 1st Dept 1962]). Indeed, where, as here, a plaintiff has provided vastly different accounts of the incident, a factfinder could reject plaintiff's version of events and reasonably determine that the plaintiff "fail[ed] to properly look out for oncoming traffic before stepping into the roadway" to either walk along the sidewalk or cross the roadway (*Campusano-Compre v Motor Veh. Acc. Indem. Corp.*, 66 Misc 3d 1222 [A], 2020 NY Slip Op 50211 [U], *2 [Civ Ct, Kings County 2020]; see generally *Savage*, 46 AD2d at 980).

We therefore conclude that the court properly denied plaintiff's motion for summary judgment with respect to the issue of negligence.

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

751

CA 22-01502

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

CRESSIDA A. DIXON, TEMPORARY ADMINISTRATOR, C.T.A.,
OF THE ESTATE OF THOMAS C. TURNER, DECEASED, AND
MICHAEL P. STANARD, AS ADMINISTRATOR OF THE ESTATE
OF KINGSLEY STANARD, DECEASED,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

MEMORANDUM AND ORDER

CITY OF ROCHESTER, DEFENDANT-RESPONDENT-APPELLANT.

SANTIAGO BURGER LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS-RESPONDENTS.

PATRICK BEATH, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF
COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered August 19, 2022. The order and judgment, inter alia, granted in part and denied in part the motions of the parties for summary judgment.

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

Memorandum: Plaintiffs' decedents, Thomas C. Turner and Kingsley Stanard, commenced this action against defendant, City of Rochester (City), seeking damages and declaratory relief arising from a special proceeding that the City commenced against them in City Court. The special proceeding pertained to property owned by Turner and rented by Stanard and sought to abate code violations existing on the exterior of the property, to compel decedents to pay outstanding fines related to those violations, and to compel decedents to allow an interior inspection of the property so the City could determine whether to issue an updated certificate of occupancy.

In the instant action, decedents asserted six causes of action premised on allegations that the City unconstitutionally and illegally prosecuted the special proceeding. Decedents moved for partial summary judgment on five of the six causes of action in the third amended complaint, and the City moved for summary judgment dismissing the third amended complaint in its entirety. Supreme Court granted that part of the City's motion with respect to the second, third, and fourth causes of action. The court also granted that part of decedents' motion with respect to the first, fifth, and sixth causes

of action insofar as decedents alleged that their federal and state constitutional rights were violated by City Court's order in the special proceeding directing them to permit an exterior and interior inspection of the property. Plaintiffs appeal, and the City cross-appeals. We affirm.

Contrary to plaintiffs' contention on their appeal, the court properly granted that part of the City's motion with respect to the second cause of action, for abuse of process. "Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; see *Behrens v City of Buffalo*, 217 AD3d 1589, 1590-1591 [4th Dept 2023]; *Liss v Forte*, 96 AD3d 1592, 1593 [4th Dept 2012]). The mere commencement of an action, even with malicious intent, does not give rise to a cause of action for abuse of process (see *Curiano*, 63 NY2d at 117; *Behrens*, 217 AD3d at 1591).

Here, the City met its initial burden on its motion by establishing that it had a legitimate purpose for commencing the special proceeding against decedents. The Municipal Code of the City of Rochester (City Code) § 90-16 mandates a certificate of occupancy for the property, a requirement that has been upheld as constitutional (see *Matter of Cappon v Carballada*, 109 AD3d 1115, 1116 [4th Dept 2013], appeal dismissed & lv denied 22 NY3d 1132 [2014]). That section also permits inspections of the property and the seeking of inspection warrants (see City Code § 90-16 [I], [K]). The failure of the property at issue to have a certificate of occupancy constituted a health and safety violation (*id.* § 90-16 [A] [1]). Contrary to plaintiffs' contention, the special proceeding commenced by the City was a proper vehicle for seeking a remedy for the violation (see UCCA 203 [c]). Thus, the City established that it employed a legitimate process in commencing the special proceeding against decedents to enforce the certificate of occupancy requirement. In opposition, decedents failed to raise an issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to plaintiffs' further contention on their appeal, the court properly granted that part of the City's motion with respect to the fourth cause of action, for malicious prosecution. A plaintiff asserting a cause of action for malicious prosecution of a prior civil action must establish that the defendant initiated a proceeding that terminated in favor of the plaintiff, a patent lack of probable cause for that proceeding, malice, and special injury (see *Thyroff v Nationwide Mut. Ins. Co.*, 57 AD3d 1433, 1435 [4th Dept 2008], appeal dismissed 12 NY3d 911 [2009], lv denied 13 NY3d 710 [2009]; see generally *Engel v CBS, Inc.*, 93 NY2d 195, 204 [1999]).

Here, the City met its initial burden on its motion by establishing that it actually or reasonably believed that the property was in violation of the applicable housing standards (see PJI 3:50A; see also *Galland v Kossoff*, 34 AD3d 306, 307 [1st Dept 2006]). There is no dispute that a certificate of occupancy was never issued for the

property despite the mandate of City Code § 90-16. It is also undisputed that, at the time the special proceeding was commenced, there were other unabated violations on the property. In opposition, decedents failed to raise an issue of fact whether there was an "entire lack of probable cause [underlying] the prior proceeding" (*Engel*, 93 NY2d at 204; see *Perryman v Village of Saranac Lake*, 41 AD3d 1080, 1081-1082 [3d Dept 2007]).

We reject plaintiffs' contention that the court erred in failing to make declarations defining and limiting the scope of relief available under UCCA 203 (c). The decision whether to grant a declaratory judgment rests within the discretion of the court and is "dependent upon facts and circumstances rendering it useful and necessary. [The court's] discretion must be exercised judicially and with care" (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931], *rearg denied* 256 NY 681 [1931]; see CPLR 3001). Here, the denial of the declaratory relief requested was proper inasmuch as the other relief sought in the instant action made the declarations unnecessary (see generally *Matter of Zen Ctr. of Syracuse, Inc. v Gamage*, 94 AD3d 1490, 1490 [4th Dept 2012]; *Harris v Town of Mendon*, 284 AD2d 988, 989 [4th Dept 2001]).

We have considered plaintiffs' remaining contentions on their appeal, and we conclude that they are without merit.

The City contends on its cross-appeal that the court improperly granted that part of decedents' motion seeking summary judgment on their first, fifth, and sixth causes of action insofar as those causes of action were premised on the claim that decedents' constitutional rights were violated by City Court's order compelling them to permit an interior and exterior inspection of the premises. Decedents argued on their motion that the issue of the City's constitutional violations was previously adjudicated on decedents' appeal of that order to County Court and that collateral estoppel thus applies, and the court agreed. In opposition to decedents' motion, the City failed to address the doctrine of collateral estoppel. Similarly, the City has failed on its cross-appeal to either address plaintiffs' reliance on the doctrine of collateral estoppel or argue that the doctrine does not apply. Inasmuch as the City did not address the doctrine of collateral estoppel either in opposition to decedents' motion or on appeal, we cannot now address the propriety of the lower court's determination sua sponte (see *Misicki v Caradonna*, 12 NY3d 511, 519 [2009]).

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

771

CA 23-01839

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

IN THE MATTER OF THE ESTATE OF GORDON EWING,
ALSO KNOWN AS GORDON M. EWING, DECEASED.

ORDER

NANCY EWING, AS EXECUTOR OF THE ESTATE OF
GORDON EWING, PETITIONER-APPELLANT,

GAIL BURNS, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF REBECCA J. BURNS-EWING,
RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

COLE, SORRENTINO, HURLEY, HEWNER & GAMBINO, P.C., BUFFALO, MAGAVERN
MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR
PETITIONER-APPELLANT.

JEFFREY F. VOELKL, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered August 21, 2023. The order, among other things, directed the Estate of Gordon Ewing to pay respondent Gail Burns, as the fiduciary of the Estate of Rebecca J. Burns-Ewing, the sum of \$41,780.83.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

772

CA 23-01840

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

IN THE MATTER OF THE ESTATE OF GORDON EWING,
ALSO KNOWN AS GORDON M. EWING, DECEASED.

ORDER

NANCY EWING, AS EXECUTOR OF THE ESTATE OF
GORDON EWING, PETITIONER-APPELLANT,

GAIL BURNS, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF REBECCA J. BURNS-EWING,
RESPONDENT-RESPONDENT.

THOMAS D. MIGLIACCIO, GUARDIAN AD LITEM FOR
MINOR BENEFICIARIES, APPELLANT.
(APPEAL NO. 2.)

COLE, SORRENTINO, HURLEY, HEWNER & GAMBINO, P.C., BUFFALO, MAGAVERN
MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR
PETITIONER-APPELLANT.

THOMAS D. MIGLIACCIO, WILLIAMSVILLE, FOR APPELLANT.

JEFFREY F. VOELKL, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

Appeals from a corrected order of the Surrogate's Court, Erie
County (Acea M. Mosey, S.), entered September 28, 2023. The corrected
order, among other things, directed the Estate of Gordon Ewing to pay
respondent Gail Burns, as the fiduciary of the Estate of Rebecca J.
Burns-Ewing, the sum of \$37,780.83.

It is hereby ORDERED that said appeals are unanimously dismissed
without costs (*see Matter of Panella* [appeal No. 2], 218 AD3d 1198,
1199 [4th Dept 2023]; *Moody v Sorokina*, 56 AD3d 1246, 1247 [4th Dept
2008]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

773

CA 24-00393

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

IN THE MATTER OF THE ESTATE OF GORDON EWING,
ALSO KNOWN AS GORDON M. EWING, DECEASED.

ORDER

NANCY EWING, EXECUTOR OF THE ESTATE OF
GORDON EWING, DECEASED, PETITIONER-APPELLANT,

GAIL BURNS, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF REBECCA J. BURNS-EWING,
RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

COLE, SORRENTINO, HURLEY, HEWNER & GAMBINO, P.C., BUFFALO, MAGAVERN
MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR
PETITIONER-APPELLANT.

JEFFREY F. VOELKL, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Acea
M. Mosey, S.), entered July 12, 2022. The order, among other things,
denied in part petitioner's motion for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs (*see Matter of Panella* [appeal No. 2], 218 AD3d 1198,
1199 [4th Dept 2023]; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d
988, 988 [4th Dept 1988]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

783

CA 23-01902

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

SHERYL L. ROOK, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KEVIN S. DIBBLE AND HORSEHEADS AUTOMOTIVE
RECYCLING, INC., DEFENDANTS-RESPONDENTS.

JAMES L. ALEXANDER, EAST SYRACUSE, FOR PLAINTIFF-APPELLANT.

CARTAFALSA, TURPIN & LENOFF, NEW YORK CITY (BRIAN P. MINEHAN OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Jason L. Cook, J.), entered November 6, 2023. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a motor vehicle accident when the vehicle that she was driving was struck by a vehicle operated by defendant Kevin S. Dibble and owned by defendant Horseheads Automotive Recycling, Inc. According to plaintiff's bill of particulars, she sustained a serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories of serious injury (see Insurance Law § 5102 [d]). Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the subject motor vehicle accident. Supreme Court granted the motion, and plaintiff now appeals.

Plaintiff contends that the court erred in granting that part of the motion with respect to the permanent consequential limitation of use and significant limitation of use categories. We agree, and we therefore modify the order accordingly. "On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did

not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]; see *Sywak v Grande*, 217 AD3d 1382, 1383 [4th Dept 2023]). Viewing the evidence in the light most favorable to plaintiff and affording her the benefit of every reasonable inference (see *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that defendants failed to meet that burden with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury (see *Banas v Waikiki*, 216 AD3d 1413, 1414-1415 [4th Dept 2023]; *Tate v Brown*, 125 AD3d 1397, 1397-1398 [4th Dept 2015]).

Defendants' submissions in support of their motion include the affirmed report of a physician who performed a physical examination of plaintiff and reviewed plaintiff's pre- and post-accident medical records, including a digital motion x-ray report indicating cervical ligament damage. The physician concluded that plaintiff sustained "an exacerbation of her cervical and trapezius muscle strain along with left shoulder pain" in the subject accident. The physician also set forth a quantitative assessment of the degree of plaintiff's loss of range of motion. Inasmuch as defendants' own submissions contain objective proof of a causally related injury as well as a "designation of a numeric percentage of [her] loss of range of motion" sufficient to constitute a serious injury (*Gates v Longden*, 120 AD3d 980, 982 [4th Dept 2014] [internal quotation marks omitted]; see generally *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002]), defendants failed to meet their initial burden of establishing as a matter of law that plaintiff did not sustain a serious injury in the accident and, thus, "the burden never shifted to plaintiff to raise a triable issue of fact" (*Tate*, 125 AD3d at 1398 [internal quotation marks omitted]; see *Houston v Geerlings*, 83 AD3d 1448, 1450 [4th Dept 2011]; see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

788

CA 23-01899

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

SHERYL L. ROOK, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KAITLIN ONALEE-IRENE WOOD AND C TERRERI-WOOD,
DEFENDANTS-RESPONDENTS.

JAMES L. ALEXANDER, EAST SYRACUSE, FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN TROP, TARRYTOWN (BRIAN P. MINEHAN OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Jason L. Cook, J.), entered November 3, 2023. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a motor vehicle accident when the vehicle that she was driving was rear-ended by defendants' vehicle. According to plaintiff's bill of particulars, she sustained a serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories of serious injury (see Insurance Law § 5102 [d]). Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the subject motor vehicle accident. Supreme Court granted the motion, and plaintiff now appeals.

Plaintiff contends that the court erred in granting that part of the motion with respect to the permanent consequential limitation of use and significant limitation of use categories. We agree, and we therefore modify the order accordingly. "On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation

marks omitted]; see *Sywak v Grande*, 217 AD3d 1382, 1383 [4th Dept 2023]). Viewing the evidence in the light most favorable to plaintiff and affording her the benefit of every reasonable inference (see *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that defendants failed to meet that burden with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury (see *Banas v Waikiki*, 216 AD3d 1413, 1414-1415 [4th Dept 2023]; *Tate v Brown*, 125 AD3d 1397, 1397-1398 [4th Dept 2015]).

Defendants' submissions in support of their motion include the affirmed report of a physician who performed a physical examination of plaintiff and reviewed plaintiff's pre- and post-accident medical records, including a digital motion x-ray report indicating cervical ligament damage. The physician concluded that plaintiff sustained "left trapezius and cervical paraspinal muscle strains" in the subject accident. The physician also set forth a quantitative assessment of the degree of plaintiff's loss of range of motion. Inasmuch as defendants' own submissions contain objective proof of a causally related injury as well as a "designation of a numeric percentage of [her] loss of range of motion" sufficient to constitute a serious injury (*Gates v Longden*, 120 AD3d 980, 982 [4th Dept 2014] [internal quotation marks omitted]; see generally *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002]), defendants failed to meet their initial burden of establishing as a matter of law that plaintiff did not sustain a serious injury in the accident and, thus, "the burden never shifted to plaintiff to raise a triable issue of fact" (*Tate*, 125 AD3d at 1398 [internal quotation marks omitted]; see *Houston v Geerlings*, 83 AD3d 1448, 1450 [4th Dept 2011]; see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

818

KA 23-00982

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

EAMON MICHAEL SCULLIN, DEFENDANT-RESPONDENT.

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

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Oswego County Court (Theodore H. Limpert, A.J.), entered May 4, 2023. The order granted that part of defendant's omnibus motion seeking to suppress tangible evidence seized pursuant to a search warrant.

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

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to suppress tangible evidence seized pursuant to a search warrant. Contrary to the People's contention, County Court did not err in concluding that the People failed to demonstrate that the warrant was based on probable cause.

"[A] search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur" (*People v Moxley*, 137 AD3d 1655, 1656 [4th Dept 2016]; see *People v McLaughlin*, 193 AD3d 1338, 1339 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]). "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but[, rather, it] merely [requires] information sufficient to support a reasonable belief that an offense has been or is being committed or that the evidence of a crime may be found in a certain place" (*People v Conley*, 192 AD3d 1616, 1617 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; see *People v Bigelow*, 66 NY2d 417, 423 [1985]; *People v Griswold*, 155 AD3d 1658, 1659 [4th Dept 2017], *lv denied* 31 NY3d 984 [2018]). Search warrant applications "must be considered in the clear light of everyday experience and accorded all reasonable inferences" (*People v Hanlon*, 36 NY2d 549, 559 [1975]; see *People v Cahill*, 2 NY3d 14, 41 [2003]). "A presumption of validity is accorded a search warrant application approved by a magistrate" (*People v Williams*, 140 AD3d 1526, 1526 [3d Dept 2016], *lv denied* 28 NY3d 1076 [2016]; see *People v*

DeProspero, 91 AD3d 39, 44 [4th Dept 2011], *affd* 20 NY3d 527 [2013]), and "great deference" is given to that determination (*People v Park*, 266 AD2d 913, 913 [4th Dept 1999]; see *Cahill*, 2 NY3d at 41). Nevertheless, "[g]reat weight must [also] be accorded to the determination of the suppression court because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous or unsupported by the hearing evidence" (*People v Moore*, 218 AD3d 1295, 1296-1297 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023] [internal quotation marks omitted]; see *People v Fitch*, 170 AD3d 1572, 1573 [4th Dept 2019], *lv denied* 33 NY3d 1069 [2019]; see generally *People v Prochilo*, 41 NY2d 759, 761 [1977]).

The People contend that the search warrant was supported by probable cause inasmuch as it was predicated on a lawful "trash rip" procedure performed by the police at defendant's address, which resulted in the recovery of evidence suggestive of drug possession and sales. We reject that contention. "[T]he Fourth Amendment [does not] prohibit[] the warrantless search and seizure of garbage left for collection outside the curtilage of a home" (*California v Greenwood*, 486 US 35, 37 [1988]; see *People v Ramirez-Portoreal*, 88 NY2d 99, 112-113 [1996]) inasmuch as "one has no reasonable, objective expectation of privacy in trash that [they] left in a public space for removal by a third-party" (*People v Harris*, 83 AD3d 1220, 1221 [3d Dept 2011], *lv denied* 17 NY3d 817 [2011]). "[E]vidence [found] in [a] defendant's trash of illegal activity, even standing alone, [can be] sufficient to support a reasonable belief that drugs and/or evidence of drug sales may be found in [that defendant's] residence" (*People v Mothersell*, 204 AD3d 1403, 1404 [4th Dept 2022] [internal quotation marks omitted]; see *People v Humphrey*, 202 AD3d 1451, 1452 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022]). Thus, in the proper case, a court may conclude that information obtained from a trash rip procedure akin to the one performed here provided probable cause to support a search warrant (see *Mothersell*, 204 AD3d at 1404; *Humphrey*, 202 AD3d at 1452).

Here, police witnesses testified at the suppression hearing that the trash rip procedure yielded multiple leaf clippings that a field test kit determined tested positive for marijuana. The witnesses further testified that they connected the trash bags to defendant because they also recovered mail addressed to defendant and his girlfriend from the bags. The court, however, *expressly declined* to credit the witnesses' testimony with respect to the trash rip procedure and the evidence obtained as a result thereof because the officers who performed the trash rip procedure failed to take even basic measures to retain or document the material they purportedly recovered. In concluding that the trash rip procedure did not establish probable cause, the court noted the undisputed fact that, despite their decades of law enforcement experience, the police who performed the trash rip did not retain any of the inculpatory evidence found in the trash, solely because the recovered items were saturated in old food material. The court further noted that the police did not photograph the contents of the garbage bags or the positive field test

result on the recovered plant materials. We conclude that the court's credibility determination is entitled to great deference and that nothing in the record justifies a contrary determination. To the contrary, the evidence at the hearing amply supports the court's determination not to credit the police testimony concerning the trash rip (*see generally Prochilo*, 41 NY2d at 761; *Fitch*, 170 AD3d at 1573).

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

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

839

KA 18-01707

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LANDROUS HILLS, DEFENDANT-APPELLANT.

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

LANDROUS HILLS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 20, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of a weapon in the second degree under count 3 of the indictment and dismissing that count and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment entered following a joint jury trial with a codefendant convicting defendant of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]) related to a drive-by shooting that resulted in the death of one person (*see People v Richardson*, 206 AD3d 1590, 1591 [4th Dept 2022], *lv denied* 38 NY3d 1153 [2022]). Defendant contends in his pro se supplemental brief that the conviction is not supported by legally sufficient evidence and in his main brief that the verdict is against the weight of the evidence. As a preliminary matter, defendant failed to preserve for our review his pro se challenge to the sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see*

generally *Bleakley*, 69 NY2d at 495).

Inasmuch as we find the trial evidence to be legally sufficient, we need not consider defendant's contention in his pro se supplemental brief that the indictment was not based on legally sufficient evidence before the grand jury (see CPL 210.30 [6]; *People v Thomas*, 173 AD3d 1845, 1846 [4th Dept 2019]; *People v Figueroa*, 156 AD3d 1348, 1349-1350 [4th Dept 2017], *lv denied* 31 NY3d 1013 [2018]), and we reject defendant's additional contention in his pro se supplemental brief that defense counsel was ineffective in failing to make a specific motion for a trial order of dismissal inasmuch as "a specific motion would have had little or no chance of success" (*People v Myers*, 87 AD3d 826, 829 [4th Dept 2011], *lv denied* 17 NY3d 954 [2011]; see *People v Miller*, 81 AD3d 1282, 1283 [4th Dept 2011], *lv denied* 16 NY3d 861 [2011]; see generally *People v Caban*, 5 NY3d 143, 152 [2005]).

We nevertheless agree with the contention of defendant in his main brief that his prosecution for criminal possession of a weapon in the second degree under count 3 of the indictment (Penal Law § 265.03 [3]) is barred by the double jeopardy clauses of the federal and state constitutions (US Const, 5th Amend; NY Const, art I, § 6). Although defendant failed to preserve that contention for our review, "a constitutional double jeopardy claim may be raised for the first time on appeal" (*People v Gardner*, 132 AD3d 1349, 1350 [4th Dept 2015]; see generally *People v Biggs*, 1 NY3d 225, 231 [2003]). It is undisputed that approximately two weeks after the homicide, and while the police were still investigating the homicide, defendant was found in possession of a .44 caliber revolver. He was convicted of criminal possession of a weapon in the second degree (§ 265.03 [3]) as a result of that possession. With respect to this case, the People have alleged in their bill of particulars, their *Molineux* application, their trial arguments, and their brief on appeal that the gun defendant possessed two weeks after the homicide was the same weapon as the one that was used in the homicide.

Because defendant was also convicted in a different proceeding "to possessing the same gun" that was allegedly used in the homicide, and "[t]here was no evidence offered at trial to show that the defendant's possession of the gun was not continuous" between the date of the homicide and the later date that gave rise to the conviction in a different proceeding (*People v Wright*, 160 AD3d 667, 668 [2d Dept 2018], *lv denied* 31 NY3d 1154 [2018], *reconsideration denied* 32 NY3d 1069 [2018]), we conclude that defendant's possession of that weapon was continuous from the date of the murder, i.e., the product of one continuous impulse and not "successive and distinguishable impulses" (*People v Okafore*, 72 NY2d 81, 87 [1988]; see also *Matter of Johnson v Morgenthau*, 69 NY2d 148, 151-152 [1987]). As a result, defendant's subsequent prosecution for the same offense is barred. We therefore modify the judgment by reversing that part convicting him of criminal possession of a weapon in the second degree under count 3 of the indictment (Penal Law § 265.03 [3]) and dismissing that count of the indictment (see *Gardner*, 132 AD3d at 1350).

Defendant further contends in his main brief that County Court erred in permitting the People to introduce certain *Molineux* evidence. We agree with defendant that his "pretrial objection to the People's *Molineux* motion . . . was sufficient to preserve for appellate review his contention that [the court] improperly admitted" that evidence (*People v Bonich*, 208 AD3d 679, 679 [2d Dept 2022], *lv denied* 39 NY3d 939 [2022]; see generally *People v Finch*, 23 NY3d 408, 413 [2014]). With respect to the merits, however, we conclude that evidence that defendant had sold drugs to a witness was necessary background evidence, which was introduced to explain how and why the witness loaned defendant her vehicle hours before the shooting and saw him driving the vehicle shortly after the shooting (see *People v Resto*, 147 AD3d 1331, 1332-1333 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]; *People v Jackson*, 100 AD3d 1258, 1261 [3d Dept 2012], *lv denied* 21 NY3d 1005 [2013], *reconsideration denied* 21 NY3d 1043 [2013]; *People v Moore* [appeal No. 2], 78 AD3d 1658, 1659 [4th Dept 2010]). The evidence at trial established that the witness's vehicle was the alleged vehicle used by defendant and a codefendant during the commission of the drive-by shooting and the same vehicle from which a mask containing a codefendant's DNA was recovered several weeks after the crime.

Even assuming, arguendo, that evidence of defendant's possession of the alleged murder weapon two weeks after the homicide is *Molineux* evidence (*cf. People v Flowers*, 166 AD3d 1492, 1494 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]), we conclude that the evidence was properly admitted inasmuch as it was directly relevant to the issue of identity of the perpetrators, and its probative value, in this joint trial, was much more probative than prejudicial (see *People v Bean*, 229 AD3d 1231, 1234 [4th Dept 2024], *lv denied* 42 NY3d 1018 [2024]; see generally *People v Molineux*, 168 NY 264, 291-294 [1901]). The codefendant's palm print was on the revolver, defendant was in possession of the revolver within weeks of the crime, and the revolver seized is consistent with the caliber and model of the firearm used in the homicide and corroborates statements made by defendant and the codefendant to a mutual acquaintance.

Defendant failed to preserve for our review his contention in his main brief that his right to remain silent was violated (see *People v Rogers*, 103 AD3d 1150, 1153 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]), 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]). Defendant also contends in his main brief that he was denied a fair trial by prosecutorial misconduct in summation. Most of defendant's challenges regarding prosecutorial misconduct are not preserved for our review (see *People v Barber*, 229 AD3d 1295, 1295 [4th Dept 2024], *lv denied* 42 NY3d 1018 [2024]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]) and, in any event, any minor improprieties "were not so egregious as to deprive defendant of a fair trial" (*People v Everson*, 229 AD3d 1349, 1351 [4th Dept 2024]). Inasmuch as we conclude "that defendant was not denied a fair trial by prosecutorial misconduct on summation, defendant was not denied effective assistance of counsel by defense

counsel's failure to object to the allegedly improper remarks" (*People v Hanes*, 218 AD3d 1175, 1178 [4th Dept 2023], *lv denied* 40 NY3d 1092 [2024]; see *People v Freeman*, 206 AD3d 1694, 1695 [4th Dept 2022]).

We reject defendant's contention in his main brief that a photo array shown to a witness was unduly suggestive. Before showing the witness the photo array, a detective asked the witness to see if she recognized the person she knew as "Fat Boy," i.e., the man to whom she lent her car in exchange for drugs. The witness immediately recognized defendant. The detective did not tell the witness that "Fat Boy" was included in the array and did not require her to make any identification (see *People v Weston*, 83 AD3d 1511, 1511-1512 [4th Dept 2011], *lv denied* 17 NY3d 823 [2011]). Moreover, even if the detective had told the witness that the array included "Fat Boy," "advising a witness that a photograph of the suspect is included in the array is not fatal to the propriety of the procedure" (*People v Floyd*, 45 AD3d 1457, 1459 [4th Dept 2007], *lv denied* 10 NY3d 811 [2008] [internal quotation marks omitted]).

Finally, we reject defendant's challenges to the sentence as raised in his main brief. First, defendant's contention that the sentence penalized him for asserting his right to trial is not preserved (see *People v Olds*, 36 NY3d 1091, 1092 [2021]; *People v Gilmore*, 202 AD3d 1453, 1454 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022]) and, in any event, lacks merit (see *People v Angona*, 119 AD3d 1406, 1409-1410 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015]; see also *People v Urbina*, 291 AD2d 421, 421-422 [2d Dept 2002], *lv denied* 98 NY2d 656 [2002]). We finally conclude that the concurrent sentencing on the two remaining crimes is not unduly harsh or severe.

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

844

CA 23-01570

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

ROBERT DIGIACCO, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V

MEMORANDUM AND ORDER

GRENELL ISLAND CHAPEL, A NOT-FOR-PROFIT
CORPORATION, DEFENDANT-RESPONDENT.

BOUSQUET HOLSTEIN, PLLC, SYRACUSE (JAMES L. SONNEBORN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (KAYLA A. ARIAS OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County
(James P. McClusky, J.), entered September 8, 2023. The order granted
defendant's motion for partial summary judgment dismissing plaintiff's
fourth and fifth causes of action.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by denying the motion in part and
reinstating the fourth cause of action, and as modified the order is
affirmed without costs.

Memorandum: Robert DiGiacco (plaintiff) commenced this action
seeking, inter alia, to resolve a dispute over the ownership of
certain riparian rights on waterfront property located on Grenell
Island in the Saint Lawrence River. On this appeal, plaintiff
contends that Supreme Court erred in granting defendant's motion for
partial summary judgment dismissing the fourth and fifth causes of
action. We conclude that the court properly granted that part of the
motion with respect to the fifth cause of action but erred in granting
the motion with respect to the fourth cause of action. We therefore
modify the order accordingly.

In 1865, nonparty Lucy M. Grenell purchased the island and
subdivided it into various lots (see *Johnson v Grenell*, 188 NY 407,
408 [1907]). Plaintiff owns lots 68 through 70, which are inland
lots. Defendant, a not-for-profit corporation, owns lot 90, a
waterfront lot. In 1899, lot 68 was transferred to a nonparty with no
grant of any riparian rights. In 1901, lot 94, another inland lot,
was transferred to nonparty Fred Caswell with an allowance for "twenty
feet from the Eastside of [the] present boat House for privilege of
boat House." Later that year, lot 90 was transferred to various

individuals as trustees of defendant.

Throughout the years, the properties were sold to various individuals. The deeds for lot 94 continued to grant the buyers riparian rights as outlined in the original deed to Caswell. In 1951, the owners of lot 94 purchased lot 68. In 1972, those owners sold lot 68 to a third party, but purported to grant them certain riparian rights that had been afforded to lot 94 in the original deed to Caswell, while also refiling their own deed retaining some of those rights for lot 94. Ultimately, the new owners of lot 68, who also came to own lots 69 and 70, transferred those properties to plaintiff, adding into the deed the riparian rights granted to lot 68 in the 1972 deed.

In 2011, the prior owners of lot 90, i.e., the only waterfront lot at issue, transferred that property and several other properties to defendant, including "the riparian rights . . . adjacent to [l]ot 90." That transfer was "[s]ubject only to the exercise of the public easement as to the streets and roads . . . , and not the riparian rights."

Following the filing of the 2011 deed, plaintiff commenced this action, contending that he had riparian rights to the shoreline off of lot 90 and that defendant's title interfered with, or clouded, title to his property. As noted, defendant moved for partial summary judgment dismissing the fourth and fifth causes of action, and the court granted that motion.

We reject plaintiff's contention that the court erred in granting the motion with respect to the fifth cause of action, for slander of title. The elements for that cause of action are: "(1) a communication falsely casting doubt on the validity of [the] complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages" (*Brown v Bethlehem Terrace Assoc.*, 136 AD2d 222, 224 [3d Dept 1988]; see 39 *Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 455 [2d Dept 2006]; *Fink v Shawangunk Conservancy, Inc.*, 15 AD3d 754, 756 [3d Dept 2005]). Although this Court stated, in *Regan v Lanze* (42 AD2d 831, 831 [4th Dept 1973]), that "[a]n action for slander of title is maintainable only on a showing of malice" (see *Properties Hacker, LLC v City of New York*, 189 AD3d 589, 591 [1st Dept 2020]), that statement did not create a fourth element. Rather, we conclude that the use of the word "malice" was merely another way to say that the statements were reasonably calculated to cause harm (see generally *Kendall v Stone*, 5 NY 14, 18-19 [1851]; *Holmes v Young*, 6 NYS 924, 926 [4th Dept 1889]). Contrary to plaintiff's contention, defendant met its burden on the motion of establishing that no special damages have been incurred by plaintiff.

A cause of action for slander of title does not arise upon the recording of a deed or assignment that clouds title, but instead arises when "special damages actually result," i.e., "from the time when pecuniary loss is incurred" (*Rosenbaum v City of New York*, 8 NY3d 1, 12 [2006]). "Special damages must be alleged with sufficient particularity to identify actual losses and be related causally to the

alleged tortious act[]" (*Irizarry v Rosselli*, 229 AD3d 778, 780 [2d Dept 2024] [emphasis added & internal quotation marks omitted]). "The most usual manner in which a [slander of title] causes pecuniary loss is by preventing a sale to a particular purchaser" (*Rosenbaum*, 8 NY3d at 12; see *Hanbidge v Hunt*, 183 AD2d 700, 701 [2d Dept 1992]).

To the extent that plaintiff asserts in the fifth cause of action that he suffered any diminution of value to his property, we conclude that defendant established that plaintiff has not yet actually sustained any such diminution in value or other special damages. The alleged diminution in value is speculative and does not constitute actual pecuniary damages (see generally *Rosenbaum*, 8 NY3d at 12; *Hanbidge*, 183 AD2d at 701; cf. generally *Cromarty v Prentice-Hall*, 72 AD2d 782, 783 [2d Dept 1979]; *Maglio v New York Herald Co.*, 83 App Div 44, 44 [2d Dept 1903]).

We reject plaintiff's claim that he sustained actual, pecuniary loss as a result of prosecuting this action in order to clear title to his property. We recognize that there is some support for the proposition that pecuniary loss includes "the expenses of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement" (Restatement [Second] of Torts, § 633 [1] [b] [1977]; see 4 Pattern Discovery: Tort Actions § 41:11 [May 2024 update]; see also *Parkin v Cornell Univ.*, 78 NY2d 523, 530 [1991]). *Parkin*, however, is distinguishable inasmuch as, unlike here, the plaintiffs in *Parkin* commenced a civil action seeking special damages for abuse of process, i.e., they sought to recover litigation expenses incurred in a prior criminal proceeding (78 NY2d at 530). Here, plaintiff is seeking costs and fees in the original civil action. Were the costs of litigation to clear title deemed a sufficient measure of special damages to support the cause of action, then every slander of title action would contain special damages and that would obviate the holding of *Rosenbaum* (8 NY3d at 12). We decline to make such a determination. Under the general rule, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]).

We agree with plaintiff, however, that the court erred in granting the motion with respect to the fourth cause of action seeking reformation of defendant's deed to remove any cloud of title. There are material issues of fact whether plaintiff was granted riparian rights to some part of the shore of lot 90 before lot 90 was deeded to defendant's predecessors and thus whether reformation of defendant's deed would be required to remove a cloud from title to the lots owned by plaintiff (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

845

CA 21-01641

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

CNB BANK, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NEW CREATION FELLOWSHIP OF BUFFALO,
A RELIGIOUS CORPORATION, DEFENDANT-APPELLANT,
AND STEPHEN GRANT, DEFENDANT.
(APPEAL NO. 1.)

BOCHNER PLLC, NEW YORK CITY (ISAAC M. DISKIND OF COUNSEL), FOR
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MARC W. BROWN OF COUNSEL), AND BLOCK,
LONGO, LAMARCA & BRZEZINSKI, P.C., WILLIAMSVILLE, FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered June 21, 2021. The order granted in part the motion of plaintiff seeking, inter alia, summary judgment.

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

Same memorandum as in *CNB Bank v New Creation Fellowship of Buffalo* ([appeal No. 2] – AD3d – [Jan. 31, 2025] [4th Dept 2025]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

846

CA 24-00401

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

CNB BANK, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NEW CREATION FELLOWSHIP OF BUFFALO,
A RELIGIOUS CORPORATION, DEFENDANT-APPELLANT,
AND STEPHEN GRANT, DEFENDANT.
(APPEAL NO. 2.)

BOCHNER PLLC, NEW YORK CITY (ISAAC M. DISKIND OF COUNSEL), FOR
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MARC W. BROWN OF COUNSEL), AND BLOCK,
LONGO, LAMARCA & BRZEZINSKI, P.C., WILLIAMSVILLE, FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Dennis E. Ward, J.), entered December 15, 2023. The judgment, insofar as appealed from, granted plaintiff money damages against defendant New Creation Fellowship of Buffalo, a religious corporation.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, the amount due under a promissory note executed in the name of defendant New Creation Fellowship of Buffalo (New Creation), a religious corporation, by defendant Stephen Grant, a former member of New Creation and personal guarantor of the note. In appeal No. 1, New Creation appeals from an order that, inter alia, granted in part plaintiff's motion for summary judgment seeking, among other things, the relief sought in the amended complaint. In appeal No. 2, New Creation appeals from a judgment awarding plaintiff damages. We note at the outset that appeal No. 1 must be dismissed inasmuch as the order granting in part plaintiff's motion for summary judgment is subsumed in the final judgment in appeal No. 2 (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]). In appeal No. 2, we affirm.

We conclude that plaintiff met its initial burden of establishing its entitlement to judgment as a matter of law on its first cause of action, for a money judgment on the note, by submitting the note and evidence of a default (*see HSBC Bank USA, N.A. v Prime, L.L.C.*, 125

AD3d 1307, 1308 [4th Dept 2015]; *I.P.L. Corp. v Industrial Power & Light. Corp.*, 202 AD2d 1029, 1029 [4th Dept 1994]). The burden then shifted to New Creation to produce "evidentiary material in admissible form demonstrating a triable issue of fact with respect to some defense to plaintiff's recovery on the note[]" (*I.P.L. Corp.*, 202 AD2d at 1029; see *HSBC Bank USA, N.A.*, 125 AD3d at 1308).

We agree with New Creation that Supreme Court erred in concluding that New Creation was barred by the doctrine of judicial estoppel from asserting the defense that Grant lacked the authority to execute the note on behalf of New Creation and that the note is therefore invalid. "[T]he doctrine of judicial estoppel provides that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, that party may not subsequently assume a contrary position because [the party's] interests have changed" (*Matter of R.W. Burrows Grantor Family Trust [Lengvarsky]*, 222 AD3d 1389, 1391 [4th Dept 2023] [internal quotation marks omitted]; see *Borrelli v Thomas*, 195 AD3d 1491, 1494 [4th Dept 2021]). Here, although the documentary evidence establishes that New Creation sought and obtained prior judicial approval to enter into a mortgage as security on a note (see Religious Corporations Law § 12 [1]; see generally *Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. v Congregation Yetev Lev D'Satmar, Inc.*, 9 NY3d 297, 301 [2007]), the mere fact that the approval was obtained did not result in the formation of a binding requirement upon New Creation to then enter into the note (see generally *Security Mtge. Group LLC v Oak Hill Family Park, LLC*, 49 AD3d 1302, 1303-1304 [4th Dept 2008]; *Eves v Bureau*, 13 AD3d 1004, 1005-1006 [3d Dept 2004]). Thus, inasmuch as seeking and obtaining judicial approval to enter into a note and mortgage did not obligate New Creation to enter into the note and mortgage, New Creation's challenge to the validity of the note in this litigation is not contrary to its position in a prior legal proceeding (see generally *CKR Law LLP v DiPaolo*, 209 AD3d 427, 427 [1st Dept 2022]; *Capizzi v Brown Chiari LLP*, 194 AD3d 1457, 1460 [4th Dept 2021]).

Nonetheless, we reject the contention of New Creation that, in opposition to the motion, it raised a question of fact whether Grant had the apparent authority to enter into the note on behalf of New Creation. "Essential to the creation of apparent authority are words or conduct of the principal, communicated to the third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]; see *Long v Graphic Controls Acquisition Corp.*, 192 AD3d 1653, 1654 [4th Dept 2021], *lv dismissed* 38 NY3d 942 [2022]). Here, at the time the note was executed, plaintiff had the order granting New Creation's petition for judicial approval to enter into a mortgage with plaintiff, and the documents submitted in support thereof, including the notarized petition and the commitment letter executed by the authorized representative of New Creation, i.e., the pastor of New Creation, New Creation's corporate resolution to enter into the note, and a resolution to open a checking account with Grant as a signer, which, read together, created the appearance that Grant had the requisite authority to enter into a transaction on behalf of

New Creation (see generally *Pasquarella v 1525 William St., LLC*, 120 AD3d 982, 984 [4th Dept 2014]; *Elgin Realty, Inc. v Klein*, 109 AD3d 785, 786-787 [2d Dept 2013]).

Moreover, even if Grant did not have the apparent authority to enter into a transaction on behalf of New Creation, we conclude that plaintiff established as a matter of law that New Creation ratified Grant's actions because it "fail[ed] to timely repudiate the unauthorized actions, or [acted] with an intent to be bound" (*Provident Bay Rd., LLC v NYSARC, Inc.*, 117 AD3d 1356, 1358 [3d Dept 2014]; see *Panaggio v Panaggio*, 256 AD2d 1115, 1115-1116 [4th Dept 1998]). The record establishes that New Creation complied with the payments and an authorized representative of New Creation, i.e., its vice president, executed an authorization for automatic withdrawal payments to plaintiff for the note.

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

847

CA 24-00451

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

NATIONWIDE AFFINITY INSURANCE COMPANY OF
AMERICA, ET AL., PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

KARIN GEPP, PH.D., AND GEPP PSYCHOLOGICAL
SERVICES, PLLC, DEFENDANTS-RESPONDENTS.

HOLLANDER LEGAL GROUP, P.C., MELVILLE (BRIAN E. KAUFMAN OF COUNSEL),
FOR PLAINTIFFS-APPELLANTS.

THE RYBAK FIRM, PLLC, BROOKLYN (MAKSIM LEYVI OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County
(Danielle M. Fogel, J.), entered January 2, 2024. The order denied
the motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs, the motion is granted,
and judgment is granted in favor of plaintiffs as follows:

It is ADJUDGED and DECLARED that plaintiffs are under
no obligation to pay or reimburse any of the subject claims.

Memorandum: In this declaratory judgment action, plaintiffs, no-
fault insurance carriers, appeal from an order that denied their
motion for summary judgment on the complaint. We reverse.

Defendants, acting as assignees of individuals who were allegedly
provided medical care and treatment, submitted multiple claims both
under the name of defendant Karin Gepp, Ph.D., individually, and under
her professional corporation, defendant Gepp Psychological Services,
PLLC. Plaintiffs timely requested examinations under oath (EUOs) as
to each set of claims. At two successive EUOs, defendants produced
their office administrator, who had limited knowledge of, among other
things, defendants' business, the business' billing practices, the
qualifications of its providers to render services, and which
providers were actually rendering care to which patients. Plaintiffs
thus requested that defendants provide additional items of
verification, and defendants agreed to do so. Plaintiffs timely
served additional verification requests following each EUO; in each
case, defendants served an identical letter response on the eve of the
expiration of the 120-day period within which to provide verification

(see generally 11 NYCRR 65-3.5 [o]; 65-3.8 [b] [3]), asserting blanket objections to plaintiffs' requests and confirming that only one of the identified providers was licensed.

Plaintiffs thus commenced this declaratory judgment action alleging, inter alia, that defendants were not entitled to receive no-fault reimbursement for the claims in question because defendants failed to comply with 11 NYCRR 65-3.8 (b) with respect to their obligations to respond to written requests for information under their control within 120 days or submit written proof providing reasonable justification for failing to comply within the 120-day period.

Contrary to Supreme Court's conclusion, we agree with plaintiffs that they established their prima facie entitlement to judgment as a matter of law (see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and that defendants failed to raise a triable issue of fact to defeat the motion (see generally *Zuckerman*, 49 NY2d at 562).

Under the No-Fault Law and regulations, an insurer is required either to pay or deny a claim for benefits within 30 days of the receipt of the claim (see Insurance Law § 5106 [a]; 11 NYCRR 65-3.8 [c]). However, such time may be tolled when additional verification is timely sought (see *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 17-18 [2d Dept 2009]; see also 11 NYCRR 65-3.5 [b]). The purpose of the toll is to permit the carrier time to obtain information regarding the claim and determine whether it should be paid or denied (see *Hospital for Joint Diseases v New York Cent. Mut. Fire Ins. Co.*, 44 AD3d 903, 903-904 [2d Dept 2007]). The request for verification of the claim must be sent within 10 business days after receipt of the claim notice (see 11 NYCRR 65-3.5 [a]), and any additional verification required shall be requested within 15 business days (see 11 NYCRR 65-3.5 [b]).

"The insurer is entitled to receive all items necessary to verify the claim directly from the parties from whom such verification was requested" (11 NYCRR 65-3.5 [c]). To that end, when verification is requested, the applicant "shall, within 120 calendar days from the date of the initial request for verification, submit all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply" (11 NYCRR 65-3.5 [o]). If the insurer requests an EUO (see 11 NYCRR 65-3.5 [e]), the verification is deemed to have been received by the insurer on the day the examination was performed (see 11 NYCRR 65-3.8 [a] [1]). While an insurer may not designate a specific corporate representative to sit for an EUO (see Ops Gen Counsel NY Ins Dept No. 09-06-10 [June 2009]), "[i]f the insurer is unable to garner the information that it needs from the [EUO] of a person submitted by the assignee corporation or partnership, the insurer may request additional examinations of the assignee until a person is submitted for examination by the assignee who can provide the 'items necessary to verify the claim' " (*id.*).

Under the specific facts of this case, we conclude that

plaintiffs established that their post-EUO requests were proper. Though post-EUO verification requests are not a specifically enumerated disclosure device in the no-fault regulations, plaintiffs were "entitled to receive all items necessary to verify the claim[s] directly from the parties from whom such verification was requested" (11 NYCRR 65-3.5 [c]), and they were entitled to continue to request additional EUOs until defendants produced a representative who could "provide the 'items necessary to verify the claim' " (Ops Gen Counsel NY Ins Dept No. 09-06-10 [June 2009]). Rather than continuing to request EUOs in the hope that defendants produced a knowledgeable representative, counsel for the parties agreed that those issues would be best resolved by written demands and answers. Thus, the parties "chart[ed] their own litigation course" (*Matter of Workman v Dumouchel*, 175 AD3d 895, 895 [4th Dept 2019]), and defendants, having agreed to provide the additional disclosure—thereby inducing plaintiffs to forgo the additional EUOs to which they were entitled—cannot now claim that post-EUO discovery is impermissible as a matter of course.

We further agree with plaintiffs that they established that defendants failed to comply with their obligation to, "within 120 calendar days from the date of the initial request for verification, submit all such verification under the applicant's control or possession or written proof providing reasonable justification for the failure to comply" (11 NYCRR 65-3.5 [o]; see 11 NYCRR 65-3.8 [b] [3]). Moreover, even assuming, arguendo, that defendants' objections could constitute a reasonable justification for failing to provide the requested verification (*cf. Remedy Chiropractic, P.C. v Nationwide Ins.*, 76 Misc 3d 135[A], 2022 NY Slip Op 50935[U], *1-2 [App Term, 2d Dept, 11th & 13th Jud Dists 2022]), and further assuming, arguendo, that defendants appropriately objected to certain demands as impermissible based on *State Farm Mut. Auto Ins. Co. v Mallela* (4 NY3d 313, 322 [2005]), we conclude that defendants nonetheless failed to raise a triable issue of fact as to whether they had a reasonable justification for the failure to comply with the other, proper demands.

Plaintiffs sought to verify basic information, including, among other things, the licenses of the providers rendering care on defendants' behalf, information identifying which provider actually rendered the care underlying the claims in question, and "super bills" and underlying raw data to determine whether the visits were properly billed and coded. Defendants agreed to provide many, if not all, of that information during two EUOs; however, they failed to explain why they did not provide such documentation within the requisite time period following plaintiffs' demand. Having failed to do so, defendants failed to raise any triable issue of fact in opposition to plaintiffs' motion.

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

852

KA 23-01255

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HERBERT D. WOOD, JR., DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered July 17, 2023. The judgment convicted defendant upon his plea of guilty of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Contrary to defendant's contention, his bargained-for sentence is not unduly harsh or severe.

We note, however, that County Court misstated at sentencing that defendant was a second felony offender, rather than a second violent felony offender (see Penal Law §§ 70.02 [1]; 70.04 [1]; see generally *People v Seymore*, 188 AD3d 1767, 1770 [4th Dept 2020], lv denied 36 NY3d 1100 [2021]). Consequently, the certificate of conviction and uniform sentence and commitment form must be amended to reflect that defendant was sentenced as a second violent felony offender (see *People v King*, 225 AD3d 1216, 1216 [4th Dept 2024], lv denied 42 NY3d 928 [2024]; *Seymore*, 188 AD3d at 1770).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

859

CA 24-00703

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

ALBERT G. FRACCOLA, JR., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

1ST CHOICE REALTY, INC., ET AL., DEFENDANTS,
AND HONORABLE RANDAL B. CALDWELL,
DEFENDANT-RESPONDENT.

ALBERT G. FRACCOLA, JR., PLAINTIFF-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALEXANDRIA TWINEM OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Mark R. Rose, J.), entered October 26, 2023. The order, among other things, granted the motion of defendant Honorable Randal B. Caldwell to dismiss the complaint.

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

Memorandum: Plaintiff, pro se, appeals from an order that, inter alia, granted the motion of the Honorable Randal B. Caldwell (defendant) to dismiss plaintiff's complaint against him and dismissed the complaint in its entirety. We affirm.

Contrary to plaintiff's contention, Supreme Court properly granted defendant's motion and dismissed the complaint. This action is based on subject matter concerning a 2005 stipulation by which plaintiff agreed to settle various lawsuits. As we have previously noted, "courts have issued at least three prior orders prohibiting [plaintiff] from commencing actions based on the subject matter of the 2005 stipulation without prior leave of court" and, here, plaintiff's complaint was filed without leave of court (*Fraccola v 1st Choice Realty, Inc.*, 206 AD3d 1649, 1650 [4th Dept 2022], appeal dismissed 38 NY3d 1155 [2022]; see also *Fraccola v 1st Choice Realty, Inc.*, 224 AD3d 1227, 1228 [4th Dept 2024]). In light of our determination, we need not address plaintiff's remaining contentions.

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

863

CA 24-00174

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

MARIO SARAIVA, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

NEW YORK STATE THRUWAY AUTHORITY,
DEFENDANT-RESPONDENT.
(CLAIM NO. 128270.)

FARBER SCHNEIDER FERRARI LLP, NEW YORK CITY (DANIEL J. SCHNEIDER OF COUNSEL), FOR CLAIMANT-APPELLANT.

RIZZO REED & O'BRIAN, PLLC, PITTSFORD (JOSEPH B. RIZZO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Debra A. Martin, J.), entered August 3, 2023. The judgment dismissed claimant's claim.

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

Memorandum: Claimant commenced this action seeking damages for injuries he sustained after he received a static electrical shock upon touching a PVC vacuum pipe while sandblasting paint on an overpass located on the New York State Thruway. As relevant here, he asserted a Labor Law § 241 (6) claim predicated on violations of Industrial Code (12 NYCRR) 23-1.5 (c) (3) and 23-9.2 (a), alleging that defendant was negligent in permitting him to work near a known defective PVC vacuum pipe that had previously caused similar static electrical shocks to other workers on the site. According to claimant, the PVC vacuum pipe was defective because it was not properly grounded to dissipate any accumulated static electrical charge during the vacuum's operation.

The Court of Claims, inter alia, denied that part of defendant's motion for summary judgment dismissing the claim with respect to the Labor Law § 241 (6) claim, which we affirmed for reasons stated (*Saraiva v New York State Thruway Auth.*, 208 AD3d 1651, 1651 [4th Dept 2022]). The matter proceeded to a nonjury trial, which resulted in the court determining that defendant was not liable to claimant. Claimant appeals from a judgment dismissing the claim.

On appeal, claimant contends that the judgment should be reversed and that he should be granted a new trial based on several erroneous trial rulings. We reject claimant's contentions. "Since '[t]rial

courts are accorded wide discretion in making evidentiary rulings . . . , absent an abuse of discretion, those rulings should not be disturbed on appeal' " (*Mazella v Beals*, 27 NY3d 694, 709 [2016]; see *People v Carroll*, 95 NY2d 375, 385 [2000]). "To be admissible [at trial], evidence must be relevant and its probative value outweigh the risk of any undue prejudice" (*Mazella*, 27 NY3d at 709; see generally *Jerome Prince, Richardson on Evidence* § 4-101 at 136 [Farrell 11th ed 1995]). Nevertheless, "[a]n error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced"; in other words, there is no grounds for reversal if the ruling is harmless (CPLR 2002; see *Mazella*, 27 NY3d at 711; *Senycia v Vosseler*, 217 AD3d 1520, 1522 [4th Dept 2023]).

Claimant first contends that the court erred in striking a portion of testimony from a witness who asserted that on two prior occasions he had received a static electrical shock on the work site prior to claimant's accident. Specifically, the court, at trial, struck that part of the witness's testimony concerning the first of the two alleged prior shock incidents. Even assuming, arguendo, that the court erred in striking the testimony at issue (see generally *Maiorani v Adesa Corp.*, 83 AD3d 669, 671-672 [2d Dept 2011]), we conclude that the error is harmless under the circumstances (see CPLR 2002). Specifically, we note that in its written decision, the court clearly considered the testimony that it had previously stricken and simply declined to credit any of that witness's testimony. Thus, inasmuch as the testimony at issue was ultimately considered by the court, the initial decision to strike that testimony did not affect a substantial right of claimant (see *id.*).

Claimant also contends that the court erred in precluding him from impeaching certain testimony of another witness using that witness's prior report on the basis that it constituted inadmissible evidence of subsequent remedial measures. We reject that contention. It is well settled that "[e]vidence of repairs made after an accident is inadmissible if offered as an admission of negligence or culpability in causing the injury" (*Prince, Richardson on Evidence* § 4-612 at 210; see *Caprara v Chrysler Corp.*, 52 NY2d 114, 122 [1981], *rearg denied* 52 NY2d 1073 [1981]; *Cahill v Kleinberg*, 233 NY 255, 259-260 [1922]). Nonetheless, such "evidence may be admissible for any other relevant purpose," including "for impeachment purposes" (*Bolm v Triumph Corp.*, 71 AD2d 429, 436 [4th Dept 1979], *lv dismissed* 50 NY2d 801 [1980], *lv dismissed* 50 NY2d 928 [1980]; see generally *Prince, Richardson on Evidence* § 4-612 at 211). Here, we conclude that the court did not abuse its discretion in precluding claimant from impeaching the witness through use of a prior report of that witness because that report did not contain a "prior statement inconsistent with his testimony" (CPLR 4514). Even assuming, arguendo, that the court erred in precluding claimant from impeaching the witness with the prior report, we further conclude that any such error was harmless (see CPLR 2002).

Finally, we reject claimant's contention that the court erred in limiting the trial testimony of claimant's expert witness. Here, we conclude that the court did not err in precluding claimant's expert

from testifying about the magnitude of the static electrical shock received by claimant inasmuch as such testimony "exceeded the scope of the expert disclosure[, and] defendant[] established that [it was] prejudiced by [the] failure to include the" proffered testimony "in the expert disclosure" (*Lidge v Niagara Falls Mem. Med. Ctr.* [appeal No. 2], 17 AD3d 1033, 1035 [4th Dept 2005]). Regardless, because the court considered—and ultimately rejected—aspects of the expert's testimony that suggested that claimant received a significant static electrical shock, we conclude that any error in precluding the challenged testimony did not prejudice a substantial right of claimant and was, therefore, harmless (see CPLR 2002).

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

866

CA 23-01596

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

IN THE MATTER OF RUMSEYFALL LLC,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

PETER PORCELLI, TOWN ZONING OFFICER, WILLIAM
ROBERT BAILEY, DANIEL EMMO, CHAIRMAN OF THE
ZONING BOARD OF APPEALS OF THE TOWN OF SENECA
FALLS, RESPONDENTS-RESPONDENTS,
THE TOWN HERITAGE PRESERVATION COMMISSION AND
CHARLES GENCO, AS CHAIRMAN OF THE TOWN
HERITAGE PRESERVATION COMMISSION,
RESPONDENTS-APPELLANTS.

RUMSEYFALL LLC, SENECA FALLS (EMIL J. BOVE, JR., OF COUNSEL), FOR
PETITIONER-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

Appeals from a judgment (denominated order) of the Supreme Court, Seneca County (Craig J. Doran, J.), entered September 11, 2023, in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted in part the amended petition and annulled a determination of the Zoning Board of Appeals of the Town of Seneca Falls.

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

Memorandum: Petitioner Rumseyfall LLC (Rumseyfall) appeals from a judgment that, inter alia, granted its CPLR article 78 amended petition in part and annulled a determination of the Zoning Board of Appeals of the Town of Seneca Falls (ZBA), and respondents Town Heritage Preservation Commission and Charles Genco, as Chairman of the Town Heritage Preservation Commission, appeal from those parts of the same judgment that dismissed their second and fourth cross-claims, seeking annulment of the determination on alternative grounds. We conclude that the appeals must be dismissed.

A "party [that] has successfully obtained a judgment or order in [its] favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544 [1983]; see CPLR 5511). Indeed, "the concept of aggrievement is about whether relief was granted or

withheld, and not about the reasons therefor" (*Mixon v TBV, Inc.*, 76 AD3d 144, 149 [2d Dept 2010]; see *Benedetti v Erie County Med. Ctr. Corp.*, 126 AD3d 1322, 1323 [4th Dept 2015]). Here, appellants received the relief they requested in their amended petition and cross-claims, which was the annulment of the determination of the ZBA (see generally *Gross v Kurk*, 224 AD2d 582, 583 [2d Dept 1996]).

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

868

KA 23-00653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 9, 2023. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the declaration of delinquency is vacated and the matter is remitted to Cayuga County Court for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant appeals from a judgment revoking a sentence of probation previously imposed upon his conviction of burglary in the third degree (Penal Law § 140.20) and sentencing him to an indeterminate term of imprisonment of 1 to 3 years. In appeal No. 2, defendant appeals from a judgment revoking a sentence of probation imposed upon his conviction of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and sentencing him to an indeterminate term of imprisonment of 1 to 3 years, to run concurrently with the sentence imposed in appeal No. 1. Both judgments were entered following a single hearing at which the People presented evidence that defendant violated the terms and conditions of his probationary sentences by committing a new crime.

As defendant contends, and the People correctly concede, the evidence at the hearing that he committed a criminal offense while on probation consisted entirely of hearsay testimony from a police investigator. "While hearsay is admissible at a probation revocation hearing, hearsay alone does not satisfy the requirement that a finding of a probation violation must be based upon a preponderance of the evidence" (*People v Owens*, 258 AD2d 901, 901 [4th Dept 1999], lv denied 93 NY2d 975 [1999]; see *People v Paris*, 145 AD3d 1530, 1531 [4th Dept 2016]). Based on this record, we conclude that County Court's determination "was based on hearsay alone and therefore cannot

stand" (*People v Hubel*, 158 AD3d 539, 540 [1st Dept 2018]).

We therefore reverse the judgments and vacate the declaration of delinquency. Because defendant is serving a term of imprisonment on an unrelated conviction, we remit the matters to County Court for further proceedings not inconsistent with this decision. In light of our determination, we do not address defendant's remaining contention.

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

870

KA 22-00585

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE RUIZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered March 14, 2022. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]).

We reject defendant's contention that he was denied effective assistance of counsel. "[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]), and here defendant failed to meet that burden (see *People v Rogers*, 70 AD3d 1340, 1340 [4th Dept 2010], lv denied 14 NY3d 892 [2010], cert denied 562 US 969 [2010]). Instead, "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of representation, reveal that [defense counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct, but we note that he failed to object to any of the instances of alleged misconduct he now raises on appeal, and thus his contention is not preserved for our review (see *People v Freeman*, 206 AD3d 1694, 1695 [4th Dept 2022]).

Next, defendant contends that the conviction is not supported by legally sufficient evidence because the People failed to establish that defendant intended to kill the victim. Viewing the evidence in

the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction of murder in the second degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "It is well established that a defendant's [i]ntent to kill may be inferred from [their] conduct as well as the circumstances surrounding the crime . . . , and that a jury is entitled to infer that a defendant intended the natural and probable consequences of [their] acts" (*People v Noonan*, 202 AD3d 1469, 1470 [4th Dept 2022], *lv denied* 38 NY3d 1009 [2022]; *see People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]). Here, the People presented evidence that defendant inflicted approximately 60 blows to the victim's torso and approximately 50 more to her extremities. The doctor who performed the autopsy testified that it was one of the worst blunt-force trauma autopsies that she had ever performed. That doctor also testified, with respect to the strangulation, that it would take approximately four to six minutes of applying 4.4 pounds of pressure to cause death. We conclude that the evidence is legally sufficient to establish defendant's intent to kill (*see Noonan*, 202 AD3d at 1470). Additionally, viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different result would not have been unreasonable, the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention that County Court erred in refusing to substitute new counsel in place of his assigned attorneys. When defendant initially raised concerns about the two attorneys serving as defense counsel, the court permitted defendant to place his complaints on the record (*see People v Tatum*, 204 AD3d 1400, 1401-1402 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]). At an appearance shortly thereafter, defendant informed the court that he and one of his attorneys had engaged in a "very constructive conversation." Upon defendant's subsequent pro se motion for substitution, the court again conducted an inquiry in which it permitted defendant "to articulate his complaints about defense counsel" (*People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]), following which the court properly denied defendant's request, inasmuch as good cause for substitution does not exist where, as here, "on the eve of trial, disagreements over trial strategy generate discord" (*People v Linares*, 2 NY3d 507, 511 [2004]; *see People v Porto*, 16 NY3d 93, 101-102 [2010]; *People v Brady*, 192 AD3d 1557, 1558 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]).

Contrary to defendant's further contention, the court did not abuse its discretion in its *Sandoval* ruling (*see People v Molina*, 208 AD3d 1641, 1642 [4th Dept 2022], *lv denied* 39 NY3d 964 [2022]; *People v Smalls*, 16 AD3d 1154, 1155 [4th Dept 2005], *lv denied* 5 NY3d 769 [2005]).

Finally, the sentence is not unduly harsh or severe.

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

871

KA 20-00466

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYMOND BOYD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered March 12, 2019. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the third degree and grand larceny in the fourth 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, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). The conviction stems from an incident during which defendant stabbed his wife twice in the back with a large knife. Thereafter, defendant intercepted her call to 911 and attempted to dissuade the dispatched officer from responding, assuring him that everything was fine. Defendant then left the victim's apartment with her cell phone and credit cards, among other items. The victim ultimately managed to dial 911 from another phone and lost consciousness shortly after identifying defendant as her assailant. She suffered a collapsed lung and life-threatening blood loss; one of her stab wounds was 11 inches deep.

Defendant was indicted, and while incarcerated pending trial, he placed a number of telephone calls to the victim from jail using another inmate's identification number to avoid detection. In those calls, defendant attempted to coerce the victim to recant her story, falsely claim that she fell on the knife (twice), refrain from testifying, or otherwise make herself unavailable for trial. At a felony hearing where she was subject to cross-examination, the victim gave testimony describing the incident and identifying defendant as her assailant. At trial, the victim denied having any memory of the incident or her assailant.

Contrary to defendant's contention, County Court properly admitted in evidence the victim's testimony from the felony hearing because, although she testified at trial, she failed to testify truthfully or consistently with her prior testimony due to defendant's misconduct and was thereby rendered "effectively unavailable" (*People v Wilkinson*, 185 AD3d 734, 735-736 [2d Dept 2020], *lv denied* 36 NY3d 1101 [2021]; see *People v Nelson*, 156 AD3d 1112, 1117 [3d Dept 2017], *lv denied* 31 NY3d 1151 [2018]; see generally *People v Geraci*, 85 NY2d 359, 363-364, 370 [1995]). Indeed, the People established "by clear and convincing evidence that . . . defendant engaged in misconduct aimed . . . at preventing [the victim] from testifying [truthfully] and that those misdeeds were a significant cause of [her] decision not to [truthfully] testify" (*People v Smart*, 23 NY3d 213, 220 [2014]; see *People v Jackson*, 225 AD3d 1136, 1138 [4th Dept 2024], *lv denied* 42 NY3d 927 [2024]).

Defendant's contention that the evidence is legally insufficient to establish the element of intent to kill necessary to support his conviction of attempted murder in the second degree is unpreserved for our review. Defendant failed to move for a trial order of dismissal on that basis (see *People v Cooley*, 220 AD3d 1189, 1189 [4th Dept 2023], *lv denied* 41 NY3d 964 [2024]). In any event, "we necessarily review the evidence adduced as to each of the elements of [that] crime[] in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Stephenson*, 104 AD3d 1277, 1278 [4th Dept 2013], *lv denied* 21 NY3d 1020 [2013], *reconsideration denied* 23 NY3d 1025 [2014] [internal quotation marks omitted]). Here, viewing the evidence in light of the elements of attempted murder in the second degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict on that crime is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that he was deprived of effective assistance of counsel as a result of certain comments and arguments made by defense counsel during summation. Defendant " 'failed to demonstrate that those alleged errors were not strategic in nature' " (*People v Brooks*, 183 AD3d 1231, 1232 [4th Dept 2020], *lv denied* 35 NY3d 1043 [2020]; see *People v Galens*, 111 AD3d 1322, 1322-1323 [4th Dept 2013], *lv denied* 22 NY3d 1088 [2014]; see generally *People v Benevento*, 91 NY2d 708, 712-713 [1998]).

Defendant's contention that the court erred in striking the prosecutor's attempted impeachment of the victim and instructing the jury not to consider that evidence is unpreserved for our review. In any event, the court properly instructed the jury to disregard those questions and answers, inasmuch as the impeachment questioning could not be used as proof in the People's case in chief (see CPL 60.35 [2]). We similarly conclude that the court did not err in admitting in evidence, as an excited utterance, the victim's statements identifying defendant as her assailant (see generally *People v Buie*, 86 NY2d 501, 506-507 [1995]), or in admitting in evidence recorded jail calls between defendant and the victim under a consciousness of

guilt theory (*see People v Bennett*, 79 NY2d 464, 470 [1992]).

Contrary to defendant's contention, his sentence is not unduly harsh or severe. We have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

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

872

KA 22-01645

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MOHAMED NASIR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered August 31, 2022. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him, after a jury trial, of predatory sexual assault against a child (Penal Law former § 130.96).

We agree with defendant that Supreme Court erred in precluding him from calling a witness to testify as to a prosecution witness's prior inconsistent statement for the purpose of impeaching the prosecution witness. "As a general rule, the credibility of any witness can be attacked by showing an inconsistency between [the witness's] testimony at trial and what [the witness] has said on previous occasions" (*People v Duncan*, 46 NY2d 74, 80 [1978], *rearg denied* 46 NY2d 940 [1979], *cert denied* 442 US 910 [1979]). If the witness denies, or does not recall making the statement in question, the party seeking to impeach the witness may prove the statement with extrinsic evidence, i.e., by another witness's testimony (*see People v Maxam*, 135 AD3d 1160, 1161 [3d Dept 2016], *lv denied* 27 NY3d 1135 [2016]). Although a party "cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness'[s] answers concerning collateral matters solely for the purposes of impeaching that witness'[s] credibility" (*People v Pavao*, 59 NY2d 282, 288-289 [1983]; *see People v Bailey*, 179 AD3d 1518, 1519 [4th Dept 2020]), that rule "has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide" (*People v Knight*, 80 NY2d 845, 847

[1992]; see *People v Snow*, 185 AD3d 1400, 1402 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]).

Here, defendant sought to call a witness whose testimony would have directly contradicted the prosecution witness's testimony that the victim did not recant his allegation of anal sexual contact during the medical examination, an issue directly relevant to the jury's determination regarding the count of predatory sexual assault against a child based upon defendant's alleged anal contact with the victim. Thus, we conclude that the proposed testimony pertained to a noncollateral issue and that the court erred in not allowing the proffered witness to testify (*see Snow*, 185 AD3d at 1402-1403). Nonetheless, we conclude that "any error in [excluding] that testimony was harmless inasmuch as the evidence [that defendant had oral sexual contact with the victim, including a videotaped admission from defendant,] was overwhelming and there is no significant probability that the jury would have acquitted defendant [of that count] if [the proposed impeachment] testimony had been [introduced]" (*People v Drager*, 229 AD3d 1143, 1146 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024]; see *People v Robinson*, 111 AD3d 1358, 1358-1359 [4th Dept 2013], *lv denied* 22 NY3d 1141 [2014]; *People v Mickewitz*, 210 AD2d 1004, 1004 [4th Dept 1994], *lv denied* 85 NY2d 977 [1995]; see also *People v Ortiz*, 41 AD3d 114, 115 [1st Dept 2007], *lv denied* 9 NY3d 879 [2007]).

Additionally, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Based on our independent review of the evidence, we conclude that a different verdict would have been unreasonable (*see People v Muhammad*, 204 AD3d 1402, 1403 [4th Dept 2022], *lv denied* 38 NY3d 1073 [2022]; *People v Peters*, 90 AD3d 1507, 1508 [4th Dept 2011], *lv denied* 18 NY3d 996 [2012]; see generally *Bleakley*, 69 NY2d at 495).

We reject defendant's contention that his sentence is unduly harsh and severe. We have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

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

873

KA 23-00655

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 9, 2023. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the declaration of delinquency is vacated and the matter is remitted to Cayuga County Court for further proceedings in accordance with the same memorandum as in *People v Hawkey* ([appeal No. 1] – AD3d – [Jan. 31, 2025] [4th Dept 2025]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

880

CA 23-01925

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

IN THE MATTER OF CHARLES G., PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

THE STATE OF NEW YORK, RESPONDENT-RESPONDENT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (NATHANIEL V. RILEY OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Lamendola, J.), entered October 25, 2023, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued petitioner's confinement to a secure treatment facility.

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

Memorandum: On appeal from an order determining that he remains a dangerous sex offender requiring confinement under Mental Hygiene Law § 10.03 (e), petitioner contends that Supreme Court's determination, made following an annual review hearing pursuant to section 10.09 (d), is against the weight of the evidence. More specifically, petitioner contends that, although he stipulated to the fact that he "suffers from a mental abnormality" as defined by section 10.03 (i), respondent failed to meet its burden of establishing by clear and convincing evidence (§ 10.09 [h]) that he remains a dangerous sex offender requiring confinement, as opposed to a regimen of strict and intensive supervision and treatment. We reject that contention.

Respondent's expert opined that petitioner continues to require confinement in a secure treatment facility, but an independent psychiatric examiner opined that petitioner no longer required confinement. The court credited the testimony of respondent's expert and, inasmuch as the court " 'was in the best position to evaluate the weight and credibility of the conflicting [expert] testimony,' " we perceive "no reason to disturb the court's decision to credit the testimony of [respondent's] expert[]" (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], lv denied 25 NY3d 911

[2015]; see *Matter of State of New York v Connor*, 134 AD3d 1577, 1578 [4th Dept 2015], lv denied 27 NY3d 903 [2016]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

881

CA 23-01636

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

LAURA K., INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF A.K., AN INFANT,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ALLEGRA JAROS AND KALEIDA HEALTH,
DEFENDANTS-RESPONDENTS.

DEBORA K. BECERRA, DUNKIRK, AND GEFREY GISMONDI LLC, WILLIAMSVILLE,
FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered July 6, 2023. The order granted the motion of defendants to dismiss the complaint and dismissed the complaint.

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

Memorandum: Plaintiff, individually and as parent and natural guardian of her daughter, commenced this action to recover damages allegedly resulting from a report to child protective services (CPS) made by defendants pursuant to Social Services Law § 413 of suspected neglect by plaintiff of her newborn daughter due to presumptively positive results of a drug test while in the hospital. As limited by her brief, plaintiff appeals from an order insofar as it granted those parts of defendants' motion to dismiss the complaint with respect to the causes of action for willful misconduct and gross negligence. We conclude that Supreme Court properly granted the motion to that extent. Pursuant to Social Services Law § 419, defendants are entitled to immunity from liability for their good faith compliance with the reporting requirements of section 413, and here plaintiff failed to present sufficient factual allegations that defendants, in reporting her presumptively positive drug test result to CPS, acted with "willful misconduct or gross negligence" (§ 419; *see generally Selapack v Iroquois Cent. School Dist.*, 17 AD3d 1169, 1170 [4th Dept 2005]).

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

892

KA 22-01370

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARC A. COOPER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.), rendered December 22, 2021. The judgment convicted defendant upon a jury verdict of robbery in the second degree, robbery in the first degree, kidnapping in the second degree, grand larceny in the fourth degree and petit larceny.

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 robbery in the first degree (Penal Law § 160.15 [3]), robbery in the second degree (§ 160.10 [3]), kidnapping in the second degree (§ 135.20), grand larceny in the fourth degree (§ 155.30 [8]), and petit larceny (§ 155.25). We conclude that the evidence is legally sufficient to support the conviction 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 reject defendant's further contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Although defendant contends that the testimony of the victim was incredible as a matter of law, we note that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Delacruz*, 193 AD3d 1340, 1341 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022] [internal quotation marks omitted]), and we see no reason to disturb the jury's resolution of those issues.

We reject defendant's contention that County Court erred in denying his motion for a trial order of dismissal with respect to the kidnapping charge on the ground that it violates the merger doctrine. That doctrine prohibits a conviction for kidnapping based upon acts that fall within the definition of that crime but are merely

incidental to another crime (*see generally People v Gonzalez*, 80 NY2d 146, 151-152 [1992]; *People v Cassidy*, 40 NY2d 763, 767 [1976])). Here, there was no merger of the kidnapping of the victim with the robberies or larcenies relating to the victim inasmuch as the kidnapping "was not a minimal intrusion necessary and integral to another crime, nor was it simultaneous and inseparable from another crime"; rather, it constituted "a crime in itself" (*Gonzalez*, 80 NY2d at 153; *see People v O'Connor*, 21 AD3d 1364, 1365 [4th Dept 2005], *lv denied* 6 NY3d 757 [2005])). Defendant's actions in kidnapping the victim constituted a separate and distinct offense in that defendant bound the victim in her residence for a period of time prior to forcing her into her own vehicle and her confinement was continued even after the robberies and larcenies were completed.

We further reject defendant's contention that the court erred, when determining that defendant should be handcuffed and shackled during trial, in relying on statements by the prosecutor and failing to conduct a hearing. "A defendant has the right to be free of visible shackles [during trial], unless there has been a case-specific, on-the-record finding of necessity" (*People v Clyde*, 18 NY3d 145, 153 [2011], *cert denied* 566 US 944 [2012]; *see Deck v Missouri*, 544 US 622, 624, 628-629 [2005]; *People v Sanders*, 39 NY3d 216, 220 [2023])). Even assuming, arguendo, that the court was required to articulate a reasonable basis on the record justifying the use of handcuffs and shackles, even though they were neither visible nor otherwise apparent to the jury (*see generally People v Crosby*, 215 AD3d 1225, 1226 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023]; *People v Alexander*, 127 AD3d 1429, 1432 [3d Dept 2015], *lv denied* 25 NY3d 1197 [2015])), the colloquy among the court, prosecutor, defense counsel, and defendant sufficed to provide an informed basis for the court's determination and a hearing was not required (*see generally People v Buchanan*, 13 NY3d 1, 4 [2009]; *People v Barnes*, 139 AD3d 1371, 1373 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016])).

We reject defendant's contention that his sentence is unduly harsh and severe. We have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

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

894

CA 23-01652

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

SHARON DOYLE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOPS MARKETS, LLC, TOPS HOLDING, LLC,
TOPS NR, LLC, TOPS PT, LLC, AND
1438 SOUTH PARK AVE CO., LLC,
DEFENDANTS-RESPONDENTS.

HARDING MAZZOTTI, LLP, ALBANY (MATTHEW J. DILLON OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered September 6, 2023. The order granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint insofar as it alleges that defendants had constructive notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly slipped on black ice in a grocery store parking lot. In her complaint, plaintiff alleges that defendants created the dangerous condition and had actual and constructive notice of it. Defendants moved for summary judgment dismissing the complaint. Supreme Court granted the motion, and plaintiff appeals.

Preliminarily, we note that on appeal plaintiff has briefed the issue of constructive notice only, and she has therefore abandoned any claims that defendants had actual notice of or created the dangerous condition (*see Arghittu-Atmekjian v TJX Cos., Inc.*, 193 AD3d 1395, 1395 [4th Dept 2021]; *O'Bryan v Tonawanda Hous. Auth.*, 140 AD3d 1702, 1703 [4th Dept 2016]; *Anderson v Great E. Mall, L.P.*, 74 AD3d 1760, 1761 [4th Dept 2010]).

We agree with plaintiff that the court erred in granting the motion with respect to the claim that defendants had constructive notice of the allegedly dangerous condition, and we therefore modify

the order accordingly. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). In moving for summary judgment, defendants argued, and the court agreed, that they did not have constructive notice inasmuch as plaintiff slipped on black ice and thus the icy condition was not visible and apparent. Although plaintiff allegedly slipped on black ice, "that fact alone does not establish as a matter of law that the ice was not visible and apparent" (*Cottrell v Benderson Dev. Co., LLC*, 186 AD3d 1065, 1066 [4th Dept 2020]; see *Wood v Buffalo & Fort Erie Pub. Bridge Auth.*, 178 AD3d 1383, 1384 [4th Dept 2019]; *Waters v Ciminelli Dev. Co., Inc.*, 147 AD3d 1396, 1397-1398 [4th Dept 2017]). Moreover, the fact that plaintiff did not see the ice before she fell is not dispositive of whether the condition was visible and apparent (see *Lewis v Carrols LLC*, 158 AD3d 1055, 1057 [4th Dept 2018]; *Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469-1470 [4th Dept 2013]). Here, defendants submitted excerpts from plaintiff's deposition where she described the ice, as she observed it after she fell, as "[a] wide circle" and "a big patch" that "was the same color as the ground" and not shiny. We conclude that defendants failed to meet their initial burden of establishing as a matter of law that the icy condition was not visible and apparent (see *Cottrell*, 186 AD3d at 1066; *Fuller v Armor Volunteer Fire Co., Inc.*, 169 AD3d 1471, 1472 [4th Dept 2019]; *Waters*, 147 AD3d at 1397-1398).

Even assuming, arguendo, that defendants met their initial burden on the motion, we conclude that plaintiff raised a triable issue of fact in opposition. Plaintiff submitted, inter alia, photographs taken after plaintiff's accident depicting the icy condition and the deposition of the assistant store manager, who confirmed that he could see the icy patch in those photographs.

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

895

CA 23-00729

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

FITCH FARMS, INC., PLAINTIFF-RESPONDENT,

V

ORDER

JOSEPH A. FITCH, DEFENDANT-APPELLANT.

ERIC J. MIKOLS, BUFFALO, FOR DEFENDANT-APPELLANT.

DIMATTEO ROACH & KELLY, WARSAW (DAVID M. ROACH OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered March 27, 2023. The judgment, among other things, declared that plaintiff has not violated the nonassignment clauses in the subject leases.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

897

CA 24-00215

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

DANIEL CHARCHOLLA, PLAINTIFF-APPELLANT,

V

ORDER

CHANNEL 13 NEWS, ALSO KNOWN AS 13 WHAM, AND
DEERFIELD MEDIA (ROCHESTER), INC.,
DEFENDANTS-RESPONDENTS.

VIVEK J. THIAGARAJAN, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BALLARD SPAHR LLP, NEW YORK CITY (JACQUELYN N. SCHELL OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered January 11, 2024. The order and judgment, among other things, granted the motion of defendants for summary judgment.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

899

CA 22-00483

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

THE CHAPEL, ALSO KNOWN AS THE CHAPEL AT
CROSSPOINT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

GUIDEONE MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT,
JENNIFER G. FLANNERY, ERIE COUNTY PUBLIC
ADMINISTRATOR, AS ADMINISTRATOR OF THE
ESTATE OF EDWARD BATT, DECEASED,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

LAW OFFICES OF PATEL & RATHJE, GARDEN CITY (CARLA VARRIALE-BAKER OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

PERSONIUS MELBER LLP, BUFFALO (SCOTT R. HAPEMAN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court,
Erie County (Mark J. Grisanti, A.J.), entered December 7, 2021. The
judgment granted the motions of plaintiff and Edward Batt for summary
judgment.

It is hereby ORDERED that said appeal from the judgment insofar
as it granted the motion of plaintiff is unanimously dismissed and the
judgment is modified on the law by denying the motion of Edward Batt,
vacating the declaration with respect to Edward Batt, and granting
judgment in favor of defendant GuideOne Mutual Insurance Company as
follows:

It is ADJUDGED and DECLARED that defendant GuideOne
Mutual Insurance Company is not obligated to defend or
indemnify Edward Batt in the underlying action,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a judgment
declaring that defendant GuideOne Mutual Insurance Company (GuideOne),
is obligated to defend and indemnify it in an underlying action

alleging that Edward Batt (decedent), who was a youth group leader in plaintiff's employ, committed acts of sexual abuse against the plaintiff in the underlying action (tort plaintiff). Decedent asserted a cross-claim against GuideOne also seeking a declaration that GuideOne was obligated to defend and indemnify him in the underlying action. Plaintiff moved for summary judgment on its complaint, and decedent moved for summary judgment on his cross-claim. In appeal No. 1, GuideOne appeals from a judgment that granted both motions and declared that GuideOne was obligated to defend and indemnify plaintiff and decedent. GuideOne moved for leave to renew and reargue the motions. In appeal No. 2, GuideOne appeals from an order that granted its motion to the extent that it sought leave to reargue plaintiff's motion and, upon reargument, adhered to the prior determination granting plaintiff's motion but clarified the reasoning.

Initially, inasmuch as Supreme Court granted that part of GuideOne's motion seeking leave to reargue plaintiff's motion, we conclude that GuideOne's appeal from the judgment in appeal No. 1 should be dismissed to the extent that GuideOne is challenging the grant of summary judgment to plaintiff because the order in appeal No. 2 entered on reargument supersedes that part of the judgment in appeal No. 1 (see *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]). Inasmuch as the court, in effect, denied that part of GuideOne's motion seeking leave to renew and reargue decedent's motion, GuideOne's appeal from the judgment in appeal No. 1 is properly before us with respect to decedent's motion.

With respect to appeal No. 1, we agree with GuideOne that the court erred in granting decedent's motion, and we further agree with GuideOne that the court erred in denying its request for summary judgment as a non-moving party (see CPLR 3212 [b]). We therefore modify the judgment accordingly.

In support of his motion, decedent contended that the notice of disclaimer issued by GuideOne was untimely as a matter of law. It is well settled, however, that an insurer is not required to issue a disclaimer of coverage under Insurance Law § 3420 (d) (2) when a claim falls outside the scope of the policy's coverage portion (see *Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]). In addition, an insurer is not required to issue a disclaimer under section 3420 (d) (2) if the underlying claim does not arise out of an "accident" involving bodily injury (see *KeySpan Gas E. Corp. v Munich Reins. Am., Inc.*, 23 NY3d 583, 590 [2014]; *Vecchiarelli v Continental Ins. Co.*, 277 AD2d 992, 993 [4th Dept 2000]).

Here, the commercial policies issued to plaintiff defined an insured to include plaintiff's employees, other than its executive officers, "but only for acts within the scope of their employment by you." Assuming that the allegations of sexual abuse in the underlying complaint are true, we conclude that "it is clear that [decedent] departed from his duties for solely personal motives unrelated to the furtherance of [plaintiff's] business" (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]; see *N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; *Berardi v Niagara County*, 147 AD3d 1400, 1401 [4th

Dept 2017])). In other words, decedent was not acting within the scope of his employment when he allegedly committed the acts of sexual abuse, and he was therefore not an insured under the policies. Inasmuch as decedent was not an insured under the policies, GuideOne was not required to issue a timely disclaimer under Insurance Law § 3420 (d) (2) (see *D'Angelo v Philadelphia Indem. Ins. Co.*, 207 AD3d 1138, 1139 [4th Dept 2022]; *State Farm Fire & Cas. Co. v Raabe*, 100 AD3d 738, 739-740 [2d Dept 2012])).

In addition, even if decedent was an insured under the policies, we conclude that the underlying claim did not arise out of an accident. " '[I]n deciding whether a loss is the result of an accident, it must be determined, from the point of view of the insured, whether the loss was unexpected, unusual and unforeseen' " (*RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d 158, 163 [2004], quoting *Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 145 [2000])). Here, the alleged sexual abuse of the tort plaintiff was intended from decedent's point of view and was not an accident (see *id.*; *State Farm Fire & Cas. Co. v Joseph M.*, 106 AD3d 806, 807-808 [2d Dept 2013]; *Matter of Sormani v Orange County Community Coll.*, 263 AD2d 511, 511 [2d Dept 1999])). GuideOne therefore was not required to issue a timely disclaimer under Insurance Law § 3420 (d) (2) (see generally *KeySpan Gas E. Corp.*, 23 NY3d at 590; *Vecchiarelli*, 277 AD2d at 993)).

With respect to appeal No. 2, we reject GuideOne's contention that the court erred in granting plaintiff's motion. GuideOne does not dispute that plaintiff is an insured under the policy and that, from plaintiff's standpoint, the underlying claim arose out of an accident (see *RJC Realty Holding Corp.*, 2 NY3d at 164-165). GuideOne contends, however, that it issued a disclaimer pursuant to Insurance Law § 3420 (d) (2) as soon as reasonably possible. An insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay (see *Country-Wide Ins. Co. v Preferred Trucking Servs. Corp.*, 22 NY3d 571, 576 [2014]; *Stachowski v United Frontier Mut. Ins. Co.*, 148 AD3d 1716, 1717 [4th Dept 2017])). The time from which an insurer's obligation to disclaim is measured begins when the insurer first becomes aware of the ground for its disclaimer (see *Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 [2008]; *Matter of Allcity Ins. Co. [Jimenez]*, 78 NY2d 1054, 1056 [1991], rearg denied 79 NY2d 823 [1991])). "The question whether an insurer disclaimed as soon as reasonably possible is necessarily case-specific" (*Country-Wide Ins. Co.*, 22 NY3d at 576). "[T]imeliness almost always presents a factual question, requiring an assessment of all relevant circumstances surrounding a particular disclaimer," including "the time necessary for an insurer to conduct a prompt investigation into those grounds supporting a potential disclaimer" (*Continental Cas. Co.*, 11 NY3d at 449). But in some cases, "the justification for disclaimer is 'readily ascertainable from the face of the complaint in the underlying action,' " or " 'all relevant facts supporting . . . a disclaimer [are] immediately apparent . . . upon . . . receipt of notice of the accident' " (*Country-Wide Ins. Co.*, 22 NY3d at 576)).

Here, the tort plaintiff notified plaintiff in July 2020 that he was sexually abused by decedent in 1989 and requested information regarding plaintiff's insurance policy. GuideOne was notified of this request on August 3, 2020. GuideOne obtained the relevant policies on September 29, 2020, and notified plaintiff that it was in possession of those policies. Plaintiff asserts, and we agree, that September 29, 2020, represents the starting date from which GuideOne's time to disclaim should be measured.

We reject GuideOne's contention that its October 7, 2020 email to plaintiff satisfied its duty to issue a timely disclaimer. A notice of disclaimer "must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated" (*General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 [1979]; see *Titan Indus. Servs. Corp. v Navigators Ins. Co.*, 223 AD3d 426, 427-428 [1st Dept 2024]; *Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 64 AD3d 1234, 1235 [4th Dept 2009], lv dismissed 13 NY3d 893 [2009]). The October 7 email stated that "it does not appear there was any misconduct coverage added to the policies" and that the policies "includ[ed] a specific exclusion for any misconduct or any type of allegation relating to misconduct." Even assuming, arguendo, that the email constituted a disclaimer of coverage (*cf. Titan Indus. Servs. Corp.*, 223 AD3d at 427-428), we conclude that it lacks the required specificity and was thus insufficient to satisfy GuideOne's obligation under Insurance Law § 3420 (d) (2) (see *Titan Indus. Servs. Corp.*, 223 AD3d at 427-428; see generally *General Acc. Ins. Group*, 46 NY2d at 864).

We agree with GuideOne that its November 24, 2020 email to plaintiff was a sufficiently specific disclaimer, contrary to the court's determination. The court properly determined, however, that the 56-day delay rendered the disclaimer untimely as a matter of law. GuideOne contends that the delay was reasonable inasmuch as the letter that GuideOne received on August 3, 2020, describing the claim was generic and the tort plaintiff did not file his complaint until October 14, 2020. The letter GuideOne received on August 3 described the 1989 claim as "allegations of child sexual abuse that [the tort plaintiff] sustained at the hands of [decedent], whom [the tort plaintiff] came into contact with while [decedent] was a youth group leader for [plaintiff]." The October 14 complaint alleged that decedent was a youth group leader for plaintiff and that, in approximately 1989, the tort plaintiff was the victim of "sexual harassment, sexual abuse, and violence by or at the direction of" decedent. Thus, the nature of the claim was clear from the letter GuideOne received on August 3, and when GuideOne obtained the policies on September 29, it had at that time " 'all relevant facts supporting . . . a disclaimer' " (*Country-Wide Ins. Co.*, 22 NY3d at 576). GuideOne further contends that the delay was reasonable inasmuch as plaintiff believed that the dates listed in the underlying complaint might be wrong and requested additional investigation from GuideOne into other policies. We reject that contention and conclude that plaintiff's request for an additional investigation did not justify

the lengthy delay by GuideOne or raise a triable issue on timeliness
(*see generally id.*).

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

900

CA 22-00505

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

THE CHAPEL, ALSO KNOWN AS THE CHAPEL AT
CROSSPOINT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

GUIDEONE MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

LAW OFFICES OF PATEL & RATHJE, GARDEN CITY (CARLA VARRIALE-BAKER OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 14, 2022. The order granted the motion of defendant GuideOne Mutual Insurance Company insofar as it sought leave to reargue its opposition to plaintiff's motion for summary judgment and, upon reargument, adhered to the prior determination granting plaintiff's motion.

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

Same memorandum as in *The Chapel v GuideOne Mut. Ins. Co.* ([appeal No. 1] – AD3d – [Jan. 31, 2025] [4th Dept 2025]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

904

KA 22-00048

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DERRICK PEACE, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered October 8, 2021. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree (two counts), assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), one count of assault in the first degree (§ 120.10 [1]), one count of assault in the second degree (§ 120.05 [2]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), arising from defendant's shooting of two victims on the front porch of a residence. We affirm.

Defendant contends that the verdict is against the weight of the evidence on the issue of identity. 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]). 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]).

Defendant contends that County Court erred in denying that part of his omnibus motion seeking to suppress identification testimony on

the ground that the photo arrays shown to the victims were unduly suggestive. Assuming, arguendo, that the contention is preserved for our review (see CPL 470.05 [2]), we reject it. Because "the subjects depicted in the photo array[s] were] sufficiently similar in appearance so that the viewer[s'] attention [was] not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection," the photo arrays themselves were not unduly suggestive (*People v Quinones*, 5 AD3d 1093, 1093 [4th Dept 2004], *lv denied* 3 NY3d 646 [2004]; see *People v Moss*, 232 AD3d 1327, 1327 [4th Dept 2024])).

Finally, defendant contends that he was deprived of effective assistance of counsel because, among other reasons, defense counsel failed to call an expert witness to testify about problems with the victims' eyewitness identifications. We reject that contention. Defense counsel vigorously cross-examined the victims about their ability to see the shooting and about their out-of-court identifications and challenged the reliability of their in-court identifications during his summation. Viewing the evidence, the law and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (see *People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Wilson*, 213 AD3d 1217, 1218-1219 [4th Dept 2023], *lv denied* 39 NY3d 1158 [2023])).

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

906

KA 23-01892

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TYRONE FLOWERS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County
(Charles A. Schiano, Jr., J.), rendered October 5, 2023. 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: Defendant appeals from a judgment convicting him,
upon a plea of guilty, of attempted criminal possession of a weapon in
the second degree (Penal Law §§ 110.00, 265.03 [3]). Contrary to
defendant's contention, Supreme Court properly denied his motion to
dismiss the indictment on statutory speedy trial grounds (*see*
generally CPL 30.30).

Where a defendant is charged with a felony, the People must
announce readiness for trial within six months of the commencement of
the action (*see* CPL 30.30 [1] [a]; *People v Cooper*, 90 NY2d 292, 294
[1997]). "Notwithstanding the provisions of any other law" and
"absent an individualized finding of special circumstances in the
instant case by the court before which the charge is pending, the
prosecution shall not be deemed ready for trial for purposes of
[CPL 30.30] until it has filed a proper certificate [of compliance]
pursuant to [CPL 245.50 (1)]" (CPL 245.50 [3]; *see* CPL 30.30 [5];
People v Bay, 41 NY3d 200, 210 [2023]). The certificate of compliance
(COC) "shall state that, after exercising due diligence and making
reasonable inquiries to ascertain the existence of material and
information subject to discovery, the prosecutor has disclosed and
made available all known material and information subject to
discovery" (CPL 245.50 [1]).

As relevant here, CPL 245.20 (1) (b) requires that the People

disclose to the defendant "[a]ll transcripts of the testimony of . . . person[s] who ha[ve] testified before a grand jury," though the initial time period within which disclosure of that material is to occur under CPL 245.10 (1) "may be stayed by up to an additional [30] calendar days without need for a motion pursuant to" CPL 245.70 (2) if, "due to the limited availability of transcription resources, . . . transcript[s] [are] unavailable for disclosure within the [relevant] time period" (CPL 245.20 [1] [b]).

Here, at the time the People filed the COC, neither the original nor the extended time period to disclose the grand jury transcripts had expired, and the People advised in the COC that the grand jury transcripts were "unavailable" at that time "due to the limited availability of transcription services." Thus, even though the statutory period to disclose the grand jury transcripts subsequently expired prior to the date the transcripts were received by the People and turned over to defendant, at the time the People filed their COC and statement of readiness (SOR) they had complied with their initial discovery obligations under CPL article 245.20 "to the extent possible" (*People v Geer*, 224 AD3d 1353, 1354 [4th Dept 2024], lv denied 42 NY3d 970 [2024]; see *People v Drayton*, 231 AD3d 1057, 1060 [2d Dept 2024]). The People therefore met their burden in opposition to defendant's CPL 30.30 motion of establishing that they "ha[d] 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " at the time the COC and SOR were filed (*Bay*, 41 NY3d at 211; see CPL 245.50 [1]), and it is irrelevant for speedy trial purposes whether the People thereafter failed to exercise due diligence or make reasonable efforts to obtain and disclose the grand jury transcripts. Although a failure by the People to obtain and disclose grand jury transcripts after the filing of a valid COC and SOR may constitute a discovery violation warranting the imposition of sanctions under CPL 245.80, defendant did not seek such sanctions in this case; instead, he moved only for dismissal of the indictment on speedy trial grounds under CPL 30.30. Under the circumstances, we therefore conclude that the court did not err in denying defendant's speedy trial motion (see CPL 30.30 [1] [a]; see also *People v Lawrence*, 231 AD3d 1497, 1499-1500 [4th Dept 2024]).

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

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

908

KA 19-00935

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DONTAYIUS GORDON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (ALEXANDER PRIETO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 12, 2019. The judgment convicted defendant upon a jury verdict of robbery in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of robbery in the third degree (Penal Law § 160.05), defendant contends that the verdict is against the weight of the evidence. According to defendant, a surveillance video of the robbery admitted into evidence at trial refutes the victim's testimony with respect to defendant's participation in the crime as a principal, and the People failed to prove beyond a reasonable doubt that he intentionally aided the principals while acting with the mental culpability required for the commission of the crime, so as to establish his guilt as an accomplice (see § 20.00). We affirm.

Defendant concedes that he was present when the victim was robbed at gunpoint by three people and that he drove those people and the victim to the secluded area where the robbery took place. The victim, who had known defendant since third grade and considered him a good friend, testified at trial that all four people, including defendant, went through his pockets, and that moments later defendant was in possession of the victim's cell phone, backpack, and keys. When the victim asked defendant why this was happening, defendant said that it was because of the victim's sister, whom defendant had dated. The victim further testified that defendant refused the victim's request to return his keys and cell phone, saying "You're not getting s. . ."

Based on our review of the surveillance video, it cannot be said with certainty whether defendant went through the victim's pockets or

took items directly from his possession, as the victim testified. Nevertheless, the video corroborates the remaining testimony of the victim, who had no reason to lie about defendant's actions. In any event, even assuming, arguendo, that the People did not establish defendant's guilt as a principal in the robbery, we conclude that the People proved beyond a reasonable doubt that defendant acted as an accomplice by luring the victim to the secluded area and intentionally aiding the principals in their commission of the crime while acting with the mental culpability required for the commission of the robbery. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although an acquittal would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Lawrence*, 231 AD3d 1497, 1501 [4th Dept 2024]).

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

909

CAF 23-01991

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

IN THE MATTER OF MELISSA M. WHITNEY,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

KEVIN A. LORD, RESPONDENT-RESPONDENT.

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

MAUREEN A. PINEAU, ROCHESTER, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Kristin F. Splain, R.), entered October 27, 2023, in a proceeding pursuant to Family Court Act article 8. The order, among other things, dismissed 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 8, petitioner appeals from an order that, inter alia, dismissed her family offense petition. We affirm.

We reject petitioner's contention that Family Court erred in dismissing the petition and in failing to issue an order of protection against respondent. "A petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" (*Matter of Harvey v Harvey*, 214 AD3d 1462, 1462 [4th Dept 2023] [internal quotation marks omitted]; see *Matter of Washington v Davis*, 207 AD3d 1078, 1079 [4th Dept 2022], lv denied 39 NY3d 902 [2022]; *Matter of Marquardt v Marquardt*, 97 AD3d 1112, 1113 [4th Dept 2012]). "The determination of whether a family offense was committed is a factual issue to be resolved by the [court], and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed if supported by the record" (*Harvey*, 214 AD3d at 1462 [internal quotation marks omitted]; see *Washington*, 207 AD3d at 1079). As relevant here, to establish that respondent committed acts constituting harassment in the second degree, petitioner was required to establish that respondent, with the intent to harass, annoy or alarm petitioner, subjected her to "physical contact, or attempt[ed] or threaten[ed] to do the same" (Penal Law § 240.26 [1]). Here, the evidence presented by petitioner at the hearing consisted of petitioner's testimony that respondent

"kinda" pushed her when respondent appeared "confused." According due deference to the court's credibility determinations (see *Washington*, 207 AD3d at 1079), we conclude that petitioner failed to establish by a preponderance of the evidence that respondent engaged in acts constituting harassment in the second degree (see *Matter of Voorhees v Talerico*, 128 AD3d 1466, 1467 [4th Dept 2015], *lv denied* 25 NY3d 915 [2015]; see also *Matter of Marilyn C. v Olsen C.*, 132 AD3d 406, 406 [1st Dept 2015]).

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

911

CAF 23-01508

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

IN THE MATTER OF NATHAN A. ZARBO,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

CONNIE B. GRANCHELLI, RESPONDENT-APPELLANT.

JASON R. DIPASQUALE, BUFFALO, FOR RESPONDENT-APPELLANT.

BRIAN R. WELSH, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Niagara County (Erin P. DeLabio, J.), entered August 7, 2023, in a proceeding pursuant to Family Court Act article 6. The order directed respondent to pay counsel fees.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order awarding counsel fees to petitioner father. The mother did not appear at the hearing on this matter, however, and we conclude that, under the circumstances of this case, her unexplained failure to appear constituted a default (see *Matter of Long v Hartung*, 232 AD3d 1218, 1219 [4th Dept 2024]; *Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446 [4th Dept 2021], lv dismissed 37 NY3d 1081 [2021]). No appeal lies from an order that is entered upon the default of the appealing party (see *Matter of David P.S. [Grace C.L.]*, 222 AD3d 1332, 1332-1333 [4th Dept 2023]; *Matter of Roache v Hughes-Roache*, 153 AD3d 1653, 1653 [4th Dept 2017]), and we therefore dismiss the appeal.

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

914

CAF 23-01992

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

IN THE MATTER OF KEVIN A. LORD,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

MELISSA M. WHITNEY, RESPONDENT-APPELLANT.

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

MAUREEN A. PINEAU, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Kristin F. Splain, R.), entered October 27, 2023, in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent appeals from an order of protection issued after a fact-finding hearing and upon a related decision made after the hearing that found that she committed family offenses against petitioner. We affirm.

Initially, we note that Family Court did not specify each of the subsections of the criminal statutes upon which it based its findings. However, upon exercising our independent review power (see *Matter of Tara N. P.-T. v Emma P.-T.*, 204 AD3d 1414, 1415 [4th Dept 2022]; *Matter of Telles v DeWind*, 140 AD3d 1701, 1701 [4th Dept 2016]), we conclude, contrary to respondent's contention, that the record is sufficient to establish, by a preponderance of the evidence, that respondent committed the family offenses of harassment in the second degree (see Penal Law § 240.26 [3]; see generally *Matter of Carney v Carney*, 231 AD3d 1535, 1535-1536 [4th Dept 2024]), disorderly conduct (see § 240.20 [2], [3]; *Tara N. P.-T.*, 204 AD3d at 1415; *Telles*, 140 AD3d at 1701-1702), criminal mischief in the fourth degree (see § 145.00 [1]; *Matter of Romena Q. v Edwin Q.*, 140 AD3d 1232, 1232-1233 [3d Dept 2016]; see generally *Matter of Scroger v Scroger*, 68 AD3d 1777, 1777 [4th Dept 2009], lv denied 14 NY3d 705 [2010]), and attempted assault in the third degree (see §§ 110.00, 120.00 [1]; see generally *Matter of Harrington v Harrington*, 63 AD3d 1618, 1619 [4th Dept 2009], lv denied 13 NY3d 705 [2009]). We have reviewed

respondent's remaining contention and conclude that it is without merit.

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

917

CA 23-01483

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

DONALD F. MURRAY, PLAINTIFF-APPELLANT,

V

ORDER

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Vincent
M. Dinolfo, J.), entered August 21, 2023. The order granted the
motion of defendant to dismiss the complaint.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

918

CA 24-00796

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

DONALD F. MURRAY, PLAINTIFF-APPELLANT,

V

ORDER

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Vincent
M. Dinolfo, J.), entered May 8, 2024. The order granted the motion of
defendant for attorney's fees.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

924

KA 22-01110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KHAM KHIAMDAVANH, DEFENDANT-APPELLANT.

CHRISTOPHER JUDE PELLI, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered December 15, 2021. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]), stemming from a road rage incident where defendant shot and severely injured the victim. We affirm.

Contrary to defendant's contention, County Court did not abuse its discretion in refusing to give a missing witness charge with respect to one of the three men other than defendant who were involved in the underlying incident. A missing witness instruction is appropriate where the witness in question has knowledge material to the trial, would be expected to give noncumulative testimony favorable to the party against whom the charge is sought, and is available to that party (see *People v Smith*, 33 NY3d 454, 458 [2019]; *People v Gonzalez*, 68 NY2d 424, 427-428 [1986]). Although defendant met his initial burden with respect to his request (see *Smith*, 33 NY3d at 458-459; *People v Kitching*, 78 NY2d 532, 536-537 [1991]; see also *People v Elmore*, 211 AD3d 1536, 1539 [4th Dept 2022], *lv denied* 42 NY3d 938 [2024]), we conclude that the prosecution established that the testimony of the witness in question would have been cumulative (see *Elmore*, 211 AD3d at 1539; cf. *People v Garcia*, 192 AD3d 1463, 1465-1466 [4th Dept 2021]; see generally *Smith*, 33 NY3d at 460-461). Further, we conclude that, the People having met their burden with

respect to cumulativeness, defendant did not meet his "ultimate burden to show that the [missing witness] charge would be appropriate"—i.e., by demonstrating that the witness's testimony would, in fact, be noncumulative (*Smith*, 33 NY3d at 459).

Defendant failed to preserve for our review his challenge to the court's use of the initial aggressor exception as part of its justification charge (see CPL 470.05 [2]; *People v Ford*, 114 AD3d 1221, 1221 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]; *People v Johnson*, 103 AD3d 1226, 1226 [4th Dept 2013], *lv denied* 21 NY3d 944 [2013]), 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]).

Defendant further contends that the verdict is against the weight of the evidence with respect to his conviction of attempted murder in the second degree and assault in the first degree inasmuch as the People did not disprove the defense of justification beyond a reasonable doubt. Viewing the evidence in light of the elements of those crimes and the defense of justification as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject that contention (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury could reasonably have found based on the testimony of the People's witnesses, inter alia, that none of the men allegedly approaching defendant at the relevant time were using or attempting to use deadly physical force when defendant shot the victim (see *People v St. John*, 215 AD3d 1267, 1268 [4th Dept 2023], *lv denied* 40 NY3d 999 [2023]; see generally Penal Law § 35.15 [2] [a]). Further, defendant's testimony, to the extent it establishes that he believed that one or more of the men may have been reaching for a weapon, merely "presented a credibility issue for the [jury] to resolve" (*People v Perkins*, 160 AD3d 1455, 1456 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018] [internal quotation marks omitted]), and the jury, "as the finder of fact, was entitled to discredit the testimony of defendant that [one of the men approaching his car] was the initial aggressor" (*id.* [internal quotation marks omitted]). Ultimately, we conclude that the jury "was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the [jury] failed to give the evidence the weight it should be accorded" (*id.* at 1457 [internal quotation marks omitted]; see *People v Gritzke*, 292 AD2d 805, 805-806 [4th Dept 2002], *lv denied* 98 NY2d 697 [2002]).

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

928

KA 22-00175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 19, 2021. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (two counts), criminal sexual act in the second degree (three counts), criminal sexual act in the first degree, rape in the second degree, assault in the second degree, criminal sexual act in the third degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of predatory sexual assault against a child (Penal Law former § 130.96), one count of criminal sexual act in the first degree (former § 130.50 [1]), three counts of criminal sexual act in the second degree (former § 130.45 [1]), one count of criminal sexual act in the third degree (former § 130.40 [2]), one count of rape in the second degree (§ 130.30 [former (1)]), two counts of endangering the welfare of a child (§ 260.10 [1]), and one count of assault in the second degree (§ 120.05 [2]). Defendant contends that Supreme Court erred in refusing to sever the assault count from the other counts in the indictment. We reject that contention. The court properly determined that the offenses were joinable pursuant to CPL 200.20 (2) (b), which allows joinder of offenses that are based on different criminal transactions where, as here, "such offenses, or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first" (see *People v Jesmer*, 229 AD3d 1112, 1113-1114 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]). Contrary to defendant's contention, evidence relating to the sexual felony and child

endangerment charges was relevant and necessary to complete the narrative of events that led to the altercation during which defendant assaulted the victim with a 20-pound exercise weight (see *id.* at 1114) and on the issue of defendant's motive and intent during that altercation (see *People v Kelley*, 46 AD3d 1329, 1331-1332 [4th Dept 2007], *lv denied* 10 NY3d 813 [2008]). Thus, the assault count was properly joined with the other counts in one indictment under CPL 200.20 (2) (b), and the court lacked statutory authority to sever them (see *Jesmer*, 229 AD3d at 1114).

We also reject defendant's contention that the court erred in refusing to charge the jury on the defense of justification in the use of non-deadly physical force in connection with the assault count (see Penal Law § 35.15 [1]; see generally *People v Vega*, 33 NY3d 1002, 1004 [2019]). This is not one of the "rare" cases in which defendant is charged with a crime containing a dangerous instrument element but the jury could nonetheless have concluded that defendant used no more than ordinary physical force and was justified in doing so (*Vega*, 33 NY3d at 1004; see Penal Law § 120.05 [2]; cf. *People v Powell*, 101 AD3d 1369, 1372 [3d Dept 2012], *lv denied* 21 NY3d 1019 [2013]). To the contrary, even considering the evidence in the light most favorable to defendant, we conclude that no reasonable view of the evidence would support a finding that defendant "did not use the [20-pound exercise weight] in question in a manner readily capable of causing death or serious physical injury" (*People v Marishaw*, 174 AD3d 401, 402 [1st Dept 2019], *lv denied* 34 NY3d 952 [2019]).

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

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

929

KA 23-01875

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTRELL DAVIS, DEFENDANT-APPELLANT.

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

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

ALVIN L. BRAGG, JR., DISTRICT ATTORNEY, NEW YORK CITY (JOHN T. HUGHES OF COUNSEL), FOR DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK, AMICUS CURIAE.

Appeal from a judgment of the Monroe County Court (Karen Bailey Turner, J.), rendered October 19, 2023. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). We affirm.

Initially, to the extent that defendant challenges the state's gun licensing scheme, we conclude that defendant has not demonstrated that he has standing to assert that challenge (*see People v Vega*, 228 AD3d 467, 467 [1st Dept 2024]; *People v Liriano*, 226 AD3d 520, 521 [1st Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *see generally United States v Decastro*, 682 F3d 160, 164 [2d Cir 2012], *cert denied* 568 US 1092 [2013]). Furthermore, we reject defendant's contention that Penal Law § 265.03 (3) is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). The decision in *Bruen* "had no impact on the constitutionality of New York State's criminal possession of a weapon statutes" (*People v Mancuso*, 225 AD3d 1151, 1153 [4th Dept 2024] [internal quotation marks omitted]; *see*

People v Cabrera, 41 NY3d 35, 49-50 [2023]; *People v Joyce*, 219 AD3d 627, 628 [2d Dept 2023], *lv denied* 40 NY3d 1013 [2023]).

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

930

KA 23-01872

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

DAMONTE PERRYMAN, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Onondaga County Court (Matthew J. Doran, J.), dated September 7, 2023. The order granted that part of defendant's omnibus motion seeking to suppress physical evidence and statements.

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

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to suppress evidence, specifically drugs and oral statements made by defendant to a New York State Trooper following a traffic stop. We affirm.

After the Trooper stopped defendant's vehicle for a traffic violation, he approached the passenger's side window. When the passenger rolled down the window, the Trooper observed a plume of smoke and smelled burning cannabis. The Trooper ordered defendant driver and the passenger out of the vehicle. While a second Trooper administered field sobriety tests to defendant, the first Trooper searched the vehicle and recovered a quantity of narcotics.

We reject the People's contention that the Trooper had reasonable cause to search the vehicle. Penal Law § 222.05 (3), which was in effect at the time of the vehicle stop, provides in relevant part that, except as provided in subdivision four, "no finding or determination of reasonable cause to believe a crime has been committed shall be based solely on evidence of the following facts and circumstances, either individually or in combination with each other: (a) the odor of cannabis; (b) the odor of burnt cannabis; [or] (c) the possession of or the suspicion of possession of cannabis or concentrated cannabis in the amounts authorized in this article." Penal Law § 222.05 (4) provides that paragraph (b) of subdivision

three "shall not apply when a law enforcement officer is investigating whether a person is operating a motor vehicle . . . while impaired by drugs or the combined influence of drugs or of alcohol and any drug or drugs in violation of [Vehicle and Traffic Law § 1192 (4) or (4-a)] . . . During such investigations, the odor of burnt cannabis shall not provide probable cause to search any area of a vehicle that is not readily accessible to the driver and reasonably likely to contain evidence relevant to the driver's condition."

Reading those provisions together, we agree with County Court that the Trooper's search of the vehicle was not authorized. At the time of the search, the Trooper had reasonable cause to believe only that defendant had *consumed* cannabis inside a vehicle in violation of Vehicle and Traffic Law § 1227, which is a simple traffic infraction that would not support the search of the vehicle (*see generally People v Marsh*, 20 NY2d 98, 100 [1967]; *People v Solivan*, 156 AD3d 1434, 1436 [4th Dept 2017]). The Trooper had no basis for believing that defendant was operating a vehicle while *impaired* by such consumption in violation of Vehicle and Traffic Law § 1192 (4) or (4-a) so as to justify the search pursuant to Penal Law § 222.05 (4). The Trooper testified at the suppression hearing that defendant stopped the vehicle immediately and appropriately when directed to do so. He further testified that he did not believe that defendant seemed impaired. Defendant was given field sobriety tests, but the Trooper searched the vehicle before that testing was complete and, in any event, the testing showed that defendant was not impaired. We therefore conclude that Penal Law § 222.05 (3) prohibited the Trooper from relying solely on his detection of burning or burnt cannabis to give him reasonable cause to search the vehicle.

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

935

CA 24-00265

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

DIANE VANBORTEL, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF MARGARET
MONTEMARANO, DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

WAYNE COUNTY NURSING HOME, WAYNE COUNTY,
DENIS VINNIK, DEFENDANTS-RESPONDENTS,
AND ARUN NAGPAUL, M.D., DEFENDANT.

FINN LAW OFFICES, ALBANY (RYAN M. FINN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

BROWN, GRUTTADARO & PRATO, LLC, ROCHESTER (DARA R. PAVIA OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (Richard M. Healy, A.J.), entered July 27, 2023. The order granted the cross-motion of defendants Wayne County Nursing Home, Wayne County, and Denis Vinnik for summary judgment dismissing the complaint and cross-claims against them.

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

Memorandum: Plaintiff commenced this medical malpractice and wrongful death action seeking damages for injuries sustained by Margaret Montemarano (decedent) while a resident at defendant Wayne County Nursing Home (Nursing Home). The Nursing Home, Wayne County, and Denis Vinnik (defendants) cross-moved for summary judgment dismissing the complaint and cross-claims against them. Supreme Court granted the cross-motion. Plaintiff appeals, and we now affirm.

Decedent, who was 94 years old at the time, fell at her home and was admitted to a hospital on December 19, 2016, with a left distal femur fracture and a small bowel obstruction. She had a medical history of, inter alia, colon cancer, kidney stones, bladder cancer, anemia, pancreatitis, chronic diarrhea, hypertension, and urinary tract infection (UTI). Decedent was transferred to the Nursing Home on January 18, 2017, for continued rehabilitation. Upon admission, she was assessed with three stage II pressure ulcers on her left ischium. On February 27, 2017, she was transferred to another hospital for a blood transfusion and was treated for a UTI and a large (stage IV) sacral decubitus ulcer. Decedent's health continued to

decline and she died in May 2017. The cause of death given on the death certificate was respiratory failure due to large sacral decubitus ulcer with osteomyelitis. A significant condition contributing to her death was colon cancer with chronic diarrhea.

We conclude that defendants met their initial burden of establishing as a matter of law that they did not depart from good and accepted medical practice or that any alleged departure did not proximately cause plaintiff's injuries (see generally *Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]; *Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]). In particular, defendants established that the wound care they provided was appropriate, but that, due to decedent's depleted state and chronic conditions, the pressure ulcers did not improve with appropriate conventional treatments (see *Cerrone v North Shore-Long Is. Jewish Health Sys., Inc.*, 197 AD3d 449, 450-451 [2d Dept 2021]).

We further conclude that, in opposition to the cross-motion, plaintiff failed to raise a triable issue of fact. Plaintiff proffered the expert opinion of a registered nurse who was a nursing supervisor in the long-term care field. Even assuming, arguendo, that the expert was qualified to render an opinion with respect to the relevant standards of wound care (see *Shattuck v Anain*, 174 AD3d 1339, 1340 [4th Dept 2019]) and that her opinion was sufficient to establish that defendants departed from good and accepted medical practice and was not merely conclusory in that respect (cf. *Rybek v New York City Health & Hosps. Corp.*, 228 AD3d 968, 969 [2d Dept 2024]), we conclude that it was insufficient to raise a triable issue of fact on causation. The nurse lacked the qualifications to render an opinion whether any deviation from the relevant standard of care was a proximate cause of the injuries (see *Boltyansky v New York Community Hosp.*, 175 AD3d 1478, 1479 [2d Dept 2019]; *Vargas v St. Barnabas Hosp.*, 168 AD3d 596, 597 [1st Dept 2019]; see also *Shattuck*, 174 AD3d at 1340). Moreover, the expert did not dispute the opinions of defendants' experts that, due to decedent's comorbidities, the pressure ulcers would not heal (see *Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1001 [2d Dept 2016]; cf. *Pichardo v St. Barnabas Nursing Home, Inc.*, 134 AD3d 421, 424-425 [1st Dept 2015]).

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

936

CA 23-01693

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

LEI LINWANG, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SHERIDAN AMHERST, LLC, DEFENDANT-APPELLANT.

BLOCK, LONGO, LAMARCA & BRZEZINSKI, P.C., CLARENCE (CHRISTOPHER A. CARDILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered August 30, 2023. The order, insofar as appealed from, granted that part of plaintiff's motion seeking a declaration that plaintiff is not obligated to pay real property taxes and insurance for the leased premises and denied that part of defendant's cross-motion seeking a declaration that plaintiff is required to pay real property taxes.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion to the extent that it sought an order declaring that plaintiff is not obligated to pay real property taxes or insurance under the lease is denied, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff (tenant) and defendant (landlord) entered into a commercial lease, which, inter alia, assigns responsibility for the payment of real estate taxes and insurance. Following a dispute over those terms, the tenant commenced this declaratory judgment action, seeking, inter alia, a declaration that those terms were ambiguous and that the tenant is not responsible for any real estate taxes or insurance payments with respect to the leased premises. The landlord appeals, as limited by its brief, from an order insofar as it granted the tenant's motion to the extent that it sought a declaration that the tenant "is not obligated to pay real property taxes or insurance under the [l]ease," and insofar as it denied the landlord's cross-motion to the extent that it sought a declaration to the contrary. Specifically, Supreme Court determined that the relevant terms of the lease were ambiguous and construed them against the landlord solely on the basis that the landlord's predecessor drafted the lease without any input from the tenant.

Although "[i]t is a basic principle of contract law that a

written document is to be construed against the party who prepared it . . . where there are ambiguous or contradictory provisions" (*Rochester Home Equity v Guenette*, 6 AD3d 1119, 1120 [4th Dept 2004] [internal quotation marks omitted]; see *Jacobson v Sassower*, 66 NY2d 991, 993 [1985]; *Gillette v Heinrich Motors*, 55 AD2d 841, 841-842 [4th Dept 1976], *affd* 44 NY2d 661 [1978]), that "is a rule of construction that should be employed only as a last resort" (*Birdsong Estates Homeowners Assn., Inc. v D.P.S. Southwestern Corp.*, 101 AD3d 1735, 1737 [4th Dept 2012] [internal quotation marks omitted]; see generally *Lamps Plus, Inc. v Varela*, 587 US 176, 186-187 [2019]; *Record Club of Am., Inc. v United Artists Records, Inc.*, 890 F2d 1264, 1271 [2d Cir 1989]). We conclude, on the record before us, that the court erred in relying solely on the doctrine of *contra proferentem* to conclude that the tenant does not owe real estate taxes and insurance payments under the lease, inasmuch as "it cannot be assumed that all relevant extrinsic evidence has been presented at this stage of the litigation" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 448 [1st Dept 2017]; see *Birdsong Estates Homeowners Assn., Inc.*, 101 AD3d at 1737). We consequently reverse the order insofar as appealed from, deny the motion insofar as it sought a declaration that the tenant does not owe any real property taxes or insurance payments under the lease, and remit the matter to Supreme Court for further proceedings on the motion and cross-motion to determine the parties' intent with respect to the lease, including a hearing if that determination "depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from [such] extrinsic evidence" (*Matter of Wilson*, 138 AD3d 1441, 1443 [4th Dept 2016] [internal quotation marks omitted]).

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

939

KA 18-01550

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARQUIS D. COUNCIL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, A.J.), rendered July 5, 2018. The judgment convicted defendant upon his plea of guilty of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). Although defendant retains the right to appellate review of his challenge to the voluntariness of the plea regardless of the validity of his waiver of the right to appeal (*see People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]), that challenge is not preserved for our review because defendant failed to move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *People v Tapia*, 158 AD3d 1079, 1080 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]). The narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply in this case. Here, nothing defendant said during the plea colloquy itself required County Court to inquire further before accepting the plea (*see People v Freeland*, 198 AD3d 1380, 1381 [4th Dept 2021]; *People v Shanley*, 189 AD3d 2108, 2109 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). Even assuming, arguendo, that defendant's act of shaking his head "no" during the plea colloquy was enough to require a further inquiry, the record establishes that the court noted defendant's behavior and asked him whether he was, in fact, "prepared to go forward with the final plea." Defendant indicated that he was, and the court then described the factual allegations in the indictment again before asking defendant how he pleaded to the charge of robbery in the first degree. After defendant pleaded "guilty," the court asked him yet again if he had

"any questions about the rights [he had] given up, the terms of the plea agreement, or the consequences of pleading guilty," and defendant responded, "No." Inasmuch as the plea minutes demonstrate that the trial court "properly conducted further inquiry to ensure that defendant's plea was knowing and voluntary," the exception to the preservation requirement does not apply to this case (*Lopez*, 71 NY2d at 667-668). Contrary to defendant's assertion, "a trial court has no duty, in the absence of a motion to withdraw a guilty plea, to conduct a further inquiry concerning the plea's voluntariness based upon comments made by the defendant during . . . sentencing" (*People v Edmonds*, 229 AD3d 1275, 1276 [4th Dept 2024] [internal quotation marks omitted]; see *People v Brown*, 204 AD3d 1519, 1519 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]). We decline to exercise our power to review defendant's challenge to the voluntariness of his plea as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

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

941

KA 24-00381

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KAITLYN CONLEY, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Oneida County Court (Michael L. Dwyer, J.), rendered February 23, 2024. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is granted, the judgment of conviction is vacated, and count 1 of the indictment is dismissed without prejudice to the People to re-present any appropriate charge with respect to such dismissed count to another grand jury.

Memorandum: Defendant appeals, by permission of this Court, from an order that denied her motion pursuant to CPL 440.10 seeking to vacate the judgment of conviction on the ground that she was denied effective assistance of counsel. Defendant was convicted upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) for the 2015 death of Mary Yoder from colchicine toxicity. During the course of its investigation into Yoder's death, the Oneida County Sheriff's Office (OCSO) obtained a warrant authorizing it to "seize" defendant's cell phone and, "without unnecessary delay, return it to th[e] [c]ourt." OCSO thereafter seized defendant's cell phone but, rather than return it to the warrant-issuing court, delivered it to a cybersecurity and forensics center, where a forensic examination and memory extraction was conducted. The examination revealed, inter alia, that the words "poison" and "colchicine" showed up multiple times in the cell phone's user dictionary, and that an email account used to acquire colchicine had been logged into on the cell phone. The information extracted from the cell phone was then used to further OCSO's investigation, including eliciting defendant's admission that she had purchased a prepaid debit card that had been used to acquire colchicine through an online chemical vendor. Defendant was

subsequently indicted for, inter alia, murder in the second degree (Penal Law § 125.25 [1]) for intentionally causing Yoder's death. Defendant's first trial ended in a hung jury. In the second trial, the jury found defendant not guilty of murder in the second degree and guilty of manslaughter in the first degree, which had been submitted to the jury as a lesser included offense of murder in the second degree. We affirmed the judgment on direct appeal (*People v Conley*, 192 AD3d 1616 [4th Dept 2021], lv denied 37 NY3d 1026 [2021]).

Defendant thereafter brought a CPL 440.10 (1) (h) motion contending that she was denied effective assistance of counsel under the Federal and New York State Constitutions by, inter alia, defense counsels' failure to move to suppress evidence obtained through the search of her cell phone on the ground that the search exceeded the scope of the warrant and the warrant was facially invalid for lack of particularity. County Court, following a hearing, denied defendant's motion. Defendant now appeals, and we reverse.

Preliminarily, we agree with defendant that the court erroneously concluded that, on her direct appeal, we considered and rejected her contention with respect to ineffective assistance insofar as it relates to suppression of the cell phone records. In our decision on the direct appeal, we concluded that defendant's "contention that the search warrant failed to meet the particularity requirement [was] unpreserved" and "decline[d] to exercise our power to review that contention as a matter of discretion in the interest of justice" (*Conley*, 192 AD3d at 1618), leaving defendant's ineffective assistance contention based on evidence outside the record for a subsequent CPL 440.10 motion (*Conley*, 192 AD3d at 1621). Further, contrary to the People's assertion, the fact that defendant's first trial ended in a mistrial does not preclude defendant from contending in her CPL 440.10 motion that the failure to seek suppression of evidence in the omnibus motion filed before the first trial on the grounds that the search exceeded the scope of the warrant and the warrant lacked particularity denied her effective assistance of counsel. We note that the failure to make a proper suppression motion in the first trial resulted in the introduction of evidence extracted from her cell phone by the People in the second trial (see generally *People v Parilla*, 214 AD3d 1399, 1402 [4th Dept 2023], lv denied 40 NY3d 936 [2023]).

With respect to the merits of defendant's CPL 440.10 motion, where, as here, "a defendant contends that they received ineffective assistance of counsel under both the Federal and New York State Constitutions, 'we evaluate the claim using the state standard, which affords greater protection than its federal counterpart' " (*People v Mastin*, 232 AD3d 1268, 1269 [4th Dept 2024], lv denied – NY3d – [2024]; see *People v Stultz*, 2 NY3d 277, 282 [2004], rearg denied 3 NY3d 702 [2004]). "In New York, the standard for an ineffective assistance of counsel claim is whether the defendant was afforded 'meaningful representation' and, while significant, the prejudice component of an ineffective assistance claim is not necessarily indispensable" (*People v Bank*, 28 NY3d 131, 137 [2016]; see *People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Oliver*, 162 AD3d 1722, 1723

[4th Dept 2018])). Thus, "[w]hile the inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Benevento*, 91 NY2d 708, 714 [1998]; see *Oliver*, 162 AD3d at 1723).

We agree with defendant that she was denied effective assistance of counsel inasmuch as defense counsel failed to properly move to suppress the evidence obtained from her cell phone. "[I]ndiscriminate searches pursuant to general warrants 'were the immediate evils that motivated the framing and adoption of the Fourth Amendment' " (*People v Brown*, 96 NY2d 80, 84 [2001], quoting *Payton v New York*, 445 US 573, 583 [1980])). A person's cell phone now contains at least as much personal and private information as their home and, thus, indiscriminate searches of cell phones cannot be permitted (see *People v Ozkaynak*, 217 AD3d 1376, 1377-1378 [4th Dept 2023], lv denied 40 NY3d 998 [2023]; *People v Thompson*, 178 AD3d 457, 458-459 [1st Dept 2019])). As defendant correctly contends, the forensic examination and memory extraction of her cell phone's contents exceeded the scope of the warrant, which only authorized OCSO to seize the cell phone and return it to the court (see *People v Velez*, 138 AD3d 1041, 1042 [2d Dept 2016], lv denied 28 NY3d 938 [2016]; *People v Blakeslee*, 66 Misc 3d 375, 381 [Ithaca City Ct 2019]; see generally *Riley v California*, 573 US 373, 386 [2014])). Furthermore, the warrant failed to meet the particularity requirement inasmuch as it, inter alia, did not "specify the items to be seized by their relation to designated crimes" (*People v Saeli*, 219 AD3d 1122, 1124 [4th Dept 2023] [internal quotation marks omitted]; see *People v Wiggins*, 229 AD3d 1095, 1096-1097 [4th Dept 2024]; see generally *Riley*, 573 US at 386). Thus, we conclude that defendant "established that a motion to suppress would likely be successful, and that defense counsel had no strategic or other legitimate explanation for not moving to suppress the evidence" (*People v Dealmeida*, 124 AD3d 1405, 1407 [4th Dept 2015]; see *Riley*, 573 US at 386; *Wiggins*, 229 AD3d at 1096-1097).

Even assuming that defense counsels' failure to properly move to suppress evidence obtained from defendant's cell phone constituted, in effect, a single error in otherwise competent representation of defendant, we conclude that the failure was sufficiently egregious and prejudicial as to compromise her right to a fair trial (see generally *People v Turner*, 5 NY3d 476, 480 [2005]; *People v Carter*, 142 AD3d 1342, 1343 [4th Dept 2016])). Although much of the information recovered from the improper search of defendant's cell phone was later available to the People from an alternate source, that source was not available when OCSO elicited defendant's admission to having purchased a prepaid debit card that was used to acquire colchicine. Further, the People's repeated assertions during the second trial that incriminating evidence of defendant's efforts to research and, ultimately, acquire colchicine had been recovered directly from her personal cell phone, and not from an alternate source, undermined defense counsel's theory of the case that Yoder's son had committed the murder and then attempted to frame defendant for it.

Therefore, we reverse the order, grant the motion, vacate the judgment of conviction, and dismiss count 1 of the indictment. Inasmuch as defendant was convicted only of a lesser included offense for which she was not indicted, the dismissal of count 1 is without prejudice to the People to re-present any appropriate charge with respect thereto to another grand jury (see *People v Nieves*, 67 NY2d 125, 136 [1986]; *People v Gonzalez*, 61 NY2d 633, 634-635 [1983]).

In light of our determination, we decline to review defendant's remaining contentions.

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

944

KA 21-00741

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS HOWARD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered January 27, 2020. The judgment convicted defendant upon a jury verdict of robbery in the first degree, criminal possession of a weapon in the second degree, criminal possession of stolen property in the third degree and criminal possession of stolen property in the fourth degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection to expire on January 1, 2045, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), criminal possession of a weapon in the second degree (§ 265.03 [3]), criminal possession of stolen property in the third degree (§ 165.50), and three counts of criminal possession of stolen property in the fourth degree (§ 165.45 [2], [5]).

Defendant contends that he was denied due process because he was not notified that the People would seek to have the victim make a first-time, in-court identification. In addition, defendant contends that Supreme Court abused its discretion in permitting the first-time, in-court identification because it was unduly suggestive. Initially, we note that defense counsel's general objection at trial was insufficient to preserve defendant's specific contention on appeal (see generally *People v Ford*, 69 NY2d 775, 776 [1987], *rearg denied* 69 NY2d 985 [1987]; *People v Lewis*, 192 AD3d 1532, 1534 [4th Dept 2021], *lv denied* 37 NY3d 993 [2021]; *People v Lewis*, 129 AD3d 1546, 1547 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015]). In any event, defendant's contention is without merit. "[W]hen the People call a witness who

may make a first-time, in-court identification, they must ensure that the defendant is aware of that possibility as early as practicable so that the defendant has a meaningful opportunity to request alternative identification procedures" (*People v Perdue*, 41 NY3d 245, 247 [2023]). "The ultimate determination of whether to admit a first-time, in-court identification, like any evidence, rests within the evidentiary gatekeeping discretion of the trial court," which "must balance the probative value of the identification against the dangers of misidentification and other prejudice to the defendant" (*id.* at 247-248).

Here, the People did not provide defendant with explicit notice that they would be seeking to elicit a first-time, in-court identification. Nevertheless, the victim described the suspect in the call he made to 911 immediately after the incident and informed law enforcement that he would be able to identify the suspect. Further, although the victim was unable to identify defendant in the first photo array, he asked officers to provide him with photographs in which the individuals' teeth were showing and, upon viewing the new photo array, selected two photographs, one of which depicted defendant. In light of that information, we conclude that defendant was on notice that an in-court identification was a possibility (*see id.* at 248, 252).

We further conclude that the court did not abuse its discretion in permitting the first-time, in-court identification. During his trial testimony, the victim established his ability to observe the suspect and described him in detail (*see id.* at 253). The victim's trial testimony, which occurred only nine months after the incident, mirrored the description of the suspect that he previously gave during the 911 call and when he spoke to the police (*see id.* at 253). Moreover, the victim's "identification was far from the only evidence linking defendant to this crime" (*id.*). Law enforcement officers testified that defendant was apprehended in close proximity to a minivan that had been seen entering the parking lot of the building where the robbery took place. The minivan was found to contain the items taken from the victim, as well as defendant's fingerprints and DNA (*see id.* at 253). We note that the victim did not immediately identify defendant when he was asked at trial whether he would recognize the "person who did this to [him]." Rather, the victim indicated that he would be able to recognize that person by "[h]is teeth." It was not until defendant was asked to stand within two feet of the victim and smile that the victim affirmatively identified him as the person who committed the robbery, which suggests that the victim did not identify defendant as the perpetrator merely because he was the only person at the defense table who was clearly on trial (*see id.* at 250).

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 the perpetrator (*see People v Brown*, 204 AD3d 1390, 1393 [4th Dept 2022], *lv denied* 39 NY3d 985

[2022]; *People v Isaac*, 195 AD3d 1410, 1410 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]; *People v Thomas*, 176 AD3d 1639, 1640 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]) or with respect to the element of possession (see *People v Hensley*, 227 AD3d 1548, 1550 [4th Dept 2024]; 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 (see *People v Cleveland*, 217 AD3d 1346, 1349 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023], *lv denied* 41 NY3d 942 [2024]; see generally *Bleakley*, 69 NY2d at 495).

Defendant further contends that the order of protection must be amended because the court erroneously set an expiration date of January 27, 2056. Although defendant's contention is not preserved for our review, we exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). The People correctly concede that the court erred in calculating the expiration date of the order, and we therefore modify the judgment by amending the order of protection to expire on January 1, 2045 (see *People v Davis*, 193 AD3d 1352, 1353 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]).

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

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

945

KA 19-00783

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARRYL B. PARKER, JR., DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered February 14, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that Penal Law § 265.03 is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Inasmuch as defendant failed to raise a constitutional challenge to the statute before Supreme Court, his contention is not preserved for our review (see *People v Nixon*, 222 AD3d 1384, 1385 [4th Dept 2023], lv denied 41 NY3d 943 [2024]; *People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], lv denied 39 NY3d 1111 [2023]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], lv denied 27 NY3d 1074 [2016], cert denied 580 US 969 [2016]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

Although defendant also contends that his waiver of the right to appeal is invalid, we note that resolution of that issue is of no moment inasmuch as his challenge to the constitutionality of Penal Law § 265.03 would survive even a valid waiver of the right to appeal (see *Nixon*, 222 AD3d at 1385; *People v Benjamin*, 216 AD3d 1457, 1457 [4th

Dept 2023]; *see also* *People v Jordan*, 169 AD3d 1357, 1358 [4th Dept 2019]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

946

CAF 23-01226

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

IN THE MATTER OF ANAVIAS D.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JASON D., RESPONDENT-APPELLANT.

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

DEANA D. GATTARI, UTICA, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Paul M. Deep, J.), entered July 6, 2023, 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 the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent father appeals from three orders terminating his parental rights with respect to each of his three children upon a finding of severe abuse arising from his conviction of murder in the second degree for killing their mother (see Social Services Law § 384-b [4] [e]; [8] [a] [iii] [A]; Penal Law § 125.25 [1]). Family Court conducted a combined fact-finding and dispositional hearing and concluded that the best interests of the children required that they be placed for adoption.

We reject the father's contention in each appeal that he was denied effective assistance of counsel by his attorney's failure to negotiate a settlement with petitioner. Here, the father rejected the offer of surrender made by petitioner and elected to proceed to a hearing. Under these circumstances, any additional course of negotiations by his counsel would have been, "at best, 'dubious' " (*People v Collins*, 129 AD3d 1676, 1677 [4th Dept 2015], lv denied 26 NY3d 1038 [2015]; see also *Matter of Daltun A.B. [Daniel B.]*, 103 AD3d 1181, 1182 [4th Dept 2013], lv denied 21 NY3d 949 [2013]), and the father failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Jazmine M. [Willie R.]*, 185 AD3d 1457, 1458 [4th Dept 2020], lv denied

36 NY3d 902 [2020] [internal quotation marks omitted]; *see Matter of Brown v Gandy*, 125 AD3d 1389, 1390-1391 [4th Dept 2015]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

951

CAF 23-01227

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

IN THE MATTER OF ARIYA D.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JASON D., RESPONDENT-APPELLANT.

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

DEANA D. GATTARI, UTICA, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Paul M. Deep, J.), entered July 6, 2023, 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 the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of Anavias D. (Jason D.)* ([appeal No. 1] – AD3d – [Jan. 31, 2025] [4th Dept 2025]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

956

CAF 23-01228

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

IN THE MATTER OF AVALINA D.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JASON D., RESPONDENT-APPELLANT.

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

DEANA D. GATTARI, UTICA, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Paul M. Deep, J.), entered July 6, 2023, 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 the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of Anavias D. (Jason D.)* ([appeal No. 1] – AD3d – [Jan. 31, 2025] [4th Dept 2025]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

18

CA 23-01421

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

SANDRA JONAS, PLAINTIFF-APPELLANT,

V

ORDER

MICHAEL JONAS, DEFENDANT-RESPONDENT.

FERON POLEON, LLP, AMHERST (KELLY A. FERON OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

MARK J. FRENTZEL, ESQ., GRAND ISLAND (MICHAEL F. MCPARTLAN OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered August 15, 2023. The order, insofar as appealed from, denied in part the motion of plaintiff for various forms of postdivorce relief.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

21

KA 22-00016

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HEZEKIAH N. BURCH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALINA YOUNG OF COUNSEL), FOR DEFENDANT-APPELLANT.

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered December 8, 2021. The judgment convicted defendant upon a plea of guilty of attempted rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of attempted rape in the first degree (Penal Law §§ 110.00, former 130.35 [1]), defendant contends that his waiver of the right to appeal is invalid, challenges County Court's denial of his request for youthful offender treatment, and contends that the sentence is unduly harsh and severe.

Contrary to defendant's contention, the record establishes that the court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Lamagna*, 173 AD3d 1772, 1772 [4th Dept 2019], *lv denied* 34 NY3d 934 [2019] [internal quotation marks omitted]; *cf. People v Dunn* [appeal No. 3], 229 AD3d 1220, 1221 [4th Dept 2024]; *People v Elmore* [appeal No. 2], 213 AD3d 1245, 1246 [4th Dept 2023]). On this record, defendant's " 'monosyllabic affirmative responses to questioning by [the court] do not render his [waiver of the right to appeal] unknowing and involuntary' " (*People v Harris*, 94 AD3d 1484, 1485 [4th Dept 2012], *lv denied* 19 NY3d 961 [2012]; *see People v Allen*, 174 AD3d 1456, 1457 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]). We conclude that "all the relevant circumstances reveal a knowing and voluntary waiver" (*People v Thomas*, 34 NY3d 545, 563, *cert denied* – US –, 140 S Ct 2634 [2020]).

The valid waiver of the right to appeal precludes appellate review of defendant's challenge to the court's consideration of and

denial of his request to be adjudicated a youthful offender (see *People v Pacherille*, 25 NY3d 1021, 1023-1024 [2015]; *People v Stackhouse*, 214 AD3d 1303, 1304 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]) as well as his challenge to the severity of the sentence (see *Pacherille*, 25 NY3d at 1023; *People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Finally, we note that the uniform sentence and commitment form contains an inaccurate citation to Penal Law § 130.25 (1) rather than the correct citation, Penal Law § 130.35 (1). The uniform sentence and commitment form must therefore be amended to correct that clerical error (see *People v Heverly*, 230 AD3d 1534, 1537 [4th Dept 2024], *lv denied* – NY3d – [2024]; *People v Graham*, 215 AD3d 1263, 1264 [4th Dept 2023], *lv denied* 40 NY3d 934 [2023]).

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

22

KA 24-00099

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRANDON K. MCNEAL, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), entered September 25, 2023. The order, among other things, determined that respondent is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act, and as modified the order is 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.*) based on his conviction in federal court, upon his plea of guilty, of conspiracy to commit sex trafficking of a minor (18 USC § 1594 [c]). We agree with defendant that County Court improperly assessed 20 points under risk factor four for engaging in a continuing course of sexual misconduct. Such a finding required the People to establish by clear and convincing evidence (*see People v Pettigrew*, 14 NY3d 406, 408 [2010]) that defendant had “engaged in a continuing course of sexual contact” by “either (i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]; *see People v Dupuis*, 229 AD3d 1149, 1149-1150 [4th Dept 2024]). Although the evidence presented at the SORA hearing established that defendant “engag[ed] in sexual intercourse” with the victim, we conclude that the People did not establish by clear and convincing evidence that defendant engaged in the requisite sexual contact on more than one occasion. Moreover, under the circumstances

of this case, defendant's actions underlying his conviction of conspiracy to commit sex trafficking of a minor do not warrant the assessment of points under risk factor four because the sexual acts that the victim committed with others do not constitute "sexual contact" between defendant and the victim or establish accessorial liability on the part of defendant for the sexual contact with others (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10; see *People v Blue*, 186 AD3d 1088, 1090 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]; *People v Dilillo*, 162 AD3d 915, 916 [2d Dept 2018], *lv denied* 32 NY3d 905 [2018]; cf. *People v Bracero*, 214 AD3d 577, 577 [1st Dept 2023], *lv denied* 40 NY3d 902 [2023]). Defendant's score on the risk assessment instrument, originally assessed at 80 points, must therefore be reduced by 20 points, which results in a total score of 60 points and renders defendant a presumptive level one risk. We modify the order accordingly.

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

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

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CAF 23-01683

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

IN THE MATTER OF LILLIANA S., ELIJAH S.,
AMELIA R., SKYLAH V., AND GAUGE V.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

NICOLE D., RESPONDENT-APPELLANT.

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

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

SUSAN E. GRAY, CATONSVILLE, MARYLAND, ATTORNEY FOR THE CHILDREN.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County
(Jacqueline E. Sisson, A.J.), entered September 11, 2023, in a
proceeding pursuant to Social Services Law § 384-b. The order, inter
alia, terminated the parental rights of respondent with respect to the
subject children.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs (*see Matter of Corey MM. [Cassandra LL.]*, 177 AD3d 1119,
1120-1121 [3d Dept 2019]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-01708

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

IN THE MATTER OF JOYCE KENYON, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

MOLLY NICOLETTA, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Cattaraugus County (Moses M. Howden, J.), entered July 18, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject child to petitioner.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent mother appeals from an order, entered following an evidentiary hearing, that granted sole custody of the subject child to the child's paternal grandmother. We agree with the Attorney for the Child that the appeal must be dismissed because the notice of appeal was not filed within 35 days of the date that the order from which the mother seeks to appeal was served by mail upon her, as required by Family Court Act § 1113 (*see Matter of Fraser v Fraser*, 185 AD3d 1444, 1444-1445 [4th Dept 2020]; *Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1458 [4th Dept 2015], lv dismissed 26 NY3d 995 [2015]; *Matter of Liliana G. [Orena G.]*, 91 AD3d 1325, 1326 [4th Dept 2012]). "A timely notice of appeal is a jurisdictional prerequisite, and the time to take an appeal cannot be extended when the notice of appeal was neither timely filed nor served" (*Matter of Jones v Coughlin*, 207 AD2d 1037, 1037 [4th Dept 1994]).

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01908

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

PETER C. DEMARCO AND DEBRA A. DEMARCO,
PLAINTIFFS-APPELLANTS,

V

ORDER

DOMINICK A. SEVERANCE AND ASHLEY M. SEVERANCE,
DEFENDANTS-RESPONDENTS.

RUPP PFALZGRAF LLC, ROCHESTER (KEVIN J. FEDERATION OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

MICHAEL S. STEINBERG, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (John B. Gallagher, Jr., J.), entered November 8, 2023. The order granted the motion of defendants to dismiss the action.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

46

KA 23-02056

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MARIANO AKERS, JR., DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Karen Bailey Turner, J.), entered October 19, 2023. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

51

KA 23-01458

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MARCUS BRUMBERGER, DEFENDANT-APPELLANT.

THOMAS L. PELYCH, HORNELL, 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 10, 2023. The judgment convicted defendant, upon his plea of guilty, of conspiracy in the second degree.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

63

CA 24-00542

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

IN THE MATTER OF ANN L. WALLACE,
AN ALLEGED INCAPACITATED PERSON.

SANDRA MILLER, PETITIONER-RESPONDENT,

V

ORDER

JACQUELYN M. BELL, CPA, AS GUARDIAN FOR
ANN L. WALLACE, RESPONDENT-APPELLANT.

LAW OFFICE OF CARA M. BRIGGS, ROCHESTER (CARA M. BRIGGS OF COUNSEL),
FOR RESPONDENT-APPELLANT.

SANDRA MILLER, PETITIONER-RESPONDENT PRO SE.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Karen Bailey Turner, A.J.), entered March 22, 2024. The order and judgment denied the motion of respondent to hold petitioner in contempt.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-00962

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

AMARION D., DEFENDANT-APPELLANT.

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

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

Appeal from an adjudication of the Erie County Court (Suzanne Maxwell Barnes, J.), rendered June 14, 2022. Defendant was adjudicated a youthful offender upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

82

CA 23-02058

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

ZAKORY WIRFEL, AS ADMINISTRATOR OF THE
ESTATE OF DANIEL T. WIRFEL, DECEASED,
PLAINTIFF-RESPONDENT,

V

ORDER

LAKSHMANA RAO KONERU, M.D., ET AL., DEFENDANTS,
NAVEED SHAHID, M.D., COGENT MEDICAL CARE, P.C.,
ENDION HOSPITALIST NORTH, P.C., ENDION HOSPITALIST OF
WESTERN NEW YORK, P.C., AND SOUND PHYSICIANS OF NEW YORK,
PLLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

THE TARANTINO LAW FIRM LLP, BUFFALO (TAMSIN J. HAGER OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 31, 2023. The order, insofar as appealed from, denied in part the motion of defendants Naveed Shahid, M.D., Cogent Medical Care, P.C., Endion Hospitalist North, P.C., Endion Hospitalist of Western New York, P.C., and Sound Physicians of New York, PLLC, for summary judgment.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

87

CA 23-02096

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

ZAKORY WIRFEL, AS ADMINISTRATOR OF THE
ESTATE OF DANIEL T. WIRFEL, DECEASED,
PLAINTIFF-RESPONDENT,

V

ORDER

LAKSHMANA RAO KONERU, M.D., ABBOTT ANESTHESIOLOGISTS
ASSOCIATES, P.C., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (HEDWIG M. AULETTA OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered November 1, 2023. The order, insofar as appealed from, denied in part the motion of defendants Lakshmana Rao Koneru, M.D., and Abbott Anesthesiologists Associates, P.C., for summary judgment.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

88

CA 24-00773

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

MAYFAIR LANE, INC., PLAINTIFF-APPELLANT,

V

ORDER

NOEL SUTTON, DEFENDANT-RESPONDENT.

COLLIGAN LAW LLP, BUFFALO (ERICK D. KRAEMER OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mary L. Slisz, J.), entered October 20, 2023. The order, insofar as appealed from, granted the motion of defendant to vacate a notice of pendency.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

111

CA 23-01834

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

DONALD J. LEONE, LORI LEONE AND
DONALD J. LEONE, LLC, PLAINTIFFS-APPELLANTS,

V

ORDER

ELMWOOD BIDWELL REDEVELOPMENT COMPANY, LLC,
CIMINELLI REAL ESTATE CORPORATION AND
CIMINELLI REAL ESTATE VENTURES, LLC,
DEFENDANTS-RESPONDENTS.

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

LIPPES MATHIAS LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Craig D. Hannah, J.), entered October 12, 2023. The order granted the motion of defendants to dismiss the complaint.

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court

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

127

CA 24-00160

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

TAISHA ORTIZ, PLAINTIFF-APPELLANT,

V

ORDER

DOMENICO ALAMPI, DEFENDANT-RESPONDENT.

PARISI & BELLAVIA LAW, LLP, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (LAURA B. GARDINER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered December 18, 2023. The order and judgment, insofar as appealed from, denied the motion and cross-motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 12 and 23, 2024,

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

Entered: January 31, 2025

Ann Dillon Flynn
Clerk of the Court