SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 25, 2025

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. NANCY E. SMITH

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED APRIL 25, 2025

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_____	802	CA 24 00390	U.S. BANK NATIONAL ASSOCIATION V PATRICK M. ECKER
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 23-01212

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

U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE FOR CIM TRUST 2016-4, MORTGAGE-BACKED NOTES, SERIES 2016-4, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK M. ECKER, DEFENDANT-APPELLANT, ROSE I. ECKER, ALSO KNOWN AS ROSE E. ECKER, ET AL., DEFENDANTS. (APPEAL NO. 1.)

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., JAMESTOWN (RICK GOODELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

MCCALLA RAYMER LEIBERT PIERCE, LLC, NEW YORK CITY (HAROLD L. KOFMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered June 14, 2023. The order denied the cross-motion of defendant Patrick M. Ecker seeking, inter alia, a determination that plaintiff failed to negotiate in good faith in violation of CPLR 3408 (f).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the cross-motion seeking a determination that plaintiff failed to negotiate in good faith in violation of CPLR 3408 (f) during the period from November 14, 2019 to November 23, 2021 and seeking the tolling of the interest, costs, and fees that accumulated during that period, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Chautauqua County, for further proceedings in accordance with the following memorandum: In this residential mortgage foreclosure action, in appeal No. 1, Patrick M. Ecker (defendant) appeals from an order denying his cross-motion seeking, inter alia, a determination that plaintiff failed to negotiate in good faith in violation of CPLR 3408 (f) and an order tolling the interest, costs and fees that accumulated during the time during which plaintiff failed to negotiate in good faith. In appeal No. 2, defendant appeals from an order granting plaintiff's motion to discontinue the action.

In February 2006, defendant and defendant Rose I. Ecker, also known as Rose E. Ecker (collectively, Ecker defendants) executed a promissory note secured by a mortgage against their residential property. In June 2018, the Ecker defendants defaulted in payment on

the note, and in February 2019, plaintiff commenced this action to foreclose the mortgage.

From May 2019 until November 2022, over a span of almost 3½ years, the Ecker defendants and plaintiff participated in 17 Foreclosure Settlement Conferences (FSCs). The initial FSC took place in May 2019. On October 16, 2019, Supreme Court confirmed that all supporting paperwork from defendant had been supplied in support of his loss mitigation (LM) application. At the FSC on September 15, 2021, plaintiff advised the court that a decision had not been reached on defendant's LM application because of the COVID-19 related moratoriums, and plaintiff stated that defendant was to submit a new LM application because the original application had expired.

At the outset, we dismiss the appeal from the order in appeal No. 2 as abandoned inasmuch as defendant has not raised any contentions with respect to that order (*see Golf Glen Plaza Niles, Il. L.P. v Amcoid USA, LLC*, 160 AD3d 1375, 1376 [4th Dept 2018]).

In appeal No. 1, defendant contends the court erred in denying those parts of the cross-motion seeking a determination that plaintiff failed to negotiate in good faith and seeking interest, costs and fees that accumulated after plaintiff breached its statutory duty to negotiate in good faith. We agree with defendant.

CPLR 3408 provides for mandatory settlement conferences in certain residential foreclosure actions and requires that "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible" (CPLR 3408 [f]; *see Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 11 [2d Dept 2013]).

" 'The purpose of the good faith requirement [in CPLR 3408] is to ensure that both plaintiff and defendant are prepared to participate in a meaningful effort at the settlement conference to reach resolution' " (*US Bank N.A. v Sarmiento*, 121 AD3d 187, 200 [2d Dept 2014]). To determine whether a party failed to negotiate in good faith pursuant to CPLR 3408 (f), a court must "consider[ ] whether the totality of the circumstances demonstrates that the party's conduct did not constitute a meaningful effort at reaching a resolution" (*id.* at 203). During settlement conferences held pursuant to CPLR 3408, "[t]he court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner" (22 NYCRR 202.12-a [c] [4]). Regulations provide that, "within 30 days of receiving [a] complete loss mitigation application, a [loan] servicer shall: (i) [e]valuate the borrower for all loss mitigation options available to the borrower; (ii) [r]eview any initial determination to deny a loss mitigation option. Such a review shall be performed by supervisory personnel who were not involved in making the initial determination; and (iii) [i]f the servicer denies the borrower's loss mitigation application, the servicer shall, upon the borrower's request, provide to the borrower the result of any evaluation of the net present value

of a loss mitigation option if the servicer performed such an evaluation" (3 NYCRR 419.7 [e] [1]).

Here, we conclude that the totality of the circumstances demonstrates that plaintiff failed to negotiate in good faith. In its brief, plaintiff concedes that defendant submitted a complete LM application by October 15, 2019, which means that the deadline for plaintiff to complete its evaluation of the application was no later than November 14, 2019 (*see* 3 NYCRR 419.7 [e] [1]). During FSCs that took place on November, 20, 2019, December 18, 2019 and January 15, 2020, however, plaintiff offered no information on the status of its review despite repeated requests for a response to the application. Thus, when the FSCs were postponed due to COVID-19 in March 2020, plaintiff had already failed to meet the 30-day deadline for evaluating the LM application. Further, there is no evidence in the record supporting plaintiff's argument that the COVID-19 pandemic prevented it from complying with the requirement to evaluate the application within 30 days.

When FSCs resumed in September 2021, plaintiff still had not made a decision on defendant's LM application and, in lieu of an update, plaintiff required that defendant submit a new application. On November 23, 2021 plaintiff provided defendant with a new LM application packet. We conclude that none of plaintiff's subsequent actions cure plaintiff's failure to negotiate in good faith. Pursuant to CPLR 3408, a "court shall, at a minimum, toll the accumulation and collection of interest, costs, and fees *during any undue delay* caused by the plaintiff" (CPLR 3408 [j] [emphasis added]; *see generally U.S. Bank, N.A. v Smith*, 123 AD3d 914, 917 [2d Dept 2014]). Here, we conclude that plaintiff caused an undue delay from November 14, 2019, the deadline for plaintiff to complete its review of the complete LM application submitted by defendant on October 15, 2019, until November 23, 2021, the date on which plaintiff provided defendant with a new LM application package.

We therefore modify the order in appeal No. 1 by granting those parts of defendant's cross-motion seeking a determination that plaintiff failed to negotiate in good faith during the period from November 14, 2019 to November 23, 2021, and seeking the tolling of interest, costs, and fees that accumulated during that period, and we remit the matter to Supreme Court for calculation of the accumulated interest, costs, and fees during the period from November 14, 2019 to November 23, 2021.

We have reviewed defendant's remaining contention and conclude that it is without merit.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

802

CA 24-00390

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

U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE FOR CIM TRUST 2016-4, MORTGAGE-BACKED NOTES, SERIES 2016-4, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK M. ECKER, DEFENDANT-APPELLANT, ROSE I. ECKER, ALSO KNOWN AS ROSE E. ECKER, ET AL., DEFENDANTS. (APPEAL NO. 2.)

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., JAMESTOWN (RICK GOODELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

MCCALLA RAYMER LEIBERT PIERCE, LLC, NEW YORK CITY (HAROLD L. KOFMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered June 14, 2023. The order, inter alia, granted the motion of plaintiff to discontinue the action.

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

Same memorandum as in *U.S. Bank Natl. Assn. v Ecker* ([appeal No. 1] — AD3d — [Apr. 25, 2025] [4th Dept 2025]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

821

CA 23-02140

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

RUCHATNEET PRINTUP, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN W. BECKWITH AND WYOMING COUNTY
HARLEY DAVIDSON, INC., DEFENDANTS-RESPONDENTS.

NICHOLAS J. NARCHUS, PLLC, NIAGARA FALLS (NICHOLAS J. NARCHUS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Terrence M. Parker, A.J.), entered June 8, 2023. The order granted the motion of defendants for summary judgment.

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 against defendant Wyoming County Harley Davidson, Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell from a box truck that was on property owned by defendant Wyoming County Harley Davidson, Inc. (defendant). When the accident occurred, plaintiff was delivering newspapers to defendant's property. Plaintiff used a box truck to deliver the newspapers and, on the date of the accident, parked the truck partly on the shoulder of the road and partly on defendant's parking lot, which had over one foot of snow on it, according to plaintiff's deposition testimony. To deliver the newspapers, plaintiff walked onto defendant's property and through the snow to get to the side door of the box truck. Plaintiff sustained injuries when he slipped while he was climbing the metal ladder on the side of the box truck and fell on allegedly uneven ground. Defendants moved for summary judgment dismissing the complaint, contending, inter alia, that "plaintiff did not fall *on* . . . defendant's property" but "rather . . . fell from his truck *onto* [that] property," and therefore defendant did not owe a duty of care to plaintiff. Supreme Court granted the motion on the basis that plaintiff did not offer evidence to establish that defendant's alleged breach of its duty to keep its property reasonably safe was a proximate cause of his fall from the box truck. Plaintiff appeals.

Preliminarily, we note that plaintiff does not address in his brief on appeal the dismissal of the complaint against defendant Stephen W. Beckwith, and we therefore deem any challenge to that part of the order abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We agree with plaintiff that the court erred in granting the motion with respect to defendant, however, and we therefore modify the order accordingly. Defendant, "as the movant for summary judgment, had the burden of establishing as a matter of law that [it] was not negligent or that, even if [it] was negligent, [its] negligence was not a proximate cause of the accident" (*Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept 2018]). Here, defendants, in support of their motion, submitted plaintiff's deposition testimony, in which plaintiff testified that after walking through the snow he started climbing the ladder on the side of the box truck and then slipped and fell on uneven ground causing his foot to bend at a 90-degree angle from his ankle. We conclude that a jury could reasonably conclude, based on plaintiff's testimony, that the accumulated snow caused or contributed to his accident (*see Garcia v Black Sea Props., LLC*, 227 AD3d 1486, 1488 [4th Dept 2024]; *Trzaska v Allied Frozen Stor., Inc.*, 77 AD3d 1291, 1293 [4th Dept 2010]), and that the uneven ground "caused or contributed to plaintiff's injuries" (*Stackwick v Young Men's Christian Assn. of Greater Rochester*, 242 AD2d 878, 879 [4th Dept 1997]). Therefore, defendants failed to meet their initial burden of establishing entitlement to summary judgment, and the burden never shifted to plaintiff to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

We also reject defendants' contention, raised as an alternative ground for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545 [1983]), that summary judgment was proper because defendant did not owe a duty of care to plaintiff, inasmuch as plaintiff did not slip "on" its property but rather while he was on the ladder of a box truck that defendant had no duty to maintain. "The question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is . . . a question of law for the courts" (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988], *rearg denied* 72 NY2d 953 [1988]), but, "once the nature of the duty has been determined as a matter of law, whether a particular defendant owes a duty to a particular plaintiff is a question of fact" (*Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]; *see Bialecki v HBO Bldrs. W., Inc.*, 221 AD3d 1573, 1576 [4th Dept 2023]). A property owner has a duty to maintain the premises in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584-585 [1994]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). "The duty of a landowner to maintain [its] property in a safe condition extends to persons whose presence is reasonably foreseeable by the landowner" (*Breau v Burdick*, 166 AD3d 1545, 1546 [4th Dept 2018]). Here, plaintiff, who was in the course of routine delivery of newspapers to defendant, using a box truck, was injured after walking through an accumulation of snow on

defendant's property and while the box truck remained on that property. We conclude that defendants failed to establish as a matter of law that defendant did not owe a duty to plaintiff (*see generally Kimmell*, 89 NY2d at 263; *Valvo v Loyal Order of Moose 1614*, 27 AD3d 1110, 1111 [4th Dept 2006]; *Perrelli v Orlow*, 273 AD2d 533, 534-535 [3d Dept 2000]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

826

CA 23-01463

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

KATHY ARCANGELI, AS ADMINISTRATOR OF THE ESTATE OF JAY EMERY ARCANGELI, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GLOBAL INDUSTRIES, INC., AS SUCCESSOR IN INTEREST TO HUTCHINSON MAYRATH, INC., AND/OR MAYRATH INDUSTRIES, INC., AND/OR ROYAL INDUSTRIES, INC., DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 1.)

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

BARCLAY DAMON LLP, ROCHESTER (DAVID M. FULVIO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered August 30, 2023. The order granted the motion for summary judgment of defendant Global Industries, Inc., as successor in interest to Hutchinson Mayrath, Inc., and/or Mayrath Industries, Inc., and/or Royal Industries, Inc.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendant Global Industries, Inc., as successor in interest to Hutchinson Mayrath, Inc., and/or Mayrath Industries, Inc., and/or Royal Industries, Inc., is denied, and the complaint is reinstated against that defendant.

Memorandum: While plaintiff's decedent was working on his family farm he became entangled in a grain auger and sustained fatal injuries. Thereafter, plaintiff commenced this action against defendant Global Industries, Inc., as successor in interest to Hutchinson Mayrath, Inc., and/or Mayrath Industries, Inc., and/or Royal Industries, Inc. (Global), and Lea Michael Hares, Frances M. Hares, and Jesse James Hares, individually and/or collectively doing business as Hares Farms (collectively, Hares defendants), seeking to recover damages. As relevant, plaintiff asserted causes of action against Global for negligent design (first cause of action), strict products liability based on defective design (second cause of action), and strict products liability based on failure to warn (third cause of

action). Plaintiff asserted a cause of action against the Hares defendants for negligence, alleging that the Hares defendants failed to warn decedent of a safety defect, i.e., that a guard shield was missing from the auger (fourth cause of action), and a wrongful death cause of action against all defendants (fifth cause of action). In appeal No. 1, plaintiff appeals from an order granting the motion of Global for summary judgment dismissing the complaint against it. In appeal No. 2, plaintiff appeals from an order granting the motion of the Hares defendants for summary judgment dismissing the complaint against them. We reverse in both appeals.

The subject grain auger was originally manufactured by a division of Global. The Hares defendants purchased the auger at some point between 2012 and 2014 from another individual who had purchased the auger at auction and, after using the auger for a few months, they decided to sell it to decedent in June 2014. Certain guards that covered a connection point on the auger (connection point) were in place on the auger when the Hares defendants bought it, but not at the time of decedent's accident. In 2019, decedent was using the auger to transfer grain when he became entangled at the connection point where there was no guard.

In appeal No. 1, plaintiff contends that Supreme Court erred in granting Global's motion with respect to the second and third causes of action, for strict products liability based on design defect and failure to warn, respectively. We agree. "A cause of action in strict products liability lies where a manufacturer places on the market a product which has a defect that causes injury," and a defect may consist of defective manufacturing, defective design, or a failure of the manufacturer to provide adequate warnings about the use of the product (*Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 478-479 [1980]). With respect to the alleged design defect, Global had the burden of establishing "through the affidavit of a person with qualifications, experience, or personal knowledge in the design, manufacture or use of the product that the product complied with all applicable industry standards . . . , and that the product was reasonably safe for its intended use when it was manufactured consistent with those industry standards" (*Chamberlain v MAC Trailer Mfg., Inc.*, 128 AD3d 1336, 1337-1338 [4th Dept 2015] [internal quotation marks omitted]). Here, Global failed to meet its initial burden with respect to the second cause of action because the expert affidavit submitted by it was insufficient to establish that the auger "was manufactured in accordance with industry standards in effect at the time of manufacture" (*Steinbarth v Otis El. Co.*, 269 AD2d 751, 752 [4th Dept 2000]; *cf. Beechler v Kill Bros. Co.*, 170 AD3d 1606, 1607-1608 [4th Dept 2019], *lv denied in part & dismissed in part* 34 NY3d 973 [2019]; *Terwilliger v Max Co., Ltd.*, 137 AD3d 1699, 1702 [4th Dept 2016]). Additionally, because Global did not establish that the auger was not defective at the time it was manufactured and sold, it could not establish entitlement to summary judgment based upon its substantial modification defense (*see Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 56 [2014]). Inasmuch as Global failed to meet its initial burden with respect to the second cause of action, we need not consider the sufficiency of plaintiff's opposing papers with respect

thereto (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Mariani v Guardian Fences of WNY, Inc.*, 194 AD3d 1380, 1381-1382 [4th Dept 2021]).

We also agree with plaintiff that the court erred in granting that part of the motion with respect to the third cause of action, for strict products liability based on failure to warn. "The duty of a manufacturer to provide instructions and warnings on the proper and safe use of its product extends to persons exposed to a foreseeable and reasonable risk of harm by the failure to warn . . . A manufacturer may also be liable for failure to warn of the consequences of using its machine when original safety devices are rendered inoperative . . . Moreover, manufacturer liability for a failure to warn will exist even in the presence of substantial modification of the product" (*Gian v Cincinnati Inc.*, 17 AD3d 1014, 1016 [4th Dept 2005] [internal quotation marks omitted]). Even assuming, arguendo, that Global met its initial burden on the motion with respect to the third cause of action, we conclude that plaintiff raised a triable issue of fact by submitting an affidavit from an expert who opined that the warning labels were inadequate (*see Repka v Arctic Cat, Inc.*, 20 AD3d 916, 918 [4th Dept 2005]; *Oliver v NAMCO Controls*, 161 AD2d 1188, 1189-1190 [4th Dept 1990]; *see generally Houston v McNeilus Truck & Mfg., Inc.*, 115 AD3d 1185, 1187 [4th Dept 2014]).

We likewise conclude that the court erred in granting the motion with respect to the first cause of action, for negligent design. " '[I]nasmuch as there is almost no difference between a prima facie case in negligence and one in strict [products] liability,' " we conclude that for the same reasons set forth above regarding the second cause of action Global failed to meet its burden on the motion with respect to the cause of action for negligent design (*Beechler*, 170 AD3d at 1608; *see Mariani*, 194 AD3d at 1382; *cf. Menear v Kwik Fill*, 174 AD3d 1354, 1357 [4th Dept 2019]).

In appeal No. 2, assuming, arguendo, that the Hares defendants met their initial burden on the motion with respect to the fourth cause of action, for failure to warn, we conclude that plaintiff raised a triable issue of fact whether the hazard was open and obvious and thus whether the Hares defendants owed decedent a duty to warn. "Even casual sellers owe a duty to warn of dangers that are not open and obvious or readily discernable . . . The determination of [w]hether a hazard is open and obvious cannot be divorced from the surrounding circumstances . . . A condition that is ordinarily apparent to a person making reasonable use of [their] senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*Rosario v Monroe Mech. Servs., Inc.*, 158 AD3d 1155, 1157 [4th Dept 2018], *lv dismissed* 31 NY3d 1067 [2018] [internal quotation marks omitted]). " '[W]here reasonable minds might disagree as to the extent of plaintiff's knowledge of the hazard, the question is for the jury' " (*Johnson v Delta Intl. Mach. Corp.*, 60 AD3d 1307, 1308 [4th Dept 2009]; *cf. Breau v Burdick*, 166 AD3d 1545, 1548-1549 [4th Dept 2018]). Here, issues of fact exist whether the Hares defendants negligently failed to warn decedent of a

danger that was not open and obvious.

Finally, in appeal Nos. 1 and 2, we conclude that, in light of our determination, the court erred in granting defendants' respective motions with respect to the wrongful death cause of action (*see generally* EPTL 5-4.1 [1]; *Freeland v Erie County*, 204 AD3d 1465, 1467 [4th Dept 2022]; *Bulman v P & R Enter.*, 17 AD3d 1139, 1140 [4th Dept 2005]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

827

CA 23-01475

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

KATHY ARCANGELI, AS ADMINISTRATOR OF THE ESTATE OF JAY EMERY ARCANGELI, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GLOBAL INDUSTRIES, INC., AS SUCCESSOR IN INTEREST TO HUTCHINSON MAYRATH, INC., AND/OR MAYRATH INDUSTRIES, INC., AND/OR ROYAL INDUSTRIES, INC., DEFENDANT, LEA MICHAEL HARES, FRANCES M. HARES AND JESSE JAMES HARES, INDIVIDUALLY AND/OR COLLECTIVELY DOING BUSINESS AS HARES FARMS, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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

SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (RYAN J. MILLS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered August 30, 2023. The order granted the motion for summary judgment of defendants Lea Michael Hares, Frances M. Hares and Jesse James Hares, individually and/or collectively doing business as Hares Farms.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendants Lea Michael Hares, Frances M. Hares, and Jesse James Hares, individually and/or collectively doing business as Hares Farms is denied, and the complaint is reinstated against those defendants.

Same memorandum as in *Arcangeli v Global Indus., Inc.* ([appeal No. 1] — AD3d — [Apr. 25, 2025] [4th Dept 2025]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

842

CA 23-01603

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

GARY A. GRANATH AND LORRAINE M. GRANATH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MONROE COUNTY, TODD BAXTER, AS SHERIFF OF
MONROE COUNTY AND KHADIJA H. FONG,
DEFENDANTS-RESPONDENTS.

FARACI LANGE, LLP, ROCHESTER (LESLEY E. NIEBEL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered September 11, 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 affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries they sustained in a motor vehicle collision that occurred in an intersection and involved a police vehicle driven by defendant Khadija H. Fong, a Monroe County Sheriff's Deputy. At the time the collision occurred, Fong was responding to a call for an unrelated motor vehicle accident with heavy damage. Fong's vehicle was traveling westbound while proceeding through a red traffic signal, and plaintiffs' vehicle was traveling southbound while proceeding through a green traffic signal. Defendants moved for summary judgment dismissing the complaint on, inter alia, the ground that Fong was engaged in the emergency operation of an authorized emergency vehicle at the time of the accident and her operation of the vehicle was not reckless (*see generally* Vehicle and Traffic Law § 1104). Supreme Court granted the motion, and plaintiffs now appeal. We affirm.

Pursuant to Vehicle and Traffic Law § 1104, the driver of an emergency vehicle who is engaged in an emergency operation may "[p]roceed past a steady red signal . . . but only after slowing down as may be necessary for safe operation" (§ 1104 [b] [2]; *see Martinez v City of Rochester*, 164 AD3d 1655, 1655 [4th Dept 2018]; *see generally Kabir v County of Monroe*, 68 AD3d 1628, 1630 [4th Dept 2009], *affd* 16 NY3d 217 [2011]). "Under those circumstances, the

driver is exempt from the consequences of their ordinary negligence and liable only for conduct constituting 'the higher standard of reckless disregard for the safety of others' " (*Williams v City of Buffalo*, 229 AD3d 1267, 1267 [4th Dept 2024]). The reckless disregard standard requires "evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*Frezzell v City of New York*, 24 NY3d 213, 217 [2014] [internal quotation marks omitted]; *see Saarinen v Kerr*, 84 NY2d 494, 501 [1994]). Factors considered in determining whether a police officer acted recklessly in operating an emergency vehicle include the nature of the underlying police call, road conditions, traffic, weather, time of day, the speed of the officer's vehicle, and whether the officer followed departmental guidelines (*see Gernatt v Gregoire*, 217 AD3d 1340, 1342 [4th Dept 2023]).

Here, we conclude that defendants met their initial burden on the motion. Initially, it is undisputed that the reckless disregard standard of care applies because Fong was driving an emergency vehicle and was engaged in an emergency operation at the time she proceeded through the red traffic signal (*see* Vehicle and Traffic Law § 1104 [b] [2]). In addition, defendants established that Fong's conduct did not rise to a level of reckless disregard for the safety of others. Defendants' submissions established, in particular, that Fong took several precautions before proceeding into the intersection against the red traffic signal, including bringing her vehicle to a complete stop, looking in all directions, activating her emergency lights, and proceeding slowly into the intersection (*see Levere v City of Syracuse*, 173 AD3d 1702, 1704 [4th Dept 2019]; *Williams v Fassinger*, 119 AD3d 1368, 1369 [4th Dept 2014], *lv denied* 24 NY3d 912 [2014]; *Green v State of New York*, 71 AD3d 1310, 1312 [3d Dept 2010]).

In opposition, plaintiffs failed to raise a triable issue of fact. Contrary to plaintiffs' contention and the view of our dissenting colleagues, any deposition testimony suggesting that Fong's view may have been obstructed is speculative and insufficient to raise a triable issue of fact (*see Weydman Elec., Inc. v Joint Schs. Constr. Bd.*, 140 AD3d 1605, 1607 [4th Dept 2016], *lv dismissed* 28 NY3d 1024 [2016]). Even assuming, arguendo, that Fong "experienced a short-term reduction in visibility of the intersection where the collision occurred," we conclude that "such factor . . . does not constitute reckless disregard for the safety of others under the circumstances of this case" (*Nikolov v Town of Cheektowaga*, 96 AD3d 1372, 1373 [4th Dept 2012]). Further, plaintiffs contend, and the dissent agrees, that there are questions of fact whether Fong timely engaged her emergency lights and whether she used a siren or horn prior to entering the intersection, and whether such a failure to do so violated departmental policy. However, we reject that contention inasmuch as "the alleged violation [of departmental policy] failed to establish that [Fong's] conduct was reckless" (*Hubbard v Robinson*, 184 AD3d 1097, 1099 [4th Dept 2022]; *see Martinez*, 164 AD3d at 1656), and the use of emergency lights or a siren or horn is not required for police vehicles to obtain the benefits of the statute (*see* Vehicle and

Traffic Law § 1104 [c]; *Nikolov*, 96 AD3d at 1373).

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

All concur except BANNISTER and NOWAK, JJ., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent. In our view, there are triable issues of fact whether defendant Khadija H. Fong, a Monroe County Sheriff's Deputy, operated her vehicle with reckless disregard for the safety of others when she entered the intersection in question without the right-of-way and collided with plaintiffs' vehicle.

It is undisputed that Vehicle and Traffic Law § 1104 applies in this case. Vehicle and Traffic Law § 1104 grants the driver of an authorized emergency vehicle special driving privileges when involved in an emergency operation, including, inter alia, passing through red lights, exceeding the speed limit and disregarding regulations governing the direction of movement or turning in specified directions, "*as long as certain safety precautions are observed*" (*Saarinen v Kerr*, 84 NY2d 494, 499 [1994] [emphasis added]; *see Frezzell v City of New York*, 24 NY3d 213, 217 [2014]; *Ellis v City of Buffalo*, 218 AD3d 1131, 1135 [4th Dept 2023]). Section 1104 does not "protect the driver from the consequences of [their] reckless disregard for the safety of others" (*Frezzell*, 24 NY3d at 217). The analysis of whether the reckless disregard standard has been met "is *a fact-specific inquiry*[,] and our analysis is focused on the precautionary measures taken by [the emergency responder] to avoid causing harm to the general public weighed against [the emergency responder's] duty to respond to an urgent emergency situation" (*id.* at 217-218 [emphasis added]; *see McElhinney v Fitzpatrick*, 193 AD3d 1409, 1409-1410 [4th Dept 2021]). "In other words, emergency personnel will be liable for 'disproportionate, overreactive conduct' " (*Ellis*, 218 AD3d at 1135).

Here, defendants' submissions on their motion reflect that, just prior to the collision at issue here, Fong and two other deputies, each in separate patrol vehicles, were congregating in a parking lot near the intersection in question when they heard a call regarding a motor vehicle accident that happened a few miles away. There is no question that, at the time of the collision with plaintiffs' vehicle, the deputies were responding to the police call, with Fong driving the lead vehicle and the two other deputies driving the second and third patrol vehicles, respectively. There is also no dispute that Fong entered the nearby intersection against the red light and without the right-of-way. Notably, the deputies driving the second and third patrol vehicles did not join Fong in entering the intersection against the red light. The driver of the third patrol vehicle testified at her deposition that her plan was to wait at the light until it turned green and that she was not intending to go through the intersection against the red light as Fong did.

Fong testified at her deposition that she "believe[d]" that the intersection was clear, and that she had her emergency lights on and

was using her air horn. However, both plaintiffs testified at a General Municipal Law § 50-h hearing that they did not see emergency lights and never heard sirens or a horn prior to the impact. The deputy driving the second patrol vehicle testified at his deposition that he believed Fong turned on her vehicle's emergency lights when she stopped at the intersection just before entering against the red light, but never heard a siren being activated. The deputy driving the third patrol vehicle testified at her deposition that she could not recall Fong activating her emergency lights until Fong reached the intersection and never heard sirens. Neither of the deputies following Fong had turned on their vehicles' lights or sirens at any time. Moreover, both of those deputies testified at their depositions that the Monroe County Sheriff's Department policies require that, when an officer goes into emergency operation, the officer is required to dispatch such information and activate the vehicle's lights and sirens or horn. Neither of the deputies following Fong could recall whether Fong dispatched that she was in emergency operation, and both testified that they did not recall her using her vehicle's siren or air horn when entering the intersection.

Additionally, defendants' submissions reflect that there are questions of fact regarding the sight lines of Fong when entering the intersection. Plaintiff Gary A. Granath testified at the General Municipal Law § 50-h hearing that he was familiar with the intersection from his work as a school bus driver and that three of the corners have obstructed views, which could have made it impossible for Fong to properly evaluate the propriety of entering the intersection (*see Gernatt v Gregoire*, 217 AD3d 1340, 1342 [4th Dept 2023]; *McLoughlin v City of Syracuse*, 206 AD3d 1600, 1602 [4th Dept 2022]).

Even assuming that Fong stopped before entering the intersection, we conclude that a jury could find based on the facts adduced in defendants' own submissions that Fong entered the intersection in disregard of the traffic signal, that she failed to activate her emergency lights and siren in the presence of an obstructed view, and that her actions were in violation of departmental policy and, consequently, that Fong acted with reckless disregard for the safety of others. Thus, viewing the facts in the light most favorable to plaintiffs as the nonmoving party and drawing all inferences in their favor, we conclude that Supreme Court should have denied the motion insofar as it sought summary judgment dismissing the complaint on the ground that Fong, as a matter of law, did not act with reckless disregard under Vehicle and Traffic Law § 1104 (*see McElhinney*, 193 AD3d at 1410; *see generally Williams v Beemiller, Inc.*, 159 AD3d 148, 152 [4th Dept 2018], *affd* 33 NY3d 523 [2019]).

Finally, with respect to defendants' contentions that affirmance is nevertheless warranted on alternative grounds, we agree that the court properly granted defendants' motion to the extent that it sought summary judgment dismissing the complaint against defendant Todd Baxter, as Sheriff of Monroe County (*see Barr v County of Albany*, 50 NY2d 247, 257 [1980]; *Smelts v Meloni* [appeal No. 3], 306 AD2d 872, 873-874 [4th Dept 2003], *lv denied* 100 NY2d 516 [2003]). We conclude,

however, that defendants' remaining contentions raised as alternative grounds for affirmance lack merit. We therefore would modify the order by denying defendants' motion in part and reinstating the complaint except to the extent that it is asserted against Baxter.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01384

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

KAREN SWEATMAN, AS ADMINISTRATOR OF THE ESTATE
OF JACOB SWEATMAN, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE HURLBUT, THE HURLBUT, LLC, HURLBUT CARE
COMMUNITIES, ROHM SERVICES CORPORATION AND
ROBERT W. HURLBUT, DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (JESSE A. DRUMM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PULLANO & FARROW, EAST ROCHESTER (JEFFREY T. WOLBER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Emilio Colaiacovo, J.), entered July 28, 2023. The order, insofar as appealed from, granted in part the motion of defendants to dismiss the amended complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety, and the amended complaint is reinstated in its entirety.

Memorandum: Plaintiff commenced this action for, inter alia, wrongful death, arising from the death of plaintiff's decedent (decedent) in March 2020 following decedent's transfer from defendants' nursing home to a local hospital. After plaintiff filed an amended complaint, defendants moved to dismiss the amended complaint on various grounds. Plaintiff now appeals from an order that, inter alia, granted defendants' motion in part by dismissing the amended complaint, pursuant to CPLR 3211 (a) (7), insofar as it seeks damages as a result of decedent's exposure to or complications from COVID-19. Supreme Court granted the motion to that extent based upon the immunity conferred by the Emergency or Disaster Treatment Protection Act (EDTPA) (Public Health Law former art 30-D, §§ 3080-3082) and the Federal Public Readiness and Emergency Preparedness Act (PREP Act) (42 USC § 247d-6d). Plaintiff contends that the court erred to the extent that it granted the motion, and we agree.

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 [the proponent] has stated one" (*Leon*, 84 NY2d at 88 [internal quotation marks omitted]). Thus, "[s]ummary dismissal is appropriate under CPLR 3211 (a) (7) when the defendant[s'] evidentiary submissions 'establish conclusively that plaintiff has no cause of action' " (*Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 87 [4th Dept 2015], quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

With respect to the EDTPA, it provided, with certain exceptions, that "any health care facility or health care professional shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services" as long as three conditions were met: the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; the act or omission occurred in the course of arranging for or providing health care services and the treatment of the individual was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives; and the services were arranged or provided in good faith (Public Health Law former § 3082 [1]). Health care facilities included nursing homes (*see* former § 3081 [3]), and health care professionals included individual medical providers as well as administrators and executives of health care facilities (*see* former § 3081 [4]). There is no dispute that defendants fall within the group of individuals and entities covered by the EDTPA, inasmuch as each of them is either a health care facility or a health care professional (*see* former § 3081 [3], [4]). We agree, however, with plaintiff that defendants' submission of the affidavit of Robert G. Hurlbut, the administrator of the facility during the relevant time period, does not conclusively establish that the act or omission constituting defendants' alleged negligence occurred in the course of arranging for or providing health care services, and it likewise does not conclusively establish that the treatment of decedent was impacted by the health care facility's or health care professionals' decisions or activities in response to or resulting from the COVID-19 outbreak (*see Holder v Jacob*, 231 AD3d 78, 89 [1st Dept 2024]). We therefore conclude that defendants' submissions did not conclusively establish the three requirements for immunity under the EDTPA (*see* former § 3082 [1]; *Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 AD3d 618, 619 [2d Dept 2024]).

With respect to the PREP Act, that legislation "provides broad immunity 'from suit and liability under [f]ederal and state law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of

a covered countermeasure' during a public-health emergency" (*Solomon v St. Joseph Hosp.*, 62 F4th 54, 58 [2d Cir 2023], quoting 42 USC § 247d-6d [a] [1]). "Effective February 4, 2020, the [Secretary of the Department of Health and Human Services] declared COVID-19 . . . a public health emergency and defined 'covered countermeasures' as any antiviral, drug, biologic, diagnostic, device, or vaccine used to treat, diagnose, cure, prevent, or mitigate COVID-19" (*id.* [internal quotation marks omitted]). Under the PREP Act, the scope of immunity "applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing or use of such countermeasure" (42 USC § 247d-6d [a] [2] [B]). Here, plaintiff alleged, among other things, that defendants failed to properly sterilize equipment to prevent the spread of infection, failed to follow their own infection control practices, and failed to maintain and utilize the proper personal protective equipment as required by federal law. Plaintiff further alleged that decedent suffered a range of injuries from defendants' negligence, including pressure ulcers, head injuries, and lacerations, in addition to the contraction of COVID-19. Defendants' submissions failed to establish that decedent's injuries arose from the use of an approved countermeasure under the PREP Act (*see Kluska v Montefiore St. Luke's Cornwall*, 227 AD3d 690, 692 [2d Dept 2024]). Based on the foregoing, we reverse the order insofar as appealed from, deny the motion in its entirety, and reinstate the amended complaint in its entirety.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

883

CA 23-02064

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

ROCK STAR ENTERPRISES, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VILLAGE OF SYLVAN BEACH, DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NADINE C. BELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

DIRK J. OUDEMOOL, SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered May 25, 2023. The order and judgment, inter alia, dismissed the first cause of action without prejudice and granted that part of the motion of plaintiff seeking summary judgment on its second cause of action.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying plaintiff's motion in its entirety, vacating the third and fourth ordering paragraphs and dismissing without prejudice the second cause of action, and as modified the order and judgment is affirmed without costs.

Memorandum: In this RPAPL article 15 action, defendant, Village of Sylvan Beach (Village), appeals from an order and judgment that, following a CPLR 2218 hearing, inter alia, dismissed plaintiff's first cause of action, alleging adverse possession, without prejudice for failing to name necessary parties, and granted that part of plaintiff's motion seeking summary judgment on its second cause of action, for permanent injunctive relief.

At issue in this action is the ownership of a concrete patio adjoining a cottage that plaintiff acquired in 2018. The patio extends onto a beach. In 2019, plaintiff and the Village became embroiled in a dispute regarding the ownership of the beach underlying the patio. The Village claimed ownership of the beach, and thus the patio, pursuant to a 1988 quitclaim deed. Plaintiff claimed ownership of the patio via adverse possession. Following depositions and discovery, plaintiff moved for summary judgment on the complaint, and the Village cross-moved for summary judgment "dismissing [the] complaint with prejudice." Supreme Court thereafter issued a written decision in which it determined that plaintiff could not have acquired the patio by adverse possession after 1988 inasmuch as the Village purported to own the beach and has used it for a public purpose since

that time (*see generally Loree v Barnes*, 59 AD3d 965, 965 [4th Dept 2009]). However, the court reserved decision on the motion and cross-motion and ordered a CPLR 2218 hearing to determine the ownership of the property in question in the years between 1968 and 1988, i.e., the time period before the Village obtained the quitclaim deed during which plaintiff alleges that its predecessors in interest adversely possessed the property (*see generally* RPAPL former 522; *Walling v Przybylo*, 7 NY3d 228, 232 [2006]).

During the CPLR 2218 hearing, plaintiff called two witnesses and offered several items into evidence; the Village called no witnesses and adduced no documentary evidence. The undisputed evidence adduced during the hearing established that, prior to 1988, there was no deed conveying the beach to the Village, nor was there any indication that the beach was ever publicly owned before 1988. The evidence established that the beach was conveyed to a James D. Spencer in 1873, that there were certain nonparty heirs of Spencer who may still hold title to the beach, and that the Village may not hold any interest in the beach or the patio inasmuch as the chain of title indicated that Spencer's heirs still owned the land when the Village purchased it in 1988, and there was no overlap between the names of those heirs and the names of the grantors on the Village's 1988 quitclaim deed. Following the hearing, the court issued the order and judgment on appeal.

The Village contends that the court erred in dismissing the first cause of action without prejudice, and that it should have dismissed the complaint on the merits. Given the procedural posture of this case, the Village essentially argues that the court erred in denying its cross-motion. We reject that contention. First, in support of its cross-motion, the Village failed to establish that it presently owns the beach—or that it ever owned the beach—given that the grantors of the 1988 quitclaim deed to the Village are not listed on the chain of title.

Furthermore, the Village failed to establish that plaintiff did not obtain title through adverse possession and, in particular, failed to establish that plaintiff could not have obtained title through adverse possession by "tacking" the time that it possessed the property onto the time its predecessors in interest allegedly possessed the property between 1968 and 1988. Under the pre-2008 version of RPAPL article 5, a person could acquire title to property by adverse possession if, for at least 10 years, they possessed the property in a way that was (1) hostile and under claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous (*see Walling*, 7 NY3d at 232; *Rote v Gibbs*, 195 AD3d 1521, 1523 [4th Dept 2021], *appeal dismissed* 37 NY3d 1106 [2021]). Essentially, those elements mean "nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (*Brand v Prince*, 35 NY2d 634, 636 [1974]). Where a party claiming adverse possession has possessed the property for fewer than 10 years, such party can, under some circumstances, "tack" the time that they possessed the property "onto the time that the party's predecessor

adversely possessed the property" (*Kopp v Rhino Room, Inc.*, 192 AD3d 1690, 1691 [4th Dept 2021] [internal quotation marks omitted]). Under the pre-2008 version of RPAPL article 5, the central question to be answered when determining whether plaintiff's predecessors in interest adversely possessed the property—so as to permit tacking under the circumstances here—is whether there is "evidence of an intent to *hold* more than the land which the deed specifically conveyed" (*Belotti v Bickhardt*, 228 NY 296, 308 [1920] [emphasis added]); the adverse possessors' subjective knowledge is irrelevant (*see Walling*, 7 NY3d at 232-233).

Here, the Village submitted on its cross-motion, inter alia, the deposition testimony of the principal of the entity that conveyed the property to plaintiff, in which that principal indicated that she *intended to convey the use of the patio* with the sale of the cottage at issue. In particular, the principal testified that, upon completion of the sale, plaintiff could use the patio, and that the prior owners and renters of the cottage had been using the patio "since the beginning of time." She additionally testified that the owners before her had the same understanding as to the use of the patio, as did the owners before them going back some 50 years. Inasmuch as the evidence presented by the Village established that each owner of the patio intended to convey its use to the next owner, we conclude that the court properly denied the Village's cross-motion with respect to the first cause of action (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Rather, we conclude that, contrary to the Village's contention, the court properly dismissed plaintiff's first cause of action *without prejudice*. Inasmuch as the Spencer heirs' property rights could be inequitably affected by the outcome of litigation concerning the subject property, they are necessary parties to this action (*see* RPAPL 1511 [2]).

We agree with the Village, however, that the court erred in granting plaintiff's motion with respect to its second cause of action, for permanent injunctive relief, inasmuch as the first cause of action, which is the only substantive cause of action, was dismissed without prejudice. We conclude that, while the court properly denied the Village's cross-motion with respect to both causes of action (*see generally Alvarez*, 68 NY2d at 324), the second cause of action should also have been dismissed without prejudice under the circumstances here. It is well settled that permanent injunctive relief "is simply not available when the plaintiff does not have any remaining substantive cause of action" (*Pickard v Campbell*, 207 AD3d 1105, 1110 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023] [internal quotation marks omitted]). "Although it is permissible to plead a cause of action for a permanent injunction . . . , permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted" (*Town of Macedon v Village of Macedon*, 129 AD3d 1639, 1641 [4th Dept 2015] [internal quotation

marks omitted]; *see Pickard*, 207 AD3d at 1110). We therefore modify the order and judgment accordingly.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

901

CA 23-01995

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

CYNTHIA CROCKETT,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

HOME DEPOT U.S.A., INC., HOME DEPOT STORE #1287, DEFENDANTS-APPELLANTS, RWC LANDSCAPE SERVICES MANAGEMENT AND JA KRANTZ LANDSCAPE DESIGN, LLC, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

GOLDSTEIN GRECO, P.C., BUFFALO (BRIAN A. GOLDSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

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

Appeal and cross-appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 6, 2023. The order granted the motion of defendants RWC Landscape Services Management and JA Krantz Landscape Design, LLC, for summary judgment and denied the cross-motion of defendants Home Depot U.S.A., Inc., and Home Depot Store #1287 for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part the motion of defendants RWC Landscape Services Management and JA Krantz Landscape Design, LLC and reinstating the complaint against JA Krantz Landscape Design, LLC, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when she slipped and fell on ice in a parking lot on property owned by defendants Home Depot U.S.A., Inc. (Home Depot U.S.A.) and Home Depot Store #1287 (collectively, Home Depot defendants), who had hired defendant RWC Landscape Services Management (RWC) to perform maintenance of the store's outside parking lot and walkways, including snow and ice removal. RWC, in turn, subcontracted its responsibility for snow and ice removal to defendant JA Krantz Landscape Design, LLC (JA Krantz).

RWC and JA Krantz moved for summary judgment dismissing the complaint against them on the ground that they did not owe plaintiff a duty of care. The Home Depot defendants cross-moved for summary judgment dismissing plaintiff's complaint against them and, although they had not asserted any cross-claims at that time, they also sought summary judgment against RWC and JA Krantz for contractual indemnification, common-law indemnification and breach of contract. In appeal No. 1, the Home Depot defendants appeal and plaintiff cross-appeals from an order that granted the motion of RWC and JA Krantz and denied the Home Depot defendants' cross-motion. Thereafter, plaintiff moved for leave to reargue her opposition to the motion of RWC and JA Krantz, and the Home Depot defendants moved for, inter alia, leave to reargue their cross-motion for summary judgment. In appeal No. 2, Home Depot U.S.A. appeals from an order insofar as it denied that part of its motion seeking leave to reargue, and plaintiff cross-appeals from the same order insofar as it denied her motion seeking leave to reargue.

Initially, we conclude that the appeal of Home Depot U.S.A. and cross-appeal of plaintiff in appeal No. 2 must be dismissed because "[a]n order denying a motion [for leave] to reargue is not appealable" (*Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

In appeal No. 1, we agree with the Home Depot defendants and plaintiff that Supreme Court erred in granting that part of the motion of RWC and JA Krantz seeking summary judgment dismissing the complaint against JA Krantz inasmuch as there is a triable issue of fact whether JA Krantz assumed a duty of care to plaintiff by launching a force or instrument of harm. " '[T]he threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?' " (*Nicholas T. v Town of Tonawanda*, 213 AD3d 1333, 1334 [4th Dept 2023]). Here, any duty that RWC or JA Krantz owed with respect to the condition of the parking lot "arose exclusively out of [the] contract[s]" between RWC and the Home Depot defendants and between RWC and JA Krantz (*Lingenfelter v Delevan Terrace Assoc.*, 149 AD3d 1522, 1523 [4th Dept 2017]). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *see Suzanne P. v Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.*, 175 AD3d 1093, 1094 [4th Dept 2019], *affd* 41 NY3d 391 [2024], *rearg denied* 41 NY3d 1000 [2024]; *Honer v McComb*, 126 AD3d 1555, 1556 [4th Dept 2015]). Nevertheless, "a party who enters into a contract to render services may be said to have assumed a duty of care . . . to third persons . . . where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or instrument of harm' " (*Espinal*, 98 NY2d at 140).

Here, inasmuch as plaintiff's complaint and bill of particulars did not allege facts establishing the applicability of an *Espinal* exception to the general rule, RWC and JA Krantz met their initial burden on the motion by establishing that plaintiff was not a party to the contracts (*see Govenettio v Dolgencorp of N.Y., Inc.*, 175 AD3d 1805, 1805-1806 [4th Dept 2019]). In opposition, however, plaintiff

raised an issue of fact whether JA Krantz launched a force or instrument of harm. Specifically, plaintiff submitted the affidavit of an expert, who opined that JA Krantz's use of sodium chloride, i.e., rock salt, created a dangerous condition because, in light of the temperature on the day of the incident, the rock salt would have caused the ice and snow to melt and then refreeze (*see Bregaudit v Loretto Health & Rehabilitation Ctr.*, 211 AD3d 1582, 1585 [4th Dept 2022]). We therefore modify the order in appeal No. 1 by denying in part the motion of RWC and JA Krantz and reinstating the complaint against JA Krantz.

The Home Depot defendants contend on their appeal that the court erred in denying their cross-motion seeking summary judgment dismissing the complaint on the ground that there was no evidence that the Home Depot defendants had actual or constructive notice of the ice that caused plaintiff's fall. We reject that contention. We agree with the Home Depot defendants that there is no evidence of actual notice. With respect to constructive notice, it is well established that, "[t]o 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 [the] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, there is a question of fact whether the ice was visible upon a reasonable inspection (*see generally Gwitt v Denny's, Inc.*, 92 AD3d 1231, 1231-1232 [4th Dept 2012]; *Derosia v Gasbarre & Szatkowski Assn.*, 66 AD3d 1423, 1424 [4th Dept 2009]). Photographs of the area where the accident occurred that were taken near the time of plaintiff's fall clearly show ice on the pavement. Thus, plaintiff raised an issue of fact "whether the condition was visible and apparent and had existed for a sufficient length of time before plaintiff's accident to permit [the Home Depot] defendant[s] to discover and remedy it" (*Merrill v Falleti Motors, Inc.*, 8 AD3d 1055, 1056 [4th Dept 2004]; *see generally Derosia*, 66 AD3d at 1424-1425).

We also reject the Home Depot defendants' contention that they are entitled to summary judgment dismissing the complaint against them on the ground that the accident occurred during a storm in progress (*see Govenettio*, 175 AD3d at 1806). According to the certified weather report submitted by plaintiff and relied upon by the Home Depot defendants in support of their cross-motion, only "trace amounts of snow continued to fall the day [of the fall] [w]ith temperatures never going above freezing." Thus, the Home Depot defendants' own submissions raise an issue of fact whether there was a storm in progress at the time of the fall (*see Govenettio*, 175 AD3d at 1806; *see generally Gagne v MJ Props. Realty, LLC*, 221 AD3d 1210, 1213 [3d Dept 2023]).

We have reviewed the remaining contentions of the Home Depot defendants and plaintiff and conclude that none warrants further modification or reversal of the order in appeal No. 1.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

902

CA 24-00303

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

CYNTHIA CROCKETT,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

HOME DEPOT U.S.A., INC.,
DEFENDANT-APPELLANT-RESPONDENT,
RWC LANDSCAPE SERVICES MANAGEMENT,
JA KRANTZ LANDSCAPE DESIGN, LLC,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

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

GOLDSTEIN GRECO, P.C., BUFFALO (BRIAN A. GOLDSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

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

Appeal and cross-appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 30, 2024. The order, inter alia, denied those parts of the motions of the parties seeking leave to reargue.

It is hereby ORDERED that said appeal and cross-appeal are unanimously dismissed without costs.

Same memorandum as in *Crockett v Home Depot U.S.A., Inc.* ([appeal No. 1] — AD3d — [Apr. 25, 2025] [4th Dept 2025]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

932

CA 23-01707

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

JOHN O'BRIEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, DEFENDANT-RESPONDENT.

SOLOFF & ZERVANOS, CHERRY HILL, NEW JERSEY (BRIAN M. DOYLE OF COUNSEL), AND THOMAS LEGAL COUNSELORS AT LAW, LLC, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered August 28, 2023. The order granted defendant's motion to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action under the Child Victims Act (*see* CPLR 214-g) seeking damages as a result of sexual and physical abuse that he allegedly sustained while in foster care between 1973 and 1976, and between 1981 and 1983. Defendant, County of Monroe (County), moved to dismiss the complaint on the ground that plaintiff failed to allege the existence of a special duty, which the County argued is necessary for the imposition of liability against a municipal defendant acting in a governmental capacity. Supreme Court granted the motion, relying on our prior decision in *Weisbrod-Moore v Cayuga County* (216 AD3d 1459 [4th Dept 2023], *revd* — NY3d —, 2025 NY Slip Op 00903 [2025]). Plaintiff appeals, and we now reverse. Following oral argument in this case, the Court of Appeals reversed our decision in *Weisbrod-Moore* and held that "a municipality owes a duty to a foster child over whom it has assumed legal custody to guard the child from 'foreseeable risks of harm' arising from the child's placement with the municipality's choice of foster parent" (*Weisbrod-Moore*, — NY3d at —, 2025 NY Slip Op 00903, *2). "By assuming [legal] custody of plaintiff, and thus assuming the authority to control where and with whom plaintiff lived, the [municipality] necessarily assumed a duty to [him] beyond what is owed to the public generally" (*Weisbrod-Moore*, — NY3d at —, 2025 NY Slip Op 00903, *3). Thus, here, plaintiff sufficiently stated causes of action premised on "a well-established theory of common-law liability that falls outside the

special duty doctrine" (*Weisbrod-Moore*, — NY3d at —, 2025 NY Slip Op 00903, *2). Inasmuch as the County raised no other ground for dismissal in its motion, we reverse the order on appeal, deny the motion, and reinstate the complaint.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

19

CA 24-00368

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

DEVERE THOMAS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSIT AUTHORITY, NFTA POLICE DEPARTMENT AND THEIR AGENTS, SERVANTS AND EMPLOYEES, AND NFTA POLICE OFFICER ROBERT GAWLAK, INDIVIDUALLY AND IN HIS REPRESENTATIVE CAPACITY, DEFENDANTS-RESPONDENTS.

NELSON S. TORRE, BUFFALO, FOR PLAINTIFF-APPELLANT.

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 2, 2023. The order and judgment, insofar as appealed from, granted the motion of defendants insofar as it sought summary judgment dismissing the causes of action for false arrest and unlawful imprisonment and for negligent use of excessive force.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the causes of action for false arrest and unlawful imprisonment and for negligent use of excessive force are reinstated.

Memorandum: Plaintiff commenced this action sounding in, inter alia, false arrest and excessive force, and defendants thereafter moved for summary judgment dismissing the complaint. As limited by his brief, plaintiff appeals from an order and judgment insofar as it granted defendants' motion with respect to the first cause of action, for false arrest and unlawful imprisonment, and the second cause of action, for negligent use of excessive force. We reverse the order and judgment insofar as appealed from.

A police officer for defendant Niagara Frontier Transit Authority (NFTA) stopped a car being driven by plaintiff for certain alleged parking violations and having tinted windows that were impermissibly dark. After the stop, a second NFTA officer, defendant Robert Gawlak, individually and in his representative capacity, approached plaintiff's side of the vehicle. There is conflicting deposition testimony as to what happened next. According to Gawlak, plaintiff

rolled down the window, began yelling at him, and then began to roll the window back up. Gawlak drew his weapon and told plaintiff he needed to keep the window down. Gawlak testified that plaintiff then threatened to shoot him, reached to his right, and began to drive toward him. At that point, Gawlak fired shots through the windshield. In contrast, plaintiff testified at his deposition that Gawlak was being aggressive and told him to exit the vehicle while Gawlak was clutching his firearm. In response, plaintiff rolled up his window. According to plaintiff, Gawlak thereafter drew his service weapon, moved toward the front of the vehicle, aimed the firearm at plaintiff, and shot him through the windshield, striking his left finger. Plaintiff testified that upon being shot, he fled. Plaintiff was stopped, arrested, and taken to the hospital where he underwent surgery for his finger, which had been almost completely severed.

Plaintiff was charged by a five-count indictment with attempted assault on a peace officer, police officer, firefighter or emergency medical services professional (Penal Law §§ 110.00, 120.08); unlawful fleeing a police officer in a motor vehicle in the third degree (§ 270.25); obstructing governmental administration in the second degree (§ 195.05); resisting arrest (§ 205.30); and unlawful possession of marihuana (former § 221.05). He ultimately pleaded guilty to unlawful fleeing a police officer in a motor vehicle in the third degree in full satisfaction of the indictment.

We agree with plaintiff that Supreme Court erred in granting defendants' motion with respect to the excessive force cause of action. Excessive force claims are evaluated " 'under the Fourth Amendment's "objective reasonableness" standard' " (*Mazzariello v Town of Cheektowaga*, 305 AD2d 1118, 1119 [4th Dept 2003], quoting *Graham v Connor*, 490 US 386, 388 [1989]). Whether an officer's course of action is objectively reasonable is assessed from the perspective of a reasonable officer under the particular circumstances "rather than with the 20/20 vision of hindsight" (*Bridenbaker v City of Buffalo*, 137 AD3d 1729, 1730 [4th Dept 2016] [internal quotation marks omitted]). "The test of reasonableness under the Fourth Amendment requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight" (*Snow v Schreier*, 193 AD3d 1346, 1347 [4th Dept 2021] [internal quotation marks omitted]; *see People v Smith*, 95 AD3d 21, 26 [4th Dept 2012]).

"Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide" (*Wright v City of Buffalo*, 137 AD3d 1739, 1742 [4th Dept 2016] [internal quotation marks omitted]). " 'The fact that a person whom a police officer attempts to arrest resists, threatens, or assaults the officer no doubt justifies the officer's use of some degree of force, but it does not give the officer license to use force without limit. The force used by the officer must be reasonably related to the nature of the resistance and the force used, threatened, or reasonably perceived to be threatened,

against the officer' " (*Snow*, 193 AD3d at 1347).

Here, the evidence submitted by defendants, including video from a passing NFTA bus and plaintiff's deposition testimony that he fled only after Gawlak shot him, raises issues of fact regarding the objective reasonableness of Gawlak's conduct under the circumstances. Inasmuch as defendants failed to meet their burden on the motion with respect to the excessive force cause of action, the court was required to deny that part of the motion "without regard to the sufficiency of the opposing papers" (*Rivera v Rochester Gen. Health Sys.*, 173 AD3d 1758, 1760 [4th Dept 2019]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Similarly, we agree with plaintiff that the court erred in granting the motion with respect to the false arrest and unlawful imprisonment cause of action. Though "[t]he existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the [false imprisonment cause of action]" (*Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]), the issue of probable cause is "generally a question of fact to be decided by the jury, and should 'be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn surrounding the arrest' " (*Taylor v City of Buffalo*, 229 AD3d 1125, 1127 [4th Dept 2024]).

While in general, a guilty plea establishes probable cause for arrest on the underlying conduct and any other charges satisfied by the plea (*see Calastri v Overlock*, 125 AD3d 554, 554 [1st Dept 2015]), here, defendants also submitted the deposition testimony of the nonparty NFTA officer who initially stopped plaintiff's car, in which he testified that the police lacked probable cause to arrest plaintiff at relevant points of the encounter. Thus, under these circumstances, given the conflicting evidence submitted by defendants, their own submissions raise issues of fact concerning the existence of probable cause that preclude defendants' entitlement to summary judgment with respect to the false arrest and unlawful imprisonment cause of action.

Entered: April 25, 2025 Ann Dillon Flynn
Clerk of the Court

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

20

CA 24-00255

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

MARY C. MANN, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
ERIE COUNTY MEDICAL CENTER, RESPONDENTS-APPELLANTS,
ET AL., RESPONDENT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (KAYLA A. HUGHES OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LOTEMPIO P.C. LAW GROUP, BUFFALO (CLAUDIA M. RODR OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered September 13, 2023. The order granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: Contrary to the contention of respondents-appellants (respondents), Supreme Court did not abuse its discretion in granting claimant's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). Although claimant failed to demonstrate a reasonable excuse for failing to serve a timely notice of claim (*see Matter of Hampson v Connetquot Cent. Sch. Dist.*, 114 AD3d 790, 791 [2d Dept 2014]; *Brown v City of Buffalo*, 100 AD3d 1439, 1440 [4th Dept 2012]), that failure " 'is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondents]' " (*Matter of Mary Beth B. v West Genesee Cent. Sch. Dist.*, 186 AD3d 979, 980 [4th Dept 2020]; *see Shaul v Hamburg Cent. Sch. Dist.*, 128 AD3d 1389, 1389 [4th Dept 2015]). Here, claimant "made a persuasive showing that [respondents] acquired [timely] actual knowledge of the essential facts constituting the claim" (*Shaul*, 128 AD3d at 1389 [internal quotation marks omitted]; *see Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435 [4th Dept 2009]). Claimant also "met her initial burden by presenting 'some evidence or plausible argument that supports a finding of no substantial prejudice' " (*Arnold v Town of Camillus*, 222 AD3d 1372, 1379 [4th Dept 2023], quoting *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016], *rearg denied* 29 NY3d 963 [2017]), and respondents failed to " 'respond with a particularized evidentiary showing that [they would] be

substantially prejudiced if the late notice [was] allowed' " (*Matter of Antoinette C. v County of Erie*, 202 AD3d 1464, 1468 [4th Dept 2022], quoting *Newcomb*, 28 NY3d at 467; *see Brege v Town of Tonawanda*, 148 AD3d 1792, 1793 [4th Dept 2017]).

Finally, we have reviewed respondents' remaining contention and conclude that it lacks merit.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

25

KA 23-00691

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN THOMAS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Rory A. McMahon, J.), rendered June 30, 2022. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]).

Defendant correctly contends, and the People correctly concede, that defendant's waiver of the right to appeal is invalid inasmuch as County Court's oral colloquy was insufficient to ensure that the waiver of the right to appeal was a knowing and voluntary choice (*see People v Elmore*, 213 AD3d 1245, 1246 [4th Dept 2023]; *cf. People v Allen*, 174 AD3d 1456, 1456 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]; *People v Mellerson*, 156 AD3d 1488, 1489 [4th Dept 2017], *lv denied* 30 NY3d 1117 [2018]). We note in any event that a valid waiver of the right to appeal would not encompass defendant's contention that his sentence is illegal (*see People v Stith*, 30 AD3d 966, 966-967 [4th Dept 2006]; *People v Gathers*, 9 AD3d 912, 912 [4th Dept 2004], *lv denied* 3 NY3d 674 [2004]; *see generally People v Seaberg*, 74 NY2d 1, 9 [1989]).

Defendant further contends that the court failed to exercise its discretion with respect to sentencing but instead improperly abdicated its sentencing authority to the People inasmuch as it erroneously deemed itself bound by the sentencing commitment made by the People in connection with the plea bargain. Preliminarily, we agree with defendant that, although he did not preserve that contention, the

narrow exception to the preservation rule permitting appellate review when the illegality of a sentence "is readily discernible from the trial record" applies here (*People v Santiago*, 22 NY3d 900, 903 [2013]; *see People v Nieves*, 2 NY3d 310, 315-316 [2004]; *People v Samms*, 95 NY2d 52, 55-56 [2000]; *People v Dunham*, 83 AD3d 1423, 1424-1425 [4th Dept 2011], *lv denied* 17 NY3d 794 [2011]). However, assuming, arguendo, that the court "misapprehended the extent of its discretion to impose a lesser sentence than that set forth in the plea agreement," we conclude that there is "no reason to vacate the sentence and remand for resentencing where, as here, there is nothing in the record demonstrating that defendant was harmed as a result of any misapprehension" (*People v Kinchoy*, 186 AD3d 1838, 1839 [3d Dept 2020], *lv denied* 36 NY3d 973 [2020]). Remittal for resentencing when a sentencing court misapprehends its discretion to impose a lesser sentence than set forth in the plea agreement is necessary "only where the record indicates possible harm flowing from the court's error, such as some indication of reservation by the court as to the fairness of the sentence to be imposed" (*People v Seymour*, 21 AD3d 1292, 1293 [4th Dept 2005], *lv denied* 6 NY3d 758 [2005] [internal quotation marks omitted]; *see People v McLeod*, 189 AD3d 1967, 1968 [3d Dept 2020]; *People v Barzge*, 244 AD2d 213, 213-214 [1st Dept 1997], *lv denied* 91 NY2d 889 [1998]). Here, there is no basis in the record to conclude that the court had any reservations about the sentence contemplated by the plea agreement and the record does not otherwise indicate possible harm flowing from the court's error.

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

Entered: April 25, 2025 Ann Dillon Flynn
Clerk of the Court

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

48

KA 22-00731

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARKEEM BURROWS, DEFENDANT-APPELLANT.

JULIE CIANCA, DISTRICT ATTORNEY, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 22, 2021. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and menacing in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and menacing in the second degree (§ 120.14 [1]), defendant contends that Supreme Court erred in denying his CPL 30.30 motion because the People's certificate of compliance (COC) was improper. Defendant identifies three items of discovery that he contends the People failed to turn over in a timely manner. Initially, we disagree with the People that defendant's contention is partially unpreserved for our review. Defendant supplemented his CPL 30.30 motion with additional arguments raised in an email to the People and the court, and all of the items were discussed during motion argument (*see People v Allard*, 28 NY3d 41, 46 [2016]). We conclude, however, that defendant's contention is without merit.

First, with respect to defendant's claim that the People failed to turn over a disciplinary record of a police officer, we note that when the People filed their original and supplemental COC, which was shortly after the enactment of CPL article 245, the disciplinary records of law enforcement officers were shielded from disclosure by former Civil Rights Law § 50-a (*see People v Brown*, 222 AD3d 1362, 1363 [4th Dept 2023], *lv denied* 41 NY3d 982 [2024], *cert denied* — US —, 145 S Ct 308 [2024]). The fact that the disciplinary record was disclosed by the People after the repeal of former Civil Rights Law § 50-a "did not render the original certificate of compliance

illusory" (*id.*). Moreover, the disciplinary record related to an incident in which the officer rear-ended someone in traffic and was written up for not operating his vehicle in a safe manner, and we conclude that the information did not "relate to the subject matter of the case" (CPL 245.20 [1]) inasmuch as it was not material that tends to "impeach the credibility of a testifying prosecution witness" (CPL 245.20 [1] [k] [iv]; *see People v James*, 229 AD3d 1008, 1011 [3d Dept 2024]; *see generally People v Smith*, 27 NY3d 652, 660 [2016]).

Second, with respect to defendant's claim that the People failed to turn over impeachment materials for a witness, the item in question was the revocation of a witness's pistol permit stemming from a matter before Family Court. The People's duty to disclose impeachment materials of a testifying witness extends only to information within the People's custody, possession, or control (*see* CPL 245.20 [1]; *People v Garrett*, 23 NY3d 878, 886 [2014], *rearg denied* 25 NY3d 1215 [2015]), and the record demonstrates that the People did not have custody, possession, or control of any material relevant to the pistol permit revocation (*see generally People v Elmore*, 211 AD3d 1536, 1537-1538 [4th Dept 2022], *lv denied* 42 NY3d 938 [2024]).

Third, with respect to defendant's claim that the People failed to turn over the names and contact information of several witnesses who were depicted on surveillance footage inside the convenience store when defendant was arrested, CPL 245.20 (1) (c) provides in relevant part that the People are required to disclose "[t]he names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto." The People are not, however, required "to ascertain the existence of witnesses not known to the police or another law enforcement agency" (CPL 245.20 [2]). The record shows that the People did not know or have in their possession the names of those witnesses with the exception of one witness whose name they learned just prior to the scheduled trial. The court thus properly determined that the People exercised due diligence and made reasonable efforts to ascertain the existence of the discovery materials (*see generally People v Bay*, 41 NY3d 200, 211 [2023]).

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

All concur except WHALEN, P.J., who concurs in the result in the following memorandum: I concur in the determination to affirm in this case, but I respectfully disagree with the majority's conclusion that the People had no obligation to make reasonable inquiries to ascertain the names and contact information of several witnesses who were depicted on surveillance footage inside the convenience store when defendant was arrested. Although the People are not required to "ascertain the *existence* of witnesses" not known to law enforcement (CPL 245.20 [2] [emphasis added]), here the record establishes that, at the time their discovery obligation under CPL article 245 arose, the People possessed knowledge that several of the witnesses depicted on the surveillance footage had "evidence or information relevant to

any offense charged" (CPL 245.20 [1] [c]). Specifically, the People possessed the statements of the store owner and the victim, as well as the police report from the arresting officer, each of which reflects that just prior to defendant's arrest, the depicted store employees tackled defendant to the ground, locked the door, and waited for police to arrive. Inasmuch as there is no plausible argument that the store employees who held defendant down after an attempted robbery did not "have evidence or information relevant to any offense charged" (*id.*), the People were obligated to "make a diligent, good faith effort to ascertain" (CPL 245.20 [2]) the "names and adequate contact information for [those] persons" (CPL 245.20 [1] [c]). In my opinion, the majority, in concluding otherwise, is conflating the statutory requirement that the People possess knowledge of the "*existence* of witnesses" (CPL 245.20 [2] [emphasis added]) with knowledge of the *names* of witnesses.

I nonetheless agree with the majority that Supreme Court properly concluded that the People's certificate of compliance (COC) was not illusory and that the court thus properly denied defendant's CPL 30.30 motion. CPL article 245 "does not require or anticipate a 'perfect prosecutor' " (*People v Bay*, 41 NY3d 200, 212 [2023]). Under the circumstances of this case and applying "a holistic assessment of the People's efforts to comply with the automatic discovery provisions, rather than a strict item-by-item test that would require us to conclude that a COC is improper if the People miss even one item of discovery," I conclude that the court did not err in denying defendant's motion inasmuch as the People exercised due diligence and made reasonable efforts sufficient to satisfy their obligations under CPL article 245 (*People v Cooperman*, 225 AD3d 1216, 1220 [4th Dept 2024]; *see Bay*, 41 NY3d at 212-213).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-00549

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

IN THE MATTER OF KIM A.F., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ALEXIS M.B.-R., RESPONDENT-APPELLANT.

ROBERT GALLAMORE, ST. GEORGE, UTAH, FOR RESPONDENT-APPELLANT.

WEISBERG & ZUKHER, PLLC, SYRACUSE (DAVID E. ZUKHER OF COUNSEL), FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, J.), entered March 8, 2023, in a proceeding pursuant to Family Court Act article 5. The order adjudged that petitioner is the father 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 5, respondent appeals from an order of filiation adjudging that petitioner is the father of the subject child.

We reject respondent's contention that Family Court erred in ordering genetic marker testing. The court has the authority to order genetic marker testing in order to establish paternity (Family Ct Act § 532 [a]). "No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of[, inter alia,] equitable estoppel or the presumption of legitimacy of a child born to a married woman" (*id.*; *see Matter of Kirk M.B. v Rachel S.*, 192 AD3d 1492, 1493 [4th Dept 2021]). Contrary to respondent's contention, the court properly determined that petitioner overcame the presumption of legitimacy by demonstrating the existence of a non-frivolous controversy regarding paternity (*see Matter of Gutierrez v Gutierrez-Delgado*, 33 AD3d 1133, 1134 [3d Dept 2006]). The burden then shifted to respondent to establish that ordering the paternity test would not be in the child's best interests (*see Matter of Mario WW. v Kristin XX.*, 173 AD3d 1392, 1394 [3d Dept 2019], *lv denied* 40 NY3d 901 [2023]), which she failed to do. Contrary to respondent's further contention, she did not establish that the doctrine of equitable estoppel precluded paternity testing. Although equitable estoppel may be applied to "protect the status

interests of a child in an already recognized and operative parent-child relationship" (*Matter of Baby Boy C.*, 84 NY2d 91, 102 n [1994]), no such relationship was evident here. Respondent asserted that her husband held himself out as the father of the child, but the testimony at the hearing established that no father was listed on the child's birth certificate, that respondent and her husband had been separated since before the child was born, and that respondent had previously consented to the entry of an order of custody and visitation pursuant to which she and her mother shared joint custody of the child, the child would reside with respondent's mother, and no provisions were made for visitation with the husband. Although the doctrine of equitable estoppel may be applied to preclude a parent from challenging an order of filiation, it is the child's best interests that are of paramount concern (*see Matter of Louise P. v Thomas R.*, 223 AD2d 592, 593 [2d Dept 1996]).

Respondent next contends that evidence of petitioner's alleged drug use and abusive behavior is relevant to the best interests analysis and that the court thus erred in limiting her testimony on those matters. We reject that contention. The best interests determination with respect to genetic testing in a paternity proceeding addresses what is in "the best interests of the child and not the equities between the adults" (*Matter of Danielle E.P. v Christopher N.*, 208 AD3d 978, 980 [4th Dept 2022], *lv denied* 39 NY3d 904 [2022]) and is distinct from a best interests analysis used in custody proceedings (*see Matter of Michael S. v Sultana R.* 163 AD3d 464, 477 [1st Dept 2018], *lv dismissed* 35 NY3d 964 [2020]). Here, the court properly determined that respondent's proposed testimony is not relevant to whether genetic testing is not in the child's best interests on the basis of the presumption of legitimacy or equitable estoppel (*see Danielle E.P.*, 208 AD3d at 980-981).

Contrary to respondent's contention, the result of the paternity test was properly admitted in evidence inasmuch as respondent offered no evidence rebutting the presumption of its admissibility (*see* CPLR 4518 [e]; *see also* Family Ct Act § 532 [a]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00523

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

MICHELLE KIES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS NICHOLS, DEFENDANT-RESPONDENT.

WELCH, DONLON & CZARPLES, PLLC, CORNING (MICHAEL A. DONLON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW OFFICES OF JOHN TROP, TARRYTOWN (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Jason L. Cook, J.), entered March 12, 2024. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained while a guest at defendant's home. Plaintiff and defendant were sharing a seat that defendant had placed on the grass near his outdoor fire pit. The seat was one that defendant had removed from a vehicle, in which it was fastened to the floor. Plaintiff was injured when defendant stood up and the seat fell backward. Plaintiff alleged that the seat was inherently dangerous for use as lawn furniture, that defendant failed to warn plaintiff of the unstable nature of the seat, and that defendant negligently caused plaintiff's injury by rising abruptly and unbalancing the unstable seat. Defendant moved for summary judgment dismissing the complaint on the ground that he had no duty to warn plaintiff about the seat because any danger was open and obvious. Supreme Court granted the motion, concluding that plaintiff conceded during discovery that she was aware that the bench was originally part of a van and was not designed to be lawn furniture and further concluding that, inasmuch as plaintiff had visited the property previously and used the seat without incident, the danger the seat presented was open and obvious. Plaintiff appeals.

We agree with plaintiff that the court erred in granting that part of the motion seeking dismissal of the complaint insofar as it alleged that defendant failed to warn plaintiff of the unstable nature of the seat. For a court "[t]o grant summary judgment, it must

clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019]). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). On a motion for summary judgment, "facts must be viewed 'in the light most favorable to the non-moving party' " (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and the proponent of the motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

We agree with plaintiff that the court erred in determining that defendant established that plaintiff was aware that the seat was taken from a vehicle. Plaintiff's deposition testimony on that point was ambiguous, and the court erred in holding otherwise inasmuch as "[i]t is not the function of a court deciding a summary judgment motion to make . . . findings of fact" (*Vega*, 18 NY3d at 505; *see Brown v Askew*, 202 AD3d 1501, 1503 [4th Dept 2022]; *see also Cosme v City of New York*, 20 AD3d 320, 322 [1st Dept 2005]). Moreover, even if plaintiff was aware that the seat came from a vehicle, nothing in defendant's submissions suggests that the unstable nature of the seat's design was apparent or that plaintiff was aware that the seat was intended to be fastened to a vehicle floor (*cf. Granison v Builders Sq.*, 266 AD2d 922, 922-923 [4th Dept 1999]; *Brown v New York Med. Coll. for Comprehensive Health Practice*, 162 AD2d 139, 139-140 [1st Dept 1990]). "[W]hether a condition is open and obvious 'cannot be divorced from the surrounding circumstances,' and a condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured" (*Barone v Risi*, 128 AD3d 874, 875 [2d Dept 2015]; *see generally Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71-72 [1st Dept 2004]). Here, inasmuch as the seat was placed on grass, which partially obscured the base, and inasmuch as defendant affirmatively offered the seat for use as lawn furniture, we conclude that defendant failed to establish that the nature of the seat was open and obvious to plaintiff. Because defendant failed to meet his initial burden on the motion, the burden never shifted to plaintiff, and denial of that part of the motion "was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez*, 68 NY2d at 324).

Further, we agree with plaintiff that the court erred in granting those parts of the motion with respect to plaintiff's claims that the seat was inherently dangerous for use as lawn furniture and that defendant negligently caused plaintiff's injury by rising abruptly and unbalancing the unstable seat (*see generally D'Amico v Christie*, 71 NY2d 76, 85 [1987]; *Finocchio v Crest Hollow Club at Woodbury, Inc.*, 184 AD2d 491, 492 [2d Dept 1992]). Although defendant's motion purported to seek summary judgment dismissing the complaint in its entirety, his moving papers did not address those claims, and defendant thus failed to establish that he was entitled to summary

judgment with respect to them (*see Woodward v Ciamaricone*, 175 AD3d 942, 944-945 [4th Dept 2019]; *Jones v Marshall*, 147 AD3d 1279, 1283 [3d Dept 2017]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-02104

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ROSS, DEFENDANT-APPELLANT.

THE LAW OFFICE OF PARKER R. MACKAY, KENMORE (PARKER R. MACKAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered October 19, 2023. The order denied the motion of defendant pursuant to CPL 440.10 to vacate a judgment of conviction.

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

Memorandum: Defendant appeals, by permission of this Court, from an order denying his motion pursuant to CPL 440.10 to vacate a judgment convicting him following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We affirm.

The motion was based on, inter alia, defendant's assertion that his trial attorney was ineffective in failing to call his mother and niece as defense witnesses at trial, and the motion was supported by affidavits from both defendant's mother and niece. At the time of the hearing on the motion, however, defendant's mother was deceased. Defendant, his niece and defendant's trial attorney testified at the hearing.

In denying the motion, Supreme Court stated that it did not credit the testimony of defendant or his niece, and did not credit the affidavit of defendant's mother. The evidence at the hearing established that defendant's niece attended the trial but remained silent for approximately five years following the verdict before signing an affidavit at defendant's request stating that she had exculpatory testimony and had been ready, willing and able to testify at trial if only she had been asked to do so by defense counsel. In its decision, the court stated that "[t]here is little to no

credibility attributable to these family members [of defendant] who logically could have come forward much sooner if in fact they had authentic, exculpatory information."

The court did, however, credit the testimony of defendant's trial counsel, who testified that he had no recollection of defendant or anyone else telling him that defendant's mother or niece had relevant testimony to offer at trial, and that during the trial defendant did not complain to trial counsel about the failure to call his mother or niece as witnesses. Defendant's trial counsel also testified that the notes in his file indicate that he met with defendant in jail multiple times prior to and during the trial, and that, at defendant's request, he traveled 200 miles to interview a potential defense witness. The record also establishes that defendant did not raise the issue of the possible trial testimony of his mother and niece in his pro se motion to set aside the verdict pursuant to CPL 330.30, on direct appeal or in either of his two subsequent motions for writs of error coram nobis (*People v Ross*, 151 AD3d 1782 [4th Dept 2017], *lv denied* 30 NY3d 983 [2017]; *People v Ross*, 129 AD3d 1556 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016], *reconsideration denied* 27 NY3d 1155 [2016]; *People v Ross*, 118 AD3d 1321 [4th Dept 2014], *lv denied* 23 NY3d 1067 [2014], *reconsideration denied* 24 NY3d 1122 [2015]). It was not until after the Court of Appeals denied defendant's application for leave to appeal in the most recent coram nobis proceeding that defendant alleged for the first time that his trial attorney was ineffective in failing to call exculpatory witnesses.

On appeal, defendant contends that defense counsel was ineffective in failing to interview his mother and niece to determine whether they could provide exculpatory testimony. "Essential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case" (*People v Oliveras*, 21 NY3d 339, 346 [2013]; *see People v Sposito*, 37 NY3d 1149, 1150 [2022]; *see generally Strickland v Washington*, 466 US 668, 690-691 [1984]). " 'To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" (*People v Cleveland*, 217 AD3d 1346, 1349 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023], *lv denied* 41 NY3d 942 [2024], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]).

Here, even assuming, arguendo, that defendant's trial counsel did not properly investigate defendant's mother and niece as potential witnesses, we must determine whether counsel's failure to do so " 'prejudice[d] the defense or defendant's right to a fair trial' " (*People v Benevento*, 91 NY2d 708, 714 [1998], quoting *People v Hobot*, 84 NY2d 1021, 1024 [1995]; *see People v Howard*, 231 AD3d 1493, 1495 [4th Dept 2024]). Because the court did not find the hearing testimony of defendant's niece to be credible, it cannot be said that defendant was prejudiced by trial counsel's failure to interview her or call her as a witness at trial. Stated otherwise, defense counsel cannot be deemed ineffective for failing to investigate or call witnesses whom the hearing court finds unworthy of belief (*see People*

v Mosley, 155 AD3d 1124, 1128 [3d Dept 2017], *lv denied* 31 NY3d 985 [2018]; *People v Llanos*, 13 AD3d 76, 77 [1st Dept 2004], *lv denied* 4 NY3d 833 [2005]). Based on our review of the record, we perceive no basis to disturb the court's credibility determinations (*see People v Keitt*, 208 AD3d 1108, 1108 [1st Dept 2022], *lv denied* 39 NY3d 986 [2022]), which "are 'entitled to great weight' in light of its opportunity to see the witnesses, hear the testimony, and observe demeanor" (*People v Thibodeau*, 151 AD3d 1548, 1552 [4th Dept 2017], *affd* 31 NY3d 1155 [2018]; *see People v Parsons*, 169 AD3d 1425, 1426 [4th Dept 2019], *lv denied* 33 NY3d 980 [2019]). There is no authority supporting defendant's contention that a court entertaining a CPL 440.10 motion must assume the truth of all hearing testimony and leave credibility determinations for the jury to make at a retrial.

Finally, with respect to defendant's mother, defendant relied on her affidavit, which was signed more than five years after his trial. Even if defendant's trial counsel should have interviewed defendant's mother as a potential defense witness, she did not testify at the hearing and, thus, defendant failed to meet his burden of proving by a preponderance of the evidence every fact essential to support the motion (*see* CPL 440.30 [6]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-00622

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENZINO E. REED, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered January 25, 2022. The judgment convicted defendant upon a plea of guilty of manslaughter in the second degree, leaving the scene of an incident resulting in death without reporting, tampering with physical evidence and aggravated unlicensed operation of a motor vehicle in the third degree.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice by reducing the sentence imposed for manslaughter in the second degree under count 1 of the indictment to an indeterminate term of imprisonment of 3 to 9 years and by vacating the surcharge, DNA databank fee, and crime victim assistance fee, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of manslaughter in the second degree (Penal Law § 125.15 [1]), tampering with physical evidence (§ 215.40 [2]), leaving the scene of an incident resulting in death without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [ii]), and aggravated unlicensed operation of a motor vehicle in the third degree (§ 511 [1] [a]). The charges arose from a fatal collision that occurred on a residential street in Rochester between a motor vehicle operated by defendant and a man riding a bicycle. At the time, defendant was racing his cousin, who was operating another vehicle on the same street. Although it is unclear how fast the vehicles were traveling at the time of the collision, it is undisputed that defendant and his cousin were exceeding the speed limit. Both defendant and his cousin fled the scene and neither reported the accident to the police. The victim's blood alcohol content was measured at .321%, more than four times the legal level of intoxication, but there is no evidence suggesting that his conduct contributed to the accident, which was

caused solely by the recklessness of defendant and his cousin. At the time of the accident, defendant was 18 years old.

We reject defendant's contention that County Court abused its discretion in denying his request for youthful offender treatment (*see People v Graham*, 218 AD3d 1359, 1360 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]). Moreover, having reviewed the applicable factors pertinent to a youthful offender determination (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to grant him such status (*see People v Simpson*, 182 AD3d 1046, 1047 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]). Although defendant has no prior criminal record and there is no indication in the record that he was under the influence of drugs or alcohol at the time of the accident, his reckless conduct caused the death of an innocent person and, after fleeing from the scene of the accident, he attempted to cover up his crimes by selling the damaged vehicle to a salvage company.

Nevertheless, considering the mitigating factors in the record, we exercise our power to modify the judgment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *People v Delgado*, 80 NY2d 780, 783 [1992]) by reducing the sentence imposed for manslaughter in the second degree under count 1 of the indictment to an indeterminate term of imprisonment of 3 to 9 years, which is the sentence received by defendant's older cousin who in our view is no less culpable than defendant for the fatal accident and subsequent attempts to avoid apprehension. Although the victim was struck by the vehicle operated recklessly by defendant rather than the vehicle operated recklessly by his cousin, that was due only to happenstance and does not render one reckless driver more or less culpable than the other.

Finally, "[b]ased on our interest of justice powers," we further modify the judgment by "vacating the surcharge and fees imposed at sentencing" (*People v Lassiter*, 211 AD3d 545, 546 [1st Dept 2022], *lv denied* 39 NY3d 1112 [2023]; *see* CPL 420.35 [2-a] [c]).

All concur except MONTOUR, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and would affirm the judgment because I would not exercise our power as a matter of discretion in the interest of justice to reduce defendant's sentence (*see* CPL 470.15 [6] [b]). While racing a car without a valid driver's license and at above the legal speed limit, defendant struck and killed a bicyclist. The victim was uninvolved with the unlawful, dangerous, and unanticipated street racing occurring on the public roadway around him. Upon striking the bicyclist head-on, defendant did not stop to determine who he had hit. He did not attempt to render aid. He did not call 911 so that first responders could render aid. Instead, defendant fled the scene. Rather than accept responsibility, defendant thereafter caused additional damage to his vehicle in order to purposefully obfuscate the fact that he had struck a person. He then sold the vehicle to a scrap yard in the hope that his involvement would never be discovered. Under these circumstances, I cannot say that the interest of justice supports a reduction of

defendant's sentence.

To the extent the majority finds that a reduction is warranted in order to match the sentence received by defendant's cousin, who was driving another car and was racing with defendant at the time of the collision, the mere fact that another participant in the conduct that resulted in the death of the victim may have received a shorter sentence of imprisonment does not in and of itself render the sentence received by defendant unduly harsh or severe. The interest of justice does not require reduction of a sentence that is itself not unduly harsh or severe down to the least severe sentence imposed for similar conduct. In any event, although the majority states that defendant's cousin "is no less culpable than defendant for the fatal accident and subsequent attempts to avoid apprehension," I note that defendant's cousin was not driving the vehicle that struck and killed the victim – he was driving a different vehicle altogether. Thus, defendant's cousin did not strike a bicyclist head-on, nor did he fail to stop to determine who he had hit or otherwise fail to provide aid to the person he had just struck. Simply put, while defendant's cousin is certainly culpable for being a participant in the criminal conduct, there are clear distinctions between his involvement and the involvement of defendant that explain the differences between their sentences and that, in my view, do not render it necessary in the interest of justice to ensure that both sentences be equal.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-01680

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLANDO A. ALLEN, ALSO KNOWN AS
CHRISTOPHER CAMP/BRANDO, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE 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 (Vincent M. Dinolfo, J.), rendered November 19, 2020. The judgment convicted defendant, upon a plea of guilty, of murder in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of three counts of murder in the second degree (Penal Law § 125.25 [1]). Defendant first contends that County Court abused its discretion in failing, sua sponte, to order a competency examination prior to accepting his guilty plea inasmuch as, on prior occasions, defendant had been adjudicated incompetent to stand trial and was committed to a psychiatric institution. Preliminarily, we note that the issue of competency survives defendant's guilty plea and waiver of the right to appeal, the validity of which he does not challenge (*see People v Smith*, 198 AD3d 1347, 1348 [4th Dept 2021]; *People v Henderson*, 162 AD3d 1507, 1508 [4th Dept 2018], *lv denied* 32 NY3d 1004 [2018]), and need not be preserved for our review (*see People v Robinson*, 225 AD3d 1266, 1266 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]; *Henderson*, 162 AD3d at 1508). Nevertheless, the contention is without merit. "The determination of whether to order a competency hearing lies within the sound discretion of the trial court . . . [and] [t]he . . . issue is whether the trial court abused that discretion, not whether it might have been reasonable to order a hearing" (*People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]; *see Robinson*, 225 AD3d at 1267). "[A] history of prior mental illness and treatment does not itself call into question defendant's competence" (*People v Brown*, 229 AD3d 1150, 1151 [4th Dept 2024] [internal quotation marks omitted];

see People v Robinson, 39 AD3d 1266, 1267 [4th Dept 2007], *lv denied* 9 NY3d 869 [2007]). Here, in contrast to defendant's prior appearances that resulted in a finding that he was not competent, during the plea proceedings defendant gave appropriate answers to the court's questions, he stated that he understood the nature of the charges against him and that he could actively participate in the proceedings, and he did not make any statements that called into question his competency or the voluntariness of his plea (*see Smith*, 198 AD3d at 1349).

Defendant further contends that defense counsel was ineffective in failing to request a competency hearing. To the extent that defendant's contention survives his guilty plea and waiver of the right to appeal (*see Henderson*, 162 AD3d at 1508), we conclude that defendant was afforded meaningful representation inasmuch as defendant received an advantageous plea offer, and nothing in the record from defendant's plea proceeding casts doubt on the apparent effectiveness of his counsel (*see Smith*, 198 AD3d at 1348*; see also Brown*, 229 AD3d at 1151).

Entered: April 25, 2025 Ann Dillon Flynn
Clerk of the Court

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

107

TP 24-01265

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

IN THE MATTER OF CITY OF ROCHESTER, PETITIONER,

V MEMORANDUM AND ORDER

FIREFIGHTER REMINGTON REYES, RESPONDENT.

PATRICK N. BEATH, CORPORATION COUNSEL, ROCHESTER (CHRISTOPHER S. NOONE OF COUNSEL), FOR PETITIONER.

TREVETT CRISTO P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Monroe County [Elena F. Cariola, J.], entered September 15, 2022) to review a determination that respondent is entitled to benefits pursuant to section 8B-5 of the Charter of the City of Rochester.

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

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks to annul a determination, following a hearing conducted pursuant to the collective bargaining agreement between petitioner and the union representing respondent, that respondent was injured while performing his duties as a firefighter employed by petitioner and therefore is entitled to benefits pursuant to section 8B-5 of the Charter of the City of Rochester.

Respondent was injured when he severed the tendon in his left thumb while helping prepare lunch for himself and the other firefighters at a firehouse kitchen. At the time he cut his thumb, respondent was working a shift as a firefighter, and had just returned from the grocery store in the fire truck with the other firefighters.

At the outset, we note that Supreme Court erred in transferring the proceeding to this Court pursuant to CPLR 7804 (g) inasmuch as the hearing was not conducted pursuant to a direction by law but, rather, was held pursuant to the terms of an agreement between the parties (*see Matter of Williams v County of Onondaga*, 215 AD3d 1291, 1292 [4th Dept 2023], *lv denied* 40 NY3d 908 [2023]). Nevertheless, in the interests of judicial economy, we consider the merits of the petition

(*see id.*), and we confirm the determination and dismiss the petition.

Our review of an administrative determination such as this is limited to whether the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]; *see Williams*, 215 AD3d at 1292). A determination "is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts . . . An agency's determination is entitled to great deference . . . and, [i]f the [reviewing] court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Thompson v Jefferson County Sheriff John P. Burns*, 118 AD3d 1276, 1277 [4th Dept 2014] [internal quotation marks omitted]). Here, the Hearing Officer wrote in his decision that he was persuaded by testimony and evidence demonstrating the value of firefighters preparing and eating meals together, and the Hearing Officer determined that respondent established that there was a direct causal relationship between his job duties and his injury (*see generally Matter of Theroux v Reilly*, 1 NY3d 232, 240-241 [2003]). "[T]he Hearing Officer was entitled to weigh the parties' conflicting . . . evidence and to assess the credibility of the witnesses, and '[w]e may not weigh the evidence or reject [the Hearing Officer's] choice where the evidence is conflicting and room for a choice exists' " (*Matter of Erie County Sheriff's Police Benevolent Assn., Inc. v County of Erie*, 159 AD3d 1561, 1562 [4th Dept 2018]). Thus, we conclude that the Hearing Officer's "determination is supported by a rational basis" and is not arbitrary or capricious (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

We have reviewed petitioner's remaining contentions and conclude that none warrants annulment of the determination.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

108

CA 24-00237

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

PETER R. MORGAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF UTICA, DEFENDANT-APPELLANT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (ZACHARY C. OREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Oneida County (Julie G. Denton, J.), entered January 18, 2024. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries that he allegedly sustained when he was arrested by police officers employed by defendant. In his complaint, plaintiff asserted a single cause of action for assault and battery, based on allegations that, during his arrest, fingerprinting, transport and arraignment, he was subjected to forcible touching. Defendant moved for summary judgment dismissing the complaint and, as relevant here, Supreme Court denied the motion with respect to plaintiff's claim of assault and battery at the time of arraignment. We affirm.

It is well settled that "[t]he proponent on a summary judgment motion bears the initial burden of establishing entitlement to judgment as a matter of law by submitting evidence sufficient to eliminate any material issues of fact" (*Rice v City of Buffalo*, 145 AD3d 1503, 1504-1505 [4th Dept 2016]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We conclude that defendant failed to meet its initial burden on the motion with respect to the claim of assault and battery at the time of plaintiff's arraignment, and thus the court properly denied that part of defendant's motion "regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853).

In support of its motion, defendant submitted, inter alia, a handwritten summons and complaint verified by the pro se plaintiff, as well as reports, deposition transcripts of police officers involved in the arrest and processing of plaintiff, and video recorded by body-worn cameras of several officers and surveillance video taken at the

police station. Although the evidence submitted by defendant in support of its motion addresses the conduct of the officers at various times, including handcuffing, booking and escorting plaintiff to the police station, it is insufficient to eliminate any material issues of fact with respect to the claim of assault and battery at the time of arraignment because defendant did not submit any evidence regarding police conduct during that time frame.

We reject defendant's contention that it met its burden with respect to the claim of assault and battery at the time of arraignment by relying on the allegations in plaintiff's verified complaint. Even assuming, arguendo, that it is proper to treat the verified complaint as an affidavit under CPLR 105 (u), that evidence is nevertheless insufficient to eliminate any material issues of fact (*see generally Winegrad*, 64 NY2d at 853; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) inasmuch as plaintiff alleged in his complaint that he was "forcibly touched" at the time of his arraignment and that the force was "excessive, unjustified and unwarranted," and not simply, as defendant contends, that contact occurred while the officers were escorting plaintiff by holding onto his arms.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01826

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

JACEK WOLOSZUK, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ELLEN WOLOSZUK, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WENDE LOGAN-YOUNG, M.D., WENDE LOGAN-YOUNG, M.D., DOING BUSINESS AS ELIZABETH WENDE BREAST CLINIC, PHILIP MURPHY, M.D., SOUTHEAST OBSTETRICS & GYNECOLOGY, P.C., AND RITA CLEMENT, M.D., DEFENDANTS-RESPONDENTS.

PAUL WILLIAM BELTZ, LLC, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WENDE LOGAN-YOUNG, M.D., WENDE LOGAN-YOUNG, M.D., DOING BUSINESS AS ELIZABETH WENDE BREAST CLINIC, AND PHILIP MURPHY, M.D.

BROWN, GRUTTADARO, & PRATO, PLLC, ROCHESTER, MARTIN CLEARWATER & BELL LLP, NEW YORK CITY (BARBARA D. GOLDBERG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SOUTHEAST OBSTETRICS & GYNECOLOGY, P.C., AND RITA CLEMENT, M.D.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered October 25, 2023. The order denied the motion of plaintiff to vacate an order dismissing the action.

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

Memorandum: In this medical malpractice action, plaintiff appeals from an order that denied plaintiff's motion to vacate Supreme Court's sua sponte dismissal of the complaint pursuant to CPLR 3216. We reverse.

Between July 2020—when the case was reassigned to the instant Justice—and September 2022, the court issued at least seven separate scheduling orders, each directing that the note of issue be filed by a date certain. Each of those scheduling orders was ultimately amended. As relevant here, on July 28, 2022, the court issued a "second

supplemental scheduling order," which directed that the note of issue "shall be filed" by September 30, 2022. The second supplemental scheduling order set forth the terms for seeking an extension, and did not advise the parties that the failure to timely file the note of issue would result in dismissal. One week before the second supplemental scheduling order was to elapse, plaintiff's counsel requested an extension consistent with the terms of that scheduling order.

On October 4, 2022—after the deadline to file the note of issue had elapsed—the court informed the parties that it was declining to extend the scheduling order. Defense counsel inquired as to how the court wished for them to proceed, and on November 16, 2022, the court issued a sua sponte order dismissing the action pursuant to CPLR 3216. Shortly thereafter, plaintiff moved, among other things, to "reverse" the November 16, 2022 order that dismissed the action and to restore the action to the trial calendar. Defendants opposed the motion. The court amended its prior decision dismissing the case, but found that dismissal of the action was a valid exercise of its discretion and denied plaintiff's motion.

We agree with plaintiff that the court erred in denying his motion inasmuch as the court erred in dismissing the complaint for want of prosecution. CPLR 3216 (a) provides that where a party fails to prosecute an action, "the court, on its own initiative or on motion, with notice to the parties, may dismiss the party's pleading." Further, CPLR 3216 (b) is clear and unambiguous: "No dismissal shall be directed under any portion of subdivision (a) of this rule and *no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with*," and the enumerated list of conditions precedent includes that "[t]he court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed. *Where the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation*" (CPLR 3216 [b] [3] [emphasis added]; *see Cadichon v Facelle*, 18 NY3d 230, 235 [2011], *rearg denied* 18 NY3d 935 [2012]).

Stated another way, absent strict compliance with the conditions precedent to dismissal set forth in CPLR 3216 (b) (3), "[n]o dismissal shall be directed" (CPLR 3216 [b]). Indeed, "[t]he conditions precedent to bringing a motion to dismiss for failure to prosecute under CPLR 3216 must be complied with strictly" (*Frank L. Ciminelli Constr. Co. v City of Buffalo*, 110 AD2d 1075, 1076 [4th Dept 1985], *appeal dismissed* 65 NY2d 1053 [1985]).

Among those conditions precedent are the service of a ninety-day demand to resume prosecution, by registered or certified mail, which specifically states that the failure to file the note of issue within ninety days will serve as a basis for a motion to dismiss for want of prosecution (*see* CPLR 3216 [b] [3]). Where the ninety-day demand is served by the court, the demand shall also "set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" (*id.*).

Here, the court did not serve a ninety-day demand upon plaintiff, and for that reason alone, the court erred in directing dismissal pursuant to CPLR 3216. Even assuming, arguendo, that the court's second supplemental scheduling order could serve as the substitute for a ninety-day demand, that scheduling order did not indicate that dismissal would result if plaintiff failed to file the note of issue, nor did it set forth the specific conduct constituting plaintiff's neglect (*see* CPLR 3216 [b] [3]). "While an order may have the same effect as a valid 90-day demand, that order *must* advise as to the consequences for failing to comply, i.e., dismissal of the complaint" (*Hilliard*, 88 AD3d at 1292 [emphasis added]), and here, the order wholly failed to do so. Inasmuch as the court failed to comply with the conditions precedent to dismissing this action for want of prosecution, we reverse the order appealed from, grant plaintiff's motion, and reinstate the complaint.

We have considered defendants' alternate grounds for affirmance and conclude that, to the extent they are preserved for our review, they are without merit (*see Rechberger v Scolaro, Shulman, Cohen, Fetter & Burstein, P.C.*, 45 AD3d 1453, 1454 [4th Dept 2007]).

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

110

CA 23-01879

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

IN THE MATTER OF ARBITRATION BETWEEN
WENDY COOPER AND WAYNE SPENCE, AS PRESIDENT
OF THE NEW YORK STATE PUBLIC EMPLOYEES
FEDERATION, AFL-CIO, PETITIONERS-RESPONDENTS,

AND MEMORANDUM AND ORDER

ROSWELL PARK COMPREHENSIVE CANCER CENTER,
ALSO KNOWN AS ROSWELL PARK CANCER INSTITUTE,
CANDACE JOHNSON, PH.D., AS PRESIDENT AND CEO,
BOARD OF TRUSTEES OF ROSWELL PARK COMPREHENSIVE
CANCER CENTER, MICHAEL L. JOSEPH, AS CHAIRMAN
OF BOARD OF DIRECTORS OF ROSWELL PARK
COMPREHENSIVE CANCER CENTER AND GREGORY F. DANIEL,
M.D., MMA, AS PRESIDENT OF BOARD OF DIRECTORS
OF ROSWELL PARK COMPREHENSIVE CANCER CENTER,
RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING PLLC, BUFFALO (MICHAEL E. HICKEY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

EDWARD J. GREENE, JR., ALBANY (JENIFER M. WHARTON OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 29, 2023. The order, insofar as appealed from, granted the petition, vacated an arbitration award, reinstated petitioner Wendy Cooper to her employment and directed the parties to negotiate any questions of retroactive pay and benefits, and denied the application of respondents to confirm the arbitration award.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is denied, the application is granted, the arbitration award is confirmed and the second and third ordering paragraphs are vacated.

Memorandum: In this CPLR article 75 proceeding to vacate an arbitration award, respondents appeal from an order insofar as it granted the petition seeking to vacate the award, effectively denied respondents' application to confirm the award, reinstated petitioner Wendy Cooper (petitioner), a former registered nurse employed by respondent Roswell Park Comprehensive Cancer Center (Roswell Park), and directed the parties to negotiate any questions of retroactive pay

and benefits.

In 2021, consistent with respondents' then-existing obligation under 10 NYCRR 2.61 (repealed by NY St Reg, Oct. 4, 2023 at 22) to ensure that certain personnel be fully vaccinated against COVID-19, respondents directed petitioner to receive her first dose of the COVID-19 vaccine. Petitioner did not comply, Roswell Park suspended her without pay and issued a Notice of Discipline in accordance with the relevant collective bargaining agreement (CBA) with petitioner's union, and she responded by, inter alia, demanding arbitration. During the arbitration proceedings, litigation in an unrelated matter resulted in a declaration that 10 NYCRR 2.61 is null and void (*Medical Professionals for Informed Consent v Bassett*, 78 Misc 3d 482, 492 [Sup Ct, Onondaga County 2023] [*MPIC*]). In the arbitration award, however, the arbitrator concluded that his jurisdiction was limited to interpreting and applying the provisions of the CBA and thus the determination in *MPIC* did not require a particular result in the instant arbitration. The arbitrator further concluded that respondents met their burden of establishing misconduct and that the misconduct prevented petitioner from performing her job duties. Thus, the arbitrator concluded that respondents had probable cause to suspend her and just cause to issue the Notice of Discipline and terminate her employment.

Petitioners commenced this CPLR article 75 proceeding seeking to vacate the arbitration award and, in their answer, respondents sought an order confirming the award (application). Following oral argument, Supreme Court concluded that the arbitrator's award violated public policy, that it was irrational, and that vacatur was in the interest of justice inasmuch as the award ignored the determination in *MPIC* that 10 NYCRR 2.61 is null and void. Thus, the court, inter alia, granted the petition, effectively denied the application, vacated the arbitration award, ordered that petitioner be reinstated, and ordered that the parties negotiate any questions of retroactive pay and benefits. We reverse the order insofar as appealed from.

A court's authority to vacate an arbitrator's award is limited to the grounds set forth in CPLR 7511 (b), which permits vacatur of an award where the arbitrator, as relevant here, "exceed[s] [their] power" (CPLR 7511 [b] [1] [iii]) by issuing an " 'award [that] violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90 [2010], quoting *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]). Where, as here, the parties agree to submit their dispute to an arbitrator pursuant to a collective bargaining agreement, "[c]ourts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of*

New York State Correctional Officers & Police Benevolent Assn. v State of New York, 94 NY2d 321, 326 [1999]). "The party seeking to vacate an arbitration award thus bears a heavy burden to establish that the arbitrator exceeded their power" (*Matter of Buffalo Teachers' Fedn. [Board of Educ. of Buffalo City Sch. Dist.]*, 227 AD3d 1435, 1436 [4th Dept 2024]).

We agree with respondents that the court "erred in vacating the award on the ground that it was against public policy because petitioners failed to meet their heavy burden to establish that the award in this employer-employee dispute violated public policy" (*Matter of Spence [State Univ. of N.Y.]*, 230 AD3d 1559, 1561 [4th Dept 2024]; *see Matter of Rochester City School Dist. [Rochester Assn. of Paraprofessionals]*, 34 AD3d 1351, 1351-1352 [4th Dept 2006], *lv denied* 8 NY3d 807 [2007]). We further agree with respondents that the court "erred in vacating the award on the ground that it was irrational" (*Spence*, 230 AD3d at 1561). " 'An award is irrational if there is no proof whatever to justify the award' " (*Buffalo Teachers' Fedn.*, 227 AD3d at 1437). Where, however, "an arbitrator 'offer[s] even a barely colorable justification for the outcome reached,' the arbitration award must be upheld" (*Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1122 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013]). Here, inasmuch as it is undisputed that Roswell Park directed petitioner to receive the vaccine by a date certain, that it apprised her that her continued employment was dependent upon her compliance, and that petitioner refused to be vaccinated by the required date, the court erred in concluding that the arbitrator's award was irrational (*see Spence*, 230 AD3d at 1561-1562). Further, the court was not permitted to vacate the award merely because it believed vacatur would better serve the interest of justice (*see generally New York State Correctional Officers & Police Benevolent Assn.*, 94 NY2d at 326).

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00050

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

IN THE MATTER OF AARON CHANG, AS
PRESIDENT OF SISTERS OF CHARITY HOSPITAL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BILLIE J.C.-W., ALSO KNOWN AS BILLI C.,
ALSO KNOWN AS MARIA T.R., ALSO KNOWN AS
MARIA TRACEY R., ALSO KNOWN AS MARIA T.W.,
ALSO KNOWN AS MARIA R., RESPONDENT.

COMMISSIONER OF DEPARTMENT OF SOCIAL SERVICES
OF ONEIDA COUNTY, NONPARTY APPELLANT.

AMANDA L. CORTESE-KOLASZ, COUNTY ATTORNEY, UTICA (SUSAN L. SCHNEIDER OF COUNSEL), FOR NONPARTY APPELLANT.

Appeal from an order of the Supreme Court, Erie County (M. William Boller, A.J.), entered November 16, 2023, in a proceeding pursuant to Mental Hygiene Law article 81. The order, inter alia, appointed the Commissioner of the Department of Social Services of Oneida County, as the permanent guardian of the person and property of respondent.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and in the exercise of discretion without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding pursuant to Mental Hygiene Law article 81 to appoint a guardian of the person and property of respondent Billie J.C.-W., an allegedly incapacitated person (AIP). Nonparty Commissioner of the Department of Social Services of Oneida County (Oneida County) appeals from an order determining that the AIP was incapacitated and in need of a guardian and appointing Oneida County to be her guardian. Oneida County contends, inter alia, that Supreme Court committed numerous procedural errors requiring reversal of the order. As a preliminary matter, we note that all of those procedural contentions are being raised by Oneida County for the first time on appeal. Although the contentions regarding those errors are not preserved for our review (*see Matter of Anonymous*, 41 AD3d 346, 347 [1st Dept 2007]), we nevertheless exercise our "inherent power to vacate [an article 81 order] in the interest of substantial justice . . . because the court held a hearing pursuant to Mental Hygiene Law § 81.11 in [the AIP's] absence and without having

made a finding regarding her inability to meaningfully participate in the hearing" (*Matter of Jenkins v Gina B.*, 232 AD3d 469, 469 [1st Dept 2024]; *see Matter of Nima B.R. [Rae-Garwood]*, 233 AD3d 879, 880 [2d Dept 2024]).

"Guardianship proceedings, as a drastic intervention in a person's liberty, must adhere to proper procedural standards" (*Nima B.R.*, 233 AD3d at 880; *see Matter of Panartos*, 308 AD2d 350, 351 [1st Dept 2003]). Pursuant to Mental Hygiene Law § 81.11, where a petition to have a guardian appointed for an AIP has been filed (*see* §§ 81.06-81.08), "[a] determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing" (§ 81.11 [a]). Any party to the proceeding "shall" have the right to present evidence, call witnesses, cross-examine witnesses and be represented by counsel (§ 81.11 [b] [1]-[4]).

Most importantly, "[t]he hearing *must be conducted in the presence of the person alleged to be incapacitated*, either at the courthouse or where the person alleged to be incapacitated resides" (Mental Hygiene Law § 81.11 [c] [emphasis added]), unless the person is outside the state or "all the information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing or (ii) no meaningful participation will result from the person's presence at the hearing" (§ 81.11 [c] [2]; *see* § 81.11 [c] [1]; *Nima B.R.*, 233 AD3d at 880). "There is an 'overarching value in a court having the opportunity to observe, firsthand, the allegedly incapacitated person' " (*Matter of Banks [Gwendolyn R.]*, 138 AD3d 519, 520 [1st Dept 2016]; *see Nima B.R.*, 233 AD3d at 880).

Here, the court did not conduct a hearing in the presence of the AIP. Although the court evaluator informed the court that "[a]ll of the parties here right now agree that the AIP needs a guardian," it is unclear whether that statement by the court evaluator constitutes an agreement by the AIP's attorney to the court's determination to appoint a guardian for all of the AIP's person and property. Regardless, even if we were to deem this a situation where the AIP's attorney agreed that the AIP consented to the appointment, "a court should not accept counsel's representation that the AIP has consented to the appointment of a guardian where the AIP is not present" (*Matter of Kover*, 134 AD3d 64, 78-79 [1st Dept 2015]). "[T]he court must first determine whether the AIP has the requisite capacity to consent, and must then make a finding of the AIP's agreement to the terms of the guardianship, on the record" (*id.* at 79).

Thus, we reverse the order and remit the matter to Supreme Court "for a new hearing at which the AIP shall be afforded an opportunity to be present and a new determination thereafter" (*Nima B.R.*, 233 AD3d at 880). We further conclude that, "[p]ending such hearing and determination, the status quo shall remain the same" (*id.*).

Based on our determination, we need not reach Oneida County's remaining contentions regarding additional procedural errors, including the court's failure to set forth the statutory findings on

the record supporting its determination, including a lack of findings with respect to the AIP's functional limitations supporting the determination that appointing a guardian over the entire person and property of the AIP was the least restrictive intervention (*see* Mental Hygiene Law §§ 81.02 [a], [c]; 81.15 [a] [1], [2]; *see generally Matter of Samuel S. [Helene S.]*, 96 AD3d 954, 957-958 [2d Dept 2012], *lv dismissed* 19 NY3d 1065 [2012]; *Matter of Daniel TT. [Diane UU.]*, 39 AD3d 94, 97 [3d Dept 2007]). We also do not reach Oneida County's contention that the court erred in appointing Oneida County as the guardian, although we note that, without any evidence or testimony in the record, we would be unable to determine whether the court abused its discretion (*see Matter of Kimberly DD.*, 220 AD3d 1091, 1093 [3d Dept 2023], *lv denied* 41 NY3d 903 [2024]; *Matter of Gladwin*, 35 AD3d 1236, 1237 [4th Dept 2006]) or improvidently exercised its discretion (*see Matter of Naquan S.*, 2 AD3d 531, 531 [2d Dept 2003]; *Matter of Gustafson*, 308 AD2d 305, 307 [1st Dept 2003]) in making its determination regarding who should be appointed the AIP's guardian.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-00423

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER WERENSKI, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (JESSICA P. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered May 29, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree, criminal possession of a weapon in the third degree, and aggravated criminal contempt.

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, murder in the second degree (Penal Law § 125.25 [1]), in connection with the fatal stabbing of his wife. We affirm.

Defendant did not preserve his contention that County Court erred in failing to charge the jury on extreme emotional disturbance inasmuch as defense counsel never requested that charge at the charge conference (*see People v Bailey*, 142 AD3d 1096, 1097 [2d Dept 2016], *lv denied* 28 NY3d 1181 [2017]) and did not object to the charge as given (*see People v VanGorden*, 147 AD3d 1436, 1440 [4th Dept 2017], *lv denied* 29 NY3d 1037 [2017]).

Defendant further contends that he received ineffective assistance of counsel. Inasmuch as defendant's contention is based upon matters outside the record, it is not properly before us on direct appeal and must be pursued by way of a motion pursuant to CPL article 440 (*see People v Jackson*, 153 AD3d 1605, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]).

Contrary to defendant's contention, his sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions

and conclude that none warrants modification or reversal of the judgment.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

144

KA 23-01806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT R. RICHMOND, DEFENDANT-APPELLANT.

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

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Melissa Lightcap Cianfrini, J.), entered August 18, 2023. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

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

Contrary to defendant's contention, County Court did not abuse its discretion in denying his request for a downward departure from his presumptive risk level (*see People v Wilson*, 186 AD3d 1066, 1067 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020]). Although a defendant's response to treatment, " 'if exceptional' (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]), may constitute a mitigating factor to serve as the basis for a downward departure," we conclude that, here, defendant "failed to prove by a preponderance of the evidence that his response to treatment was exceptional" (*People v Bernecky*, 161 AD3d 1540, 1541 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]). Defendant otherwise "failed to establish by a preponderance of the evidence the existence of mitigating factors not adequately taken into account by the guidelines" (*People v Lewis*, 156 AD3d 1431, 1432 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *see Wilson*, 186 AD3d at 1067; *People v Nilsen*, 148 AD3d 1688, 1689 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

147

CAF 23-01685

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

IN THE MATTER OF AUBREY M.T., CARMON M.T.,
HILLARY M.T., KINSLEY R.T., AND SHAWNNA L.T.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT;

SCOTT W.T., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

SEAN R. STERLING, WATERTOWN, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered August 23, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, transferred custody of the subject children to petitioner.

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

Memorandum: In this termination of parental rights proceeding pursuant to Social Services Law § 384-b, the father, the respondent in appeal No. 1 and the petitioner in appeal No. 2, appeals from an order of disposition in appeal No. 1 that transferred the custody of the subject children to petitioner in that appeal, Jefferson County Department of Social Services (DSS), after a finding that the father had permanently neglected the children. In appeal No. 2, the father appeals from an order dismissing his petition for enforcement of an order of parenting time.

Contrary to the father's contention in appeal No. 1, the evidence at the hearing establishes that, despite the diligent efforts of DSS, the father failed to plan for the future of the children. "It is well settled that, to plan substantially for a child's future, the parent must take meaningful steps to correct the conditions that led to the child's removal within a reasonable period of time" (*Matter of Patience E. [Victoria E.]*, 225 AD3d 1181, 1182 [4th Dept 2024], *lv denied* 42 NY3d 904 [2024] [internal quotation marks omitted]). Here, the father "did not successfully address or gain insight into the problems that led to the removal of the [children] and continued to prevent [their] safe return" (*Matter of Giovanni K.*, 62 AD3d 1242,

1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see Matter of Soraya S. [Kathryne T.]*, 158 AD3d 1305, 1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]).

The father also contends in appeal No. 1 that Family Court erred when it admitted a psychological report during the fact-finding hearing. Although the psychological report does not appear to have been admitted during the fact-finding hearing, even assuming, arguendo, that it was improperly admitted because it constitutes hearsay (*see Matter of Chloe W. [Amy W.]*, 137 AD3d 1684, 1685 [4th Dept 2016]), we conclude that such error was harmless inasmuch as the record otherwise contains ample evidence supporting the court's determination (*see Matter of Juliet W. [Amy W.]*, 216 AD3d 1424, 1425 [4th Dept 2023], *lv denied* 40 NY3d 1059 [2023]; *Matter of Brooklyn S. [Stafania Q.—Devin S.]*, 150 AD3d 1698, 1700 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]).

Although the father contends in appeal No. 1 that the court erred in not granting him a suspended judgment, the father did not request a suspended judgment, and thus he failed to preserve for our review his contention that the court abused its discretion in failing to issue one (*see Matter of Natalee F. [Eric F.]*, 194 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]*; Matter of Jamarion N. [Ernest N.]*, 181 AD3d 1200, 1201-1202 [4th Dept 2020]).

In appeal No. 2, the father contends that his enforcement petition seeking, inter alia, make up parenting time, which was dated the same day as the order in appeal No. 1 terminating his parental rights, was not rendered moot by that order. We reject that contention. The issue of visitation was rendered moot by the court's final order of disposition (*see generally Matter of Keon D.W. [Desire E.]*, 167 AD3d 1582, 1583 [4th Dept 2018]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

149

CAF 24-00247

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

IN THE MATTER OF PATRICIA TOWNSEND,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY MYERS, JR., RESPONDENT-APPELLANT,
AND ASHLEY MYERS, RESPONDENT-RESPONDENT.

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

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered October 24, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and physical custody with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order effectively granting, on the father's default, the petition of the subject child's maternal aunt seeking sole custody of the child. Because neither the father nor his attorney appeared at the custody hearing, Family Court deemed the father to be in default (*see generally Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446 [4th Dept 2021], *lv dismissed* 37 NY3d 1081 [2021]). " '[I]t is well settled that no appeal lies from an order that is entered upon the default of the appealing party' " (*Matter of Roache v Hughes-Roache*, 153 AD3d 1653, 1653 [4th Dept 2017]; *see Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]). We therefore dismiss the appeal.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

152

CAF 23-01956

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

IN THE MATTER OF SCOTT T., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, NAOMI GARCIA-HENRIQUEZ, AND SAVANNAH ADAMS, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

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

SEAN R. STERLING, WATERTOWN, FOR RESPONDENTS-RESPONDENTS.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered September 21, 2023. The order dismissed the petition.

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

Same memorandum as in *Matter of Aubrey M.T. (Scott W.T., Jr.)* ([appeal No. 1] — AD3d — [Apr. 25, 2025] [4th Dept 2025]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

166

KA 23-01887

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAJUAN R. SINGLETON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 15, 2023. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

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

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

Defendant contends that Supreme Court erred in refusing to suppress physical evidence—i.e., a revolver seized from him following a traffic stop—because the police did not have probable cause to search his person. We reject that contention. The record establishes, and defendant does not dispute, that the police were entitled to stop the vehicle in which he was a passenger after they observed the vehicle's driver violating a provision of the Vehicle and Traffic Law (*see People v Rodriguez-Rivera*, 203 AD3d 1624, 1625 [4th Dept 2022], *lv denied* 39 NY3d 942 [2022], *lv denied* 42 NY3d 1037 [2024]; *see also* Vehicle and Traffic Law § 1229-c [3]; *see generally People v Hinshaw*, 35 NY3d 427, 430 [2020]). We conclude that, following the traffic stop, the police had probable cause to search defendant and the vehicle after they detected, based on their training and experience, the "odor of marihuana emanating from [the inside of the] vehicle" (*Rodriguez-Rivera*, 203 AD3d at 1625 [internal quotation marks omitted]; *see People v Clanton*, 151 AD3d 1576, 1577 [4th Dept 2017]; *People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]) and observed small pieces of marihuana strewn about the vehicle's interior (*see People v Bethea*, 191 AD3d 1487, 1487-1488 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]; *see generally People v Edwards*, 14 NY3d 741, 742 [2010], *rearg denied* 14

NY3d 794 [2010]). While lawfully searching defendant for additional marihuana, the police recovered the revolver from his pocket (*see Rodriguez-Rivera*, 203 AD3d at 1625; *see generally People v Brown*, 96 NY2d 80, 88-89 [2001]).

We reject defendant's contention that the court erred in denying his motion to reopen the suppression hearing. The court properly denied the motion inasmuch as it was based on evidence that was available and could have been discovered with reasonable diligence prior to the hearing (*see* CPL 710.40 [4]; *People v Strong*, 164 AD3d 1637, 1639 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019], *cert denied* — US —, 140 S Ct 199 [2019]; *People v Smith*, 158 AD3d 1081, 1082 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018], *reconsideration denied* 32 NY3d 1008 [2018]) or that would not have changed the outcome of the hearing (*see People v Crespo*, 117 AD3d 1538, 1539 [4th Dept 2014], *lv denied* 23 NY3d 1035 [2014]; *cf. People v John*, 38 AD3d 568, 569 [2d Dept 2007]; *see generally People v Harris*, 203 AD3d 1614, 1615 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]).

Defendant further contends that the court erred in permitting the People to introduce certain *Molineux* evidence. Although we agree with defendant that his "pretrial objection to the People's *Molineux* [application] . . . was sufficient to preserve for appellate review his contention that [the court] improperly admitted" that evidence (*People v Hills*, 234 AD3d 1311, 1313 [4th Dept 2025] [internal quotation marks omitted]; *see* CPL 470.05 [2]; *People v Bonich*, 208 AD3d 679, 679 [2d Dept 2022], *lv denied* 39 NY3d 939 [2022]), we reject his contention on the merits. We conclude that evidence that defendant possessed marihuana at the time of the traffic stop was inextricably intertwined with the facts of the charged crime inasmuch as that evidence was necessary to explain how the police discovered a gun in defendant's possession (*see Hills*, 234 AD3d at 1313; *People v Spencer*, 225 AD3d 1200, 1201 [4th Dept 2024], *lv denied* 42 NY3d 930, 1037 [2024]; *People v Larkins*, 153 AD3d 1584, 1586-1587 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]). We further conclude that the challenged evidence was highly probative and that the probative value of the evidence was not outweighed by its potential for prejudice (*see generally People v Alvino*, 71 NY2d 233, 242 [1987]). Moreover, we note that the court minimized the prejudicial effect of the challenged evidence by providing appropriate limiting instructions to the jury (*see generally People v Morris*, 21 NY3d 588, 598 [2013]; *Spencer*, 225 AD3d at 1201).

To the extent that defendant on appeal implicitly challenges the admission of the revolver and ammunition in evidence at trial on the basis that the People failed to establish an adequate chain of custody, that contention is unpreserved for our review (*see People v Carey*, 162 AD3d 1476, 1478 [4th Dept 2018], *lv denied* 32 NY3d 936 [2018]; *People v Irizarry*, 160 AD3d 1384, 1386 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]; *People v Alexander*, 48 AD3d 1225, 1226 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]). In any event, even assuming, arguendo, that there were gaps in the chain of custody, we conclude that the police provided sufficient assurances of the

identity and unchanged condition of the challenged evidence (*see People v Julian*, 41 NY2d 340, 342-343 [1977]), and the alleged gaps thus went to the weight of the evidence, not its admissibility (*see People v Kennedy*, 78 AD3d 1477, 1478 [4th Dept 2010], *lv denied* 16 NY3d 798 [2011]; *People v Cleveland*, 273 AD2d 787, 788 [4th Dept 2000], *lv denied* 95 NY2d 864 [2000]).

Indeed, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). An acquittal would have been unreasonable on this record given the uncontested evidence establishing that the police found a loaded and operable revolver on defendant's person following a traffic stop—i.e., when he was not in his home or place of business. Even assuming, arguendo, that an acquittal would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*).

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

169

KA 22-01341

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARNEY J. RADFORD, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered February 23, 2022. The judgment convicted defendant upon a plea of guilty of criminal mischief in the fourth degree and driving while ability impaired.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal mischief in the fourth degree (Penal Law § 145.00 [1]) and driving while ability impaired (Vehicle and Traffic Law § 1192 [1]). We affirm.

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

Subject to limited exceptions not applicable here, the People are not deemed ready for trial for purposes of CPL 30.30 until they have filed a proper COC pursuant to CPL 245.50 (1) (*see* CPL 245.50 [3]). The COC must 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]). We conclude that the records in question

were not part of the "discovery required" to be automatically disclosed by the People prior to the filing of a proper COC (*id.*) and, "[c]onsequently, the People's failure to provide the records at the time they served and filed their original . . . [COC did] not render [the COC] improper" (*People v Walker*, 232 AD3d 1214, 1217 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]). CPL 245.20 (1) requires the People to automatically disclose to a defendant all items and information that relate to the subject matter of the case and are in the People's possession, custody, or control (*see Walker*, 232 AD3d at 1215; *People v Walker*, 228 AD3d 1318, 1319 [4th Dept 2024]; *People v Johnson*, 218 AD3d 1347, 1350 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024], *cert denied* — US —, 144 S Ct 2696 [2024]). Here, although the records relate to the subject matter of the case, they were not in the possession, custody, or control of the People before the People filed their initial COC, and the People established, in opposition to defendant's CPL 30.30 motion, that they had " 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " at that time (*People v Bay*, 41 NY3d 200, 211 [2023]; *see People v Flowers*, 234 AD3d 1347, 1348 [4th Dept 2025]).

Defendant further contends that his motions should have been granted because the People failed to meet their continuing obligation to ascertain the existence of discovery material before filing their supplemental COCs. We reject that contention. We conclude that "the remedy of dismissal of the indictment under CPL 30.30 for the violation of a defendant's statutory right to a speedy trial—which is available when, inter alia, the People are deemed not ready for trial due to an invalid certificate of compliance and have exceeded the applicable statutory speedy trial time (*see* CPL 245.50 [3])—is directly tied, and only directly tied, to the People's failure to comply with their '[i]nitial discovery' obligations as set forth in CPL 245.20 (1), which include any attendant due diligence obligations with respect to the items and information discoverable under that provision (*see* CPL 245.20 [2])" (*Walker*, 232 AD3d at 1218 [Curran, J., concurring]). Thus, although a failure by the People to comply with their continuing discovery obligations under CPL 245.60 may warrant the imposition of discovery sanctions under CPL 245.80 (2), as happened here, such a failure does not, contrary to defendant's contention, implicate speedy trial considerations under CPL 30.30.

Entered: April 25, 2025 Ann Dillon Flynn
Clerk of the Court

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

171

KA 21-00790

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY RODRIGUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 16, 2020. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree, criminal possession of a weapon in the second degree (two counts), criminal facilitation in the second degree (two counts) and hindering prosecution in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of murder in the second degree and attempted murder in the second degree under counts 1 and 2 of the superseding indictment, and as modified the judgment is affirmed and a new trial is granted on those counts.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), two counts of criminal facilitation in the second degree (§ 115.05), and two counts of hindering prosecution in the first degree (§ 205.65), all stemming from a shooting that resulted in the death of a child and injury to the child's stepmother.

Contrary to defendant's contention, we conclude that the evidence is legally sufficient to support the conviction of murder in the second degree, attempted murder in the second degree, criminal possession of a weapon in the second degree, and criminal facilitation in the second degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and that the verdict, viewed in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that County Court erred in denying defendant's request for a circumstantial evidence instruction with respect to the counts charging murder in the second degree and attempted murder in the second degree. "[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]; *see People v Francis*, 206 AD3d 1605, 1606 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]).

The People argue that certain statements made by defendant provided some direct evidence of defendant's guilt of those charges. A defendant's "statement[s are] direct evidence only if [they] constitute a relevant admission of guilt" (*Hardy*, 26 NY3d at 249 [internal quotation marks omitted]). Here, we conclude that the statements identified by the People were not admissions of guilt; rather, because they "merely includ[ed] inculpatory acts from which a jury may or may not infer guilt, the statement[s were] circumstantial and not direct evidence" (*id.* at 249-250 [internal quotation marks omitted]; *see People v Rizzo*, 267 AD2d 1041, 1042 [4th Dept 1999], *lv denied* 95 NY2d 838 [2000]). The People thus failed to present " 'both direct and circumstantial evidence of . . . defendant's guilt' " that would have negated 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]).

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 Exford*, 234 AD3d 1252, 1254 [4th Dept 2025]; *People v Swem*, 182 AD3d 1050, 1052 [4th Dept 2020]). The evidence of defendant's guilt was not overwhelming (*see Exford*, 234 AD3d at 1254). Moreover, for the jury to find defendant guilty of murder in the second degree and attempted murder in the second degree, "it had to make a number of logical leaps connecting defendant to [those crimes]" (*id.* [internal quotation marks omitted]). Thus, we conclude that there is a "significant probability that the jury would have acquitted [on the challenged counts of the superseding indictment] if the circumstantial evidence charge had been given" (*Brian*, 84 NY2d at 889; *see Swem*, 182 AD3d at 1051-1052). We therefore modify the judgment accordingly.

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

Entered: April 25, 2025 Ann Dillon Flynn
Clerk of the Court

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

173

CA 23-02137

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

C. R. J., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

OSWEGO COUNTY, ET AL., DEFENDANTS,
BERKSHIRE FARM CENTER AND SERVICES FOR YOUTH,
DEFENDANT-RESPONDENT.

COUNTY OF OSWEGO, THIRD-PARTY PLAINTIFF,

V

BERKSHIRE FARM CENTER AND SERVICES FOR YOUTH,
ET AL., THIRD-PARTY DEFENDANTS.

HERMAN LAW, NEW YORK CITY (STUART S. MERMELSTEIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIRVIN & FERLAZZO, P.C., ALBANY (BONNIE WATSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Jeffrey A. Tait, J.), entered December 6, 2023. The order, insofar as appealed from, granted the motion of defendant Berkshire Farm Center and Services for Youth to dismiss the amended complaint against it.

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

Memorandum: Plaintiff, by summons and complaint filed June 30, 2021 (original complaint), commenced this personal injury action pursuant to the Child Victims Act (CVA) (*see* CPLR 214-g) against defendant-third-party plaintiff County of Oswego (County) and unknown parties pursuant to CPLR 1024. Plaintiff alleged that, while in foster care under the custody of the County in the 1980s, she was placed in a foster home where she was regularly and repeatedly abused by her foster father. Plaintiff alleged that the County breached its duty to use reasonable care in the investigation, licensing, and supervision of foster care facilities, homes, and families and that the County was vicariously liable for the acts and omissions of private not-for-profit organizations with which it contracted to provide foster care services, which included the unknown parties.

During discovery, the County asserted upon information and belief

that plaintiff's placement in the home of the foster father was coordinated and supervised by defendant-third-party defendant Berkshire Farm Center and Services for Youth (Berkshire). The County subsequently served on Berkshire a subpoena duces tecum dated August 22, 2022, demanding, among other things, production of any records concerning the placement and supervision of children, including plaintiff, in the foster father's home. On March 28, 2023, the County filed a third-party summons and complaint that, among other things, named Berkshire as a third-party defendant. Berkshire filed an answer to the third-party complaint on April 27, 2023.

Pursuant to CPLR 1009, plaintiff filed a supplemental summons and an amended complaint on May 11, 2023 (amended complaint) that, among other things, named Berkshire as a defendant in the primary action. Berkshire filed a pre-answer motion pursuant to CPLR 3211 (a) (5) to dismiss the amended complaint against it as untimely. We conclude that Supreme Court properly granted the motion, but our reasoning differs from that of the court.

" 'On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired' " (*Falletta v Norman*, 220 AD3d 1207, 1208 [4th Dept 2023]). "If the defendant meets that burden, the burden then shifts to the plaintiff to aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*Morales v Arrowood Indem. Co.*, 203 AD3d 1603, 1607 [4th Dept 2022] [internal quotation marks omitted]). With respect to the relation back exception asserted by plaintiff, "the CPLR codifies the relation back doctrine and provides that 'a claim asserted in the complaint [in an action commenced by filing] is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced' " (*Matter of Nemeth v K-Tooling*, 40 NY3d 405, 410 [2023], quoting CPLR 203 [c]; *see* CPLR 203 [f]). Under the three-pronged test, "[t]he relation back doctrine applies when (1) the claims arise out of the same conduct, transaction or occurrence; (2) the new party is 'united in interest' with an original defendant and thus can be charged with such notice of the commencement of the action such that a court concludes that the party will not be prejudiced in defending against the action; and (3) the new party knew or should have known that, but for a mistaken omission, they would have been named in the initial pleading" (*Nemeth*, 40 NY3d at 407-408; *see Buran v Coupal*, 87 NY2d 173, 178 [1995]). "The doctrine focuses on the notice and prejudice to the added party" (*Nemeth*, 40 NY3d at 408). Indeed, "the linchpin of the relation back doctrine [is] notice to the [added party] within the applicable limitations period" (*id.* at 411 [internal quotation marks omitted]; *see Buran*, 87 NY2d at 180; *Falletta*, 220 AD3d at 1209; *Lostracco v Mt. St. Mary's Hosp. of Niagara Falls*, 38 AD3d 1312, 1312 [4th Dept 2007]).

It is undisputed that Berkshire met its initial burden of establishing that the limitations period had expired by the time plaintiff filed the supplemental summons and amended complaint naming

Berkshire as a defendant in the primary action (*see Falletta*, 220 AD3d at 1208; *see generally Patterson v Nassau County Social Servs. Dept.*, 231 AD3d 742, 743 [2d Dept 2024]).

The burden thus shifted to plaintiff to aver evidentiary facts establishing, as asserted here, that the relation back doctrine applies (*see Morales*, 203 AD3d at 1607). Preliminarily, we agree with Berkshire that plaintiff's CVA claims against Berkshire are not rendered timely under the rule allowing a direct claim asserted in an amended pleading by a plaintiff against a third-party defendant to relate back to the date that the third-party complaint was interposed (*see* CPLR 203 [f]; *Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 478 [1985]) inasmuch as the third-party complaint against Berkshire was filed on March 28, 2023, well after expiration of the statute of limitations (*see Zamani v Rite Way Bldg. Indus.*, 254 AD2d 283, 284 [2d Dept 1998]). We further agree with Berkshire that, contrary to plaintiff's contention, her CVA claims against Berkshire cannot be deemed to relate back to the timely-filed original complaint because she has not satisfied the third prong of the test. There is no dispute that plaintiff "established that her failure to include [Berkshire in the original complaint] was a mistake and not the result of a strategy to obtain a tactical advantage" (*Falletta*, 220 AD3d at 1210). However, the record here "is devoid of any evidence that [Berkshire] was aware that a CVA action had been commenced against the . . . County . . . prior to the expiration of the statute of limitations" (*Patterson*, 231 AD3d at 744). Indeed, plaintiff "failed to present any evidence establishing that [Berkshire] had notice that an action had been commenced" until the County served Berkshire with the subpoena duces tecum dated August 22, 2022, which was after the expiration of the limitations period (*Lostracco*, 38 AD3d at 1312; *see Cole v Tat-Sum Lee*, 309 AD2d 1165, 1167-1168 [4th Dept 2003]; *Williams v Majewski*, 291 AD2d 816, 817-818 [4th Dept 2002]). We thus conclude that plaintiff failed to meet her burden with respect to the third prong of the relation back doctrine (*see Patterson*, 231 AD3d at 744).

Finally, we note that plaintiff has expressly abandoned on appeal any contention that she is entitled pursuant to CPLR 1024 to substitute Berkshire as a defendant for an unknown party in the original complaint (*cf. A.S. v Erie County*, 219 AD3d 1694, 1694-1696 [4th Dept 2023]; *see generally Matter of Dhir v Winslow* [appeal No. 3], 224 AD3d 1259, 1260 [4th Dept 2024]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

183

KA 16-00129

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LYNNQUAN KELLAM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

LYNNQUAN KELLAM, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 16, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted robbery in the first degree (three counts) 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: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]), three counts of attempted robbery in the first degree (§§ 110.00, 160.15 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends in his main brief that the verdict is against the weight of the evidence. We reject that contention. We note that a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings with respect to the testimony of a witness identifying defendant as the perpetrator (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Nevertheless, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), and affording the requisite "great deference to the jury, given its opportunity to view the witness[ ]" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014]), we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Defendant's contention in his main brief that he was deprived of a fair trial by prosecutorial misconduct on summation is, for the most part, unpreserved for our review inasmuch as defendant failed to object to all but two of the statements he now challenges on appeal (*see People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]). With respect to his preserved challenges, County Court gave prompt curative instructions in response to defense counsel's objections. Inasmuch as defendant did not object further or move for a mistrial, "the curative instructions must be deemed to have corrected the error to . . . defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944 [1994]).

Defendant contends in his main brief that the court failed to comply with the procedure for disclosure of jury notes to counsel set forth in *People v O'Rama* (78 NY2d 270 [1991]). We reject defendant's contention with respect to one of the seven notes at issue, i.e., jury note No. 12. "[T]he *O'Rama* procedure is not implicated when the jury's request is ministerial in nature and therefore requires only a ministerial response" (*People v Nealon*, 26 NY3d 152, 161 [2015]; *see People v Agee*, 206 AD3d 1723, 1724 [4th Dept 2022], *lv denied* 38 NY3d 1148 [2022]) and, here, defendant has not established that jury note No. 12 was a substantive inquiry. Instead, the jury's request "was nothing more than an inquiry of a ministerial nature . . . , unrelated to the substance of the verdict . . . As a result, the judge was not required to notify defense counsel nor provide them with an opportunity to respond, as neither defense counsel nor defendant could have provided a meaningful contribution" (*People v Ochoa*, 14 NY3d 180, 188 [2010]). Defendant failed to preserve for our review his contention with respect to the other six jury notes at issue. With respect to those notes, we note that where, as here, "counsel has meaningful notice of a substantive jury note that has been read verbatim in open court, the court's failure to discuss the note or its intended response with counsel outside the presence of the jury is not a mode of proceedings error because counsel is not prevented from objecting or from participating meaningfully" (*People v Mack*, 27 NY3d 534, 542 [2016], *rearg denied* 28 NY3d 944 [2016]), and thus preservation is required. We decline to exercise our power to review defendant's contention with respect to those six jury notes as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends in his main brief that he was denied effective assistance of counsel at trial. That contention is based in part on matters outside the record. We conclude that, because "the 'claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the [mixed] claim in its entirety' " (*People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]; *see People v Kellam* [appeal No. 2], — AD3d — [Apr. 25, 2025] [4th Dept 2025] [decided herewith]; *see also People v Franklin*, 206 AD3d 1610, 1611-1612 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]).

Contrary to defendant's further contention in his main brief, the

sentence is not unduly harsh or severe. Finally, we have reviewed the remaining contentions in defendant's main and pro se supplemental briefs and conclude that they do not warrant modification or reversal of the judgment.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-00875

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LYNNQUAN KELLAM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

LYNNQUAN KELLAM, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Theodore H. Limpert, J.), dated March 27, 2023. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals, by permission of this Court, from an order that denied without a hearing his CPL 440.10 motion to vacate the judgment convicting him, following a jury trial, of murder in the second degree (Penal Law § 125.25 [3]), three counts of attempted robbery in the first degree (§§ 110.00, 160.15 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]).

We agree with defendant's contention in his main and pro se supplemental briefs that the motion, insofar as it raised allegations of ineffective assistance of counsel, was not procedurally barred and should not have been summarily denied on that ground (*see* CPL 440.10 [2] [b], [c]). Where, as here, "an ineffective assistance of counsel claim involves . . . 'mixed claims' relating to both record-based and nonrecord-based issues . . . [, such] claim may be brought in a collateral proceeding, *whether or not* the [defendant] could have raised the claim on direct appeal" (*People v Evans*, 16 NY3d 571, 575 n 2 [2011], *cert denied* 565 US 912 [2011]; *see People v Streeter*, 194 AD3d 1407, 1408 [4th Dept 2021], *lv denied* 37 NY3d 974 [2021], *reconsideration denied* 37 NY3d 1029 [2021]; *People v Wilson* [appeal

No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]). "In such situations, i.e., where the 'claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim *in its entirety*' " (*Wilson*, 162 AD3d at 1592). "That is because each alleged shortcoming or failure by defense counsel should not be viewed as a separate ground or issue raised upon the motion . . . [R]ather, the claim of ineffective assistance of counsel . . . constitutes a single, unified claim that must be assessed in totality" (*id.* [internal quotation marks omitted]; *see Streeter*, 194 AD3d at 1408).

We further conclude that County Court should not have denied the motion without a hearing on defendant's claim of ineffective assistance of counsel. In support of that claim, defendant established that there were sufficient questions of fact whether defense counsel had an adequate explanation for, inter alia, failing to call certain witnesses on his behalf—including an eyewitness—who testified at defendant's first trial, which ended in a hung jury. Defendant is thus "entitled to an opportunity to establish that [he] was deprived of meaningful legal representation" (*People v Caldavado*, 26 NY3d 1034, 1036 [2015] [internal quotation marks omitted]; *see Wilson*, 162 AD3d at 1592-1593; *cf. Streeter*, 194 AD3d at 1408-1409), and we therefore reverse the order and remit the matter to County Court for a hearing pursuant to CPL 440.30 (5) on defendant's claim of ineffective assistance of counsel.

We have reviewed the remaining contentions in defendant's main and pro se supplemental briefs and conclude that they are without merit.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-02088

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB BILES, DEFENDANT-APPELLANT.

THE LAW OFFICES OF JAMES L. RIOTTO, II, ROCHESTER (WILLIAM M. SWIFT 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 (Brian D. Dennis, J.), rendered August 22, 2023. The judgment convicted defendant upon his plea of guilty of rape in the second degree (two counts), sexual abuse in the first degree and sexual abuse 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, inter alia, two counts of rape in the second degree (Penal Law § 130.30 [former (1)]). We affirm.

Defendant pleaded guilty and was placed on interim probation on July 5, 2022. On the scheduled sentencing date of June 20, 2023, County Court indicated to the parties that, based on an interim probation summary report prepared by defendant's probation officer, it was not clear whether defendant successfully completed interim probation, and the court adjourned the matter. Thereafter, a declaration of delinquency, dated July 13, 2023, was filed, and the court held a hearing on July 21, 2023 to determine whether defendant had complied with the terms of interim probation. After determining that defendant had not complied with the terms of his interim probation, the court sentenced defendant, on August 22, 2023, to a term of incarceration, followed by a period of postrelease supervision.

Defendant contends that the court lacked the authority to sentence him based upon his violation of the terms of interim probation because he was not sentenced within one year of the date of his conviction (*see generally* CPL 390.30 [6] [a]) and the declaration of delinquency did not toll the one-year period provided for in CPL

390.30 (6) (a) inasmuch as it was filed after that period expired. We reject defendant's contention.

CPL 390.30 provides in relevant part that, "[i]n any case where the court determines that a defendant is eligible for a sentence of probation, the court, after consultation with the prosecutor and upon the consent of the defendant, may adjourn the sentencing to a specified date and order that the defendant be placed on interim probation supervision. In no event may the sentencing be adjourned for a period exceeding one year from the date the conviction is entered, except that upon good cause shown, the court may, upon the defendant's consent, extend the period for an additional one year where the defendant has agreed to and is still participating in a treatment program in connection with a . . . treatment court" (CPL 390.30 [6] [a]). Contrary to defendant's contention, "nothing in CPL 390.30 (6) (a) states that a failure to sentence a defendant within one year of the date of conviction is a jurisdictional defect or that sentencing after that one-year period is prohibited" (*People v Bryant*, 219 AD3d 1677, 1678 [4th Dept 2023], *lv denied* 41 NY3d 1017 [2024]; *see generally People v Velez*, 19 NY3d 642, 647-648 [2012]; *People v Manor*, 134 AD3d 1400, 1401 [4th Dept 2015], *lv denied* 27 NY3d 967 [2016]). Thus, under the circumstances here, where "the presentence procedures set forth in CPL 400.10 apply" (*People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008]), the court was not prohibited from imposing an enhanced sentence based on defendant's violation of the terms of his interim probation (*see generally People v Alsaaidi*, 173 AD3d 1836, 1837 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]).

Contrary to defendant's further contention, he validly waived his right to appeal (*see People v Perez-Medina*, 179 AD3d 1458, 1459 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]), and that valid waiver forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

188

KA 22-01617

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HEATHER M. FOX, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered October 4, 2022. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her, following a jury trial, of burglary in the third degree (Penal Law § 140.20). The conviction arises from allegations that defendant entered a Walmart store with an intent to commit a crime therein and with knowledge that she had been banned from entering any Walmart store. According to evidence adduced at trial, defendant was issued a written notice (notice) in 2013 stating that she was banned from all Walmart stores until the ban was rescinded. A loss prevention officer was present when defendant was given the notice and witnessed her sign it.

In 2019, defendant entered a Walmart store and attempted to steal over $450 in merchandise, as evidenced by surveillance footage and the testimony of a loss prevention officer who discreetly followed her around the store. Defendant placed numerous items in her cart and purse and passed the last point of sale without paying for any of the merchandise. A loss prevention officer testified that the notice had not been rescinded. Due to the existence of the notice, defendant was charged with burglary in the third degree (Penal Law § 140.20), i.e., for knowingly entering or remaining unlawfully in a building with intent to commit a crime therein. The notice was the basis for defendant's alleged unlawful entry, and the crime she allegedly intended to commit upon entry was larceny.

On appeal, defendant contends that County Court erred in refusing to dismiss the superior court information on speedy trial grounds

pursuant to CPL 30.30. According to defendant, the People failed to comply with their discovery obligations under CPL 245.20 (1) (c), and such failure rendered their certificate of compliance (COC) invalid and their statement of readiness illusory, thus resulting in more than six months being chargeable to the prosecution under CPL 30.30. Because the People announced readiness for trial before CPL article 245 took effect, however, they were not required to file a COC (*see People v King*, 42 NY3d 424, 427-428 [2024]). Thus, even assuming, arguendo, that the People were required to comply with CPL 245.20 (1) (*see King*, 42 NY3d at 428 n 2), we conclude that any alleged discovery violation did not affect defendant's right to a speedy trial (*see People v Perry*, — AD3d —, —, 2025 NY Slip Op 01733, *1; *see also* CPL 245.50 [3]).

Defendant further contends that the court erred in admitting the notice in evidence at trial. We reject that contention. The testimony of the loss prevention officer who was present when defendant signed the notice established all of the foundational requirements for a business record (*see* CPLR 4518 [a]; CPL 60.10; *People v Brown*, 13 NY3d 332, 341 [2009]; *see generally People v Kennedy*, 68 NY2d 569, 579-580 [1986]). Although defendant challenges the timing of the execution of the document based on alleged alterations made to the month the document was signed, any issues regarding a potential change to the month of execution go to the weight to be afforded the document and not its admissibility (*see generally* CPLR 4518 [a]; *People v Klein*, 105 AD2d 805, 806 [2d Dept 1984], *affd* 65 NY2d 613 [1985]).

We also reject defendant's contention that the evidence is legally insufficient to establish that she knew that she was banned from entering Walmart and intended to commit a crime at the time of entry. Inasmuch as a "[d]efendant's criminal intent may be inferred from the totality of [her] conduct" (*People v Colon*, 201 AD3d 1345, 1346 [4th Dept 2022], *lv denied* 38 NY3d 949 [2022]; *see generally People v Irvine*, 197 AD3d 988, 990 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]), we conclude, upon viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), that the evidence is legally sufficient to establish that defendant entered the Walmart unlawfully with an intent to commit a crime therein (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). For the same reasons, 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 Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, we conclude that the sentence is not unduly harsh or severe.

With respect to defendant's contention that the court erred in denying her CPL 330.30 motion to set aside the verdict on the grounds of juror misconduct, we conclude that remittal is warranted. According to defendant, sworn allegations from one juror established

that two other jurors "improperly inserted specialized knowledge and experience" in an effort to influence the verdict. The court denied defendant's motion, without a hearing, on the ground that the reporting juror's credibility was "suspect." The court did not reach the issue whether the juror's allegations, if true, warranted a hearing, nor did the court address whether the two jurors, assuming they said the things attributed to them by the reporting juror, "put the jury in possession of evidence not introduced at trial," thereby improperly influencing the jury (*People v Brown*, 48 NY2d 388, 393 [1979]; *see People v Maragh*, 94 NY2d 569, 573-574 [2000]).

Inasmuch as the only reason offered by the court for denying defendant's motion was its determination that the reporting juror's allegations lacked credibility, we are precluded from affirming on any other ground (*see People v Concepcion*, 17 NY3d 192, 195 [2011]; *People v LaFontaine*, 92 NY2d 470, 473-474 [1998], *rearg denied* 93 NY2d 849 [1999]; *see generally* CPL 470.15 [1]). While we agree with the court that some of the allegations made by the reporting juror are belied by the record, her statements regarding what transpired in the jury room are not "impossible of belief because [they were] manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Stroman*, 83 AD2d 370, 373 [1st Dept 1981] [internal quotation marks omitted]; *see People v Walker*, 155 AD2d 916, 916 [4th Dept 1989], *lv denied* 75 NY2d 819 [1990]). We thus conclude that the court erred in denying the motion on the ground that the juror's sworn allegations are unworthy of belief. As a result, we hold the case, reserve decision, and remit the matter to Ontario County Court "to rule upon any other issues raised by the People in opposition to the motion" (*People v Schrock*, 99 AD3d 1196, 1197 [4th Dept 2012]; *see People v Johnson*, 103 AD3d 1202, 1204 [4th Dept 2013], *lv denied* 21 NY3d 912 [2013]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00370

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

IN THE MATTER OF MAGUIRE FAMILY PROPERTIES, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF GATES, AGOSTINO MINEO,
AS ASSESSOR FOR TOWN OF GATES, AND
TOWN OF GATES BOARD OF ASSESSMENT REVIEW,
RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (JACOB S. SONNER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (MEGAN K. DORRITIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered January 31, 2024. The order, insofar as appealed from, denied the motion of respondents to dismiss the petitions.

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

Memorandum: Petitioner commenced these RPTL article 7 proceedings seeking review of real property tax assessments for property located in respondent Town of Gates for the tax years 2013 through 2018. Respondents jointly moved to dismiss the petitions on the ground that petitioner failed to file notes of issue within four years of the commencement of each proceeding as required by RPTL 718 (2) (d). Supreme Court denied the motion, and respondents now appeal.

"RPTL 718 (1) provides that a petitioner must file a note of issue within four years from the last date provided by law for the commencement of the proceeding. Should a petitioner fail to do so, 'the proceeding thereon shall be deemed to have been abandoned and an order dismissing the petition shall be entered without notice and such order shall constitute a final adjudication of all issues raised in the proceeding, except where the parties otherwise *stipulate* or a court or judge otherwise orders on good cause shown within such four-year period' " (*Matter of Pierson House, Inc. v Town of Southampton*, 191 AD3d 986, 987 [2d Dept 2021], quoting RPTL 718 [1] [emphasis added]). "Where a petitioner has not filed a timely note of issue or obtained a stipulation or court order extending that

four-year deadline, the plain language of RPTL 718 requires dismissal, a rule which is mandatory and applies irrespective of any and all circumstances" (*Matter of Traditional Links, LLC v Board of Assessors of Town of Riverhead*, 128 AD3d 978, 979 [2d Dept 2015], *lv denied* 27 NY3d 902 [2016] [internal quotation marks omitted]; *see Matter of Sullivan LaFarge v Town of Mamakating*, 94 NY2d 802, 803-804 [1999]).

Here, it is undisputed that petitioner failed to file the notes of issue. However, the record reveals that, during the litigation, the court issued, without objection, several scheduling orders extending petitioner's time to file the notes of issue. The court's last scheduling order set the same deadline for filing the notes of issue in all six proceedings. Prior to that deadline, respondents moved to compel petitioner to produce discovery documents and to extend all of the deadlines in the court's last scheduling order, including the deadline for filing the notes of issue. The parties appeared on that motion, and there is no dispute that the parties agreed before the court to resolve their underlying discovery dispute and to extend the deadlines. However, respondents failed to submit a new scheduling order for the court's signature. Instead of submitting a proposed order to the court, respondents let more than three years pass before bringing the instant motion.

We reject respondents' contention that the parties' agreement did not accomplish an extension of the deadline for filing the notes of issue pursuant to RPTL 718. The record is clear, as evidenced by, inter alia, email exchanges discussing proposed scheduling orders drafted by the parties' respective attorneys, that the parties stipulated to an extension of the deadline for filing the notes of issue. Such agreement relieved petitioner of the obligation to make a motion for an extension of that deadline or otherwise obtain a court order. Thus, the court did not err in concluding that, inasmuch as the parties agreed to extend the statutory deadline for the filing of the notes of issue, the proceedings were not abandoned pursuant to RPTL 718 (*see Matter of Fox Meadows Partners v Board of Assessment Review, Town of LaGrange*, 273 AD2d 472, 472 [2d Dept 2000]).

Entered: April 25, 2025 Ann Dillon Flynn
Clerk of the Court

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

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TP 24-01499

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

IN THE MATTER OF JOHN DOE, PETITIONER,

V MEMORANDUM AND ORDER

THE STATE UNIVERSITY OF NEW YORK BUFFALO STATE UNIVERSITY, ALSO KNOWN AS THE STATE UNIVERSITY OF NEW YORK BUFFALO STATE COLLEGE, STUDENT CONDUCT AND COMMUNITY STANDARDS OFFICE OF STATE UNIVERSITY OF NEW YORK BUFFALO STATE UNIVERSITY, NINA G. PERINO, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS ASSOCIATE DIRECTOR OF STUDENT CONDUCT, STEVEN CAHOON, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS INVESTIGATOR WITH THE UNIVERSITY POLICE DEPARTMENT AT STATE UNIVERSITY OF NEW YORK BUFFALO STATE UNIVERSITY, JOHN DOE(S), IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS BOARD MEMBER OF BUFFALO STATE STUDENT CONDUCT BOARD, AND JANE DOE(S), IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS BOARD MEMBER OF BUFFALO STATE STUDENT CONDUCT BOARD, RESPONDENTS.

RUPP PFALZGRAF LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Donna M. Siwek, J.], entered July 10, 2024) to review a determination that petitioner violated two provisions of the Code of Conduct of respondent State University of New York Buffalo State University.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the petition is granted, and respondent State University of New York Buffalo State University is directed to expunge all references to this matter from petitioner's school record.

Memorandum: In this CPLR article 78 proceeding transferred to us pursuant to CPLR 7804 (g), petitioner, an undergraduate student at respondent State University of New York Buffalo State University (respondent), seeks to annul a determination made by respondent

Student Conduct and Community Standards Office of State University of New York Buffalo State University (Student Conduct Office) following a disciplinary hearing that petitioner violated two provisions of respondent's Code of Conduct. As a sanction, petitioner was required to complete an anti-sexual violence training program. Based on our review of the record, we agree with petitioner that the determination is not supported by substantial evidence (*see Matter of Hill v State Univ. of N.Y. at Buffalo*, 163 AD3d 1454, 1455 [4th Dept 2018]; *Matter of West v State Univ. of N.Y. at Buffalo, Off. of Vice-President for Student Affairs*, 159 AD3d 1486, 1487 [4th Dept 2018]).

The disciplinary charges arose from allegations made against petitioner by a woman who did not testify at the disciplinary hearing, referred to in the record as the reporting individual (reporting individual). The reporting individual spoke to an investigator employed by campus police and signed a supporting deposition setting forth her allegations. She stated in the supporting deposition that she had met petitioner through a dating app some five months earlier and had consensual sexual intercourse with him at that time. The reporting individual did not hear from petitioner again until early March 2023, when he sent her a message through the dating app asking her to come to his dorm room. After the reporting individual made clear in several messages that she did not want to have sex with petitioner, she later agreed to go to his dorm room.

The reporting individual further stated in her supporting deposition that, while she was in the dorm room on the evening of March 4, 2023, petitioner pulled down her pants, bent her over, and "started being sexual" with her. The sexual activity lasted for "like 2 minutes" before petitioner stopped and asked her to leave. According to an incident report prepared by the investigator, petitioner inserted his penis into the reporting individual's vagina without her consent on March 4, 2023, but that allegation is not explicitly included in the supporting deposition.

The investigator thereafter filed a complaint against petitioner with the Student Conduct Office, which charged him with three violations of respondent's Code of Conduct: sexual assault, disruptive behavior, and non-consensual sexual contact, all arising from the reporting individual's statements to the investigator. The matter proceeded to a hearing before the Conduct Board. The only witnesses at the hearing were petitioner, his suitemate, and the investigator. The investigator's brief testimony was based entirely on what he had been told by the reporting individual, who was notified of the hearing but did not appear. Although the reporting individual stated in initial messages she sent to petitioner via the dating app that she did not want to have sex with him again, she did not provide the investigator with the subsequent messages she sent to petitioner in which she agreed to come to his dorm room. Petitioner testified that he was unable to obtain those messages himself because his access to the dating app had been terminated as a result of a complaint from the reporting individual.

Petitioner acknowledged at the hearing that he had engaged in

sexual intercourse with the reporting individual on March 4, 2023, but insisted that it was consensual. Petitioner's testimony was corroborated in part by testimony from his suitemate, who was in an adjoining room when the sexual activity took place. The testimony of the two men was not contradicted by any evidence at the hearing aside from hearsay statements of the reporting individual contained in the incident report.

After the hearing, the Student Conduct Office informed petitioner by letter that he had been found not responsible for sexual assault but responsible for the remaining two violations. The determination was affirmed on administrative appeal. Petitioner thereafter commenced this proceeding pursuant to CPLR article 78.

CPLR 7803 (4) authorizes this Court to review "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence" (*see West*, 159 AD3d at 1487). "Substantial evidence" is defined as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]). "Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently" (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1046 [2018]).

Under respondent's Code of Conduct, non-consensual sexual contact is defined as "[a]ny intentional sexual touching without consent and/or by force." Affirmative consent under the Code "is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity," and "[c]onsent may be given by *words or actions*, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity" (emphasis added).

In finding that petitioner engaged in non-consensual sexual contact, the Conduct Board determined that petitioner's testimony that the reporting individual *verbally* consented to sexual activity was not credible, because petitioner gave conflicting testimony with respect to when the reporting individual said the words that he interpreted as constituting verbal consent. Notably, the Conduct Board did not find any other parts of petitioner's testimony to be incredible. Petitioner testified without contradiction that the reporting individual initiated physical contact by touching his chest and stomach while he was sitting in a chair, and that she removed her own clothes without his assistance before she bent over and said "let's go." According to petitioner, the reporting individual never indicated that she did not want to continue having sex or that she wanted to stop. We conclude that such conduct constitutes affirmative consent under the Code of Conduct even if, as the Conduct Board found, the reporting individual did not verbally consent to sexual intercourse.

In the absence of testimony from the reporting individual, and accepting as true the portions of petitioner's testimony that were not

rejected by the Conduct Board, we conclude that the determination that petitioner engaged in non-consensual sexual contact "was based on no evidence and, thus, comprised of nothing more than 'surmise, conjecture, [or] speculation' " (*Matter of Velez-Santiago v State Univ. of N.Y. at Stony Brook*, 170 AD3d 1182, 1183 [2d Dept 2019], quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). We therefore annul the determination, grant the petition, and direct respondent to expunge all references to this matter from petitioner's school record (*see Matter of Doe 1 v State Univ. of N.Y. at Buffalo*, 219 AD3d 1663, 1663 [4th Dept 2023]; *West*, 159 AD3d at 1487).

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

202

KA 23-01272

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRISTINA R. PAGE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 16, 2022. The judgment convicted defendant, upon her plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of criminal sexual act in the first degree (Penal Law former § 130.50 [3]). Defendant contends that her plea was not knowing, voluntary, and intelligent. Defendant failed to preserve her contention for our review inasmuch as she did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Boyde*, 224 AD3d 1306, 1306-1307 [4th Dept 2024], *lv denied* 41 NY3d 1017 [2024]; *People v Derrell A.E.*, 128 AD3d 1536, 1536-1537 [4th Dept 2015], *lv denied* 26 NY3d 928 [2015]; *see generally People v Lopez*, 71 NY2d 662, 665 [1988]). This case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d at 666), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v O'Connor*, 229 AD3d 1380, 1381 [4th Dept 2024]). Contrary to defendant's further contention, her bargained-for sentence is not unduly harsh or severe.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

206

KA 20-00478

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 19, 2019. The judgment convicted defendant upon a guilty plea of attempted rape in the third degree.

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

Same memorandum as in *People v Smith* ([appeal No. 2] — AD3d — [Apr. 25, 2025] [4th Dept 2025]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

207

KA 21-01002

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered May 24, 2021. Defendant was resentenced upon his conviction of attempted rape in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed to the extent defendant challenges the legality of the resentence and the resentence is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted rape in the third degree (Penal Law § 110.00, former § 130.25 [3]) and, in appeal No. 2, he appeals from a resentence on that conviction. Initially, we note that defendant's contentions on appeal concern only the resentence in appeal No. 2, and we therefore dismiss the appeal from the judgment in appeal No. 1 (*see People v Davis*, 186 AD3d 1073, 1073 [4th Dept 2020]; *People v Loiz* [appeal No. 2], 175 AD3d 872, 872-873 [4th Dept 2019]; *People v Patterson*, 128 AD3d 1377, 1377 [4th Dept 2015]).

With respect to appeal No. 2, we note, preliminarily, that defendant's contentions would survive even a valid waiver of the right to appeal (*see People v Seaberg*, 74 NY2d 1, 10 [1989]; *People v Lopez*, 151 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; *People v Tate*, 83 AD3d 1467, 1467 [4th Dept 2011]). Consequently, we need not address the validity of the appeal waiver (*see People v Morse*, 233 AD3d 1470, 1470 [4th Dept 2024]; *People v Morrison*, 216 AD3d 1430, 1431 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023]). Defendant's challenge to the legality of the resentence was rendered moot inasmuch as he has served the sentence in its entirety (*see People v Dennis*, 179 AD3d 1451, 1451 [4th Dept 2020]; *People v John*, 288 AD2d 848, 850 [4th Dept 2001], *lv denied* 97 NY2d 705 [2002]; *People v Dukes*, 156 AD2d 959, 960 [4th Dept 1989], *lv denied* 75 NY2d

918 [1990]), and we conclude that the exception to the mootness doctrine does not apply (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]) and therefore dismiss the appeal to that extent.

We note that the certificate of conviction erroneously states that defendant's sentence of probation was revoked because of a violation and must be amended to correctly state that the sentence of probation was vacated (*see generally People v Jones*, 224 AD3d 1348, 1353 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2022]; *People v Lewis*, 185 AD3d 1542, 1543 [4th Dept 2020], *lv denied* 35 NY3d 1114 [2020]). Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the resentence.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

208

CAF 24-00175

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

IN THE MATTER OF TU'REAL A.E.B. AND YM'PREZZ C.E.B.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

PATRICIA S., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL), FOR PETITIONER-RESPONDENT.

STEPHEN M. MCGAHEY, HOLLAND PATENT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered November 3, 2023, in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected and derivatively neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that adjudicated her child Tu'Real to be neglected and her other child, Ym'Prezz, to be derivatively neglected. Although Tu'Real has attained the age of 18 (*see* Family Ct Act § 119 [c]), the appeal is not moot (*see generally Matter of Caylin T. [Christine T.]*, 229 AD3d 859, 861 [3d Dept 2024]; *Matter of Steven S. [Lyndsey M.]*, 229 AD3d 1207, 1208 [4th Dept 2024]).

Contrary to the mother's contention, petitioner met its burden of establishing neglect by a preponderance of the evidence. "Proof that a minor child is not attending a public or parochial school in the district where the parent[ ] reside[s] makes out a prima facie case of educational neglect" and "[u]nrebutted evidence of excessive school absences [is] sufficient to establish . . . educational neglect" (*Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1137 [4th Dept 2013] [internal quotation marks omitted]). Here, petitioner presented evidence that Tu'Real "had a significant, unexcused absentee rate that [had] a detrimental effect on [his] education," and the mother "failed to . . . establish a reasonable justification for [Tu'Real's] absences and thus failed to rebut the prima facie evidence of educational neglect" (*id.* [internal quotation marks omitted]).

We further conclude that Family Court properly determined that the evidence of neglect with respect to Tu'Real "demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the mother's] care" (*Matter of Daniella HH.*, 236 AD2d 715, 716 [3d Dept 1997]), thus warranting a finding of derivative neglect with respect to Ym'Prezz (*see generally Matter of Dayshaun W. [Jasmine G.]*, 133 AD3d 1347, 1348 [4th Dept 2015]; *Matter of Amber C.*, 38 AD3d 538, 540-541 [2d Dept 2007]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

209

TP 24-00419

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

IN THE MATTER OF ZETA CHI ZETA FRATERNITY, INC.,
PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT OSWEGO, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order [denominated judgment] of the Supreme Court, Jefferson County [William F. Ramseier, J.], entered March 8, 2024) to review a determination of respondent. The determination expelled petitioner from respondent's campus.

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

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks to annul a determination finding it responsible for violations of respondent's student code of conduct arising from incidents of hazing and expelling it from respondent's campus.

Petitioner contends that respondent denied it due process by charging it with vague "historical" allegations based on complaints of anonymous individuals. We reject that contention. Although the charges did not include any dates for the conduct, the evidence presented at the hearing addressed specific incidents from spring 2022 and spring 2023. Indeed, petitioner's president admitted at the beginning of the hearing that petitioner was adequately apprised of the charges against it. Further, petitioner's president indicated that he knew the identity of the complainant. Thus, we conclude that respondent's failure to identify the complainant and other whistleblowers did not have any impact on petitioner's opportunity to defend itself (*see generally Matter of Fitzgerald v Libous*, 44 NY2d 660, 661 [1978]; *Matter of Agudio v State Univ. of N.Y.*, 164 AD3d 986, 990 [3d Dept 2018]).

We further conclude that, contrary to petitioner's contention, respondent's determination is supported by substantial evidence. The evidence considered by respondent, including petitioner's admission to some of the charges, constituted "such relevant proof as a reasonable mind may accept as adequate to support [the] conclusion" that petitioner violated respondent's student code as charged by respondent (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Finally, the penalty is not " 'so disproportionate to the offense as to be shocking to one's sense of fairness' " (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]; *see Matter of Klockowski v State Univ. of N.Y. Coll. at Plattsburgh*, 182 AD3d 725, 728 [3d Dept 2020]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

211

CA 23-02081

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

THOMAS C. WILMOT, SR., THOMAS C. WILMOT, JR.,
AND LORETTA W. CONROY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TONY KIRIK, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

ROSENHOUSE LAW FIRM, ROCHESTER (MICHAEL A. ROSENHOUSE OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (H. TODD BULLARD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered June 20, 2023. The order, inter alia, denied the motion of plaintiffs for "modification and clarification" of a prior judgment.

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

Memorandum: Defendant Tony Kirik appeals from a 2023 order that, inter alia, denied plaintiffs' motion for "modification and clarification" of Supreme Court's 2021 judgment "pursuant to CPLR 5019 (a)." As we recently noted in a related CPLR article 78 proceeding, "the 2023 order did not substantially modify the 2021 judgment" (*Matter of Kirik v Martin*, 233 AD3d 1493, 1495 [4th Dept 2024]). Inasmuch as "no appeal lies from the denial of a motion to resettle [or clarify] a substantive portion of an order" (*Matter of Torpey v Town of Colonie, N.Y.*, 107 AD3d 1124, 1126 [3d Dept 2013] [internal quotation marks omitted]; *see Hutchings v Garrison Lifestyle Pierce Hill, LLC*, 188 AD3d 1332, 1333 [3d Dept 2020]; *Kimmel v State of New York*, 267 AD2d 1079, 1081 [4th Dept 1999]; *see also MacKenzie v Bison El., Inc.*, 8 AD3d 1062, 1063 [4th Dept 2004]), we dismiss this appeal.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

212

CA 24-00558

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

F. JAMES MCGUIRE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE MCGUIRE GROUP, INC., DEFENDANT-APPELLANT.

GOLDBERG SEGALLA, BUFFALO (MEGHAN M. BROWN OF COUNSEL), AND FRYMAN PC, VALLEY STREAM, FOR DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, BUFFALO (LAUREN R. MENDOLERA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered March 20, 2024. The order denied the motion of defendant to disqualify counsel for plaintiff.

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

Memorandum: Defendant, The McGuire Group, Inc. (TMG), appeals from an order that denied its motion to disqualify Harter Secrest & Emery LLP (HSE) from representing plaintiff, F. James McGuire, in this action alleging, inter alia, that TMG breached an employment agreement. We affirm.

TMG is a shared services company that, inter alia, provides administrative and consulting services to several skilled nursing facilities (facilities). The owner of TMG is an owner of the holding companies that, in turn, own the facilities. In short, TMG does not, itself, own the facilities, and in fact the agreement between the facilities and TMG specifies that the latter is an independent contractor. HSE represented the facilities in certain unrelated Medicaid litigation. At the time its representation of the facilities commenced, HSE had the facilities sign attorney engagement letters that contained, inter alia, clauses waiving potential future conflicts between HSE and the facilities.

At times relevant on appeal, plaintiff was chief executive officer of TMG pursuant to an employment agreement and was responsible for the general oversight and direction of the facilities. The employment agreement allowed plaintiff to terminate his own employment for "Good Reason," at which point TMG was required to pay plaintiff a certain amount of money over the course of several installments. Plaintiff alleged that, despite giving notice that he was terminating

his employment for good reason, in accordance with the employment agreement, TMG failed to pay him some of the amounts to which he was entitled.

As a result, plaintiff commenced this action asserting causes of action for breach of contract and anticipatory repudiation. Several months later, after answering the complaint and interposing counterclaims, TMG moved to disqualify HSE from representing plaintiff in this action on the basis that there was a conflict of interest under Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.7 (a). Specifically, TMG alleged that there was a conflict of interest in allowing HSE to represent plaintiff against TMG inasmuch as HSE represented the facilities in active litigation, and that the facilities never waived any conflict. TMG contends on appeal that Supreme Court abused its discretion in denying the motion. We reject that contention inasmuch as we conclude that TMG failed to establish all of the elements necessary to disqualify HSE from representing plaintiff in this action.

" 'A motion to disqualify another party's attorney is addressed to the sound discretion of the trial court' " (*Bison Plumbing City v Benderson*, 281 AD2d 955, 955 [4th Dept 2001]; *see Rose v Thrifty Rent-A-Car Sys.*, 305 AD2d 484, 485 [2d Dept 2003]). A party bringing a disqualification motion "ha[s] the burden of making a clear showing that disqualification is warranted" (*Matter of Colello* [appeal No. 3], 167 AD3d 1445, 1447 [4th Dept 2018] [internal quotation marks omitted]; *see Lake v Kaleida Health*, 60 AD3d 1469, 1470 [4th Dept 2009]). "A lawyer may not both appear for and oppose a client on substantially related matters when the client's interests are adverse" (*Solow v Grace & Co.*, 83 NY2d 303, 306 [1994]; *see Greene v Greene*, 47 NY2d 447, 451 [1979]; *Leonardo v Leonardo*, 297 AD2d 416, 418 [3d Dept 2002]). More specifically, rule 1.7 precludes an attorney from engaging in concurrent representation where "the representation will involve the lawyer in representing differing interests," or "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7 [a] [1], [2]; *see Benevolent & Protective Order of Elks of United States of Am. v Creative Comfort Sys., Inc.*, 175 AD3d 887, 889 [4th Dept 2019]). Of course, establishing that there is a conflict of interest under the aforementioned circumstances presupposes that there is a current attorney-client relationship between the lawyer and the client seeking disqualification (*see Benevolent & Protective Order of Elks of United States of Am.*, 175 AD3d at 889; *see generally Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996], *rearg denied* 89 NY2d 917 [1996]; *Matter of Carl B., Jr. [Carl B., Sr.]*, 181 AD3d 1161, 1161-1162 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]).

We also note the seriousness of a motion to disqualify a party's counsel of choice. "Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice" (*S & S*

Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 443 [1987]; *see Matter of Abrams [John Anonymous]*, 62 NY2d 183, 196 [1984]; *Consumers Beverages, Inc. v Kavcon Dev. LLC*, 227 AD3d 1381, 1383 [4th Dept 2024]). In short, disqualification "is a severe remedy" and should be limited to "cases where counsel's conduct will probably taint the underlying trial" (*Harris v Erie County Med. Ctr. Corp.*, 175 AD3d 1104, 1106 [4th Dept 2019] [internal quotation marks omitted]; *see Consumers Beverages, Inc.*, 227 AD3d at 1383).

Here, we conclude that TMG did not satisfy the first part of the relevant disqualification test—i.e., an attorney-client relationship between TMG and HSE—and therefore TMG lacked standing to move to disqualify HSE. To establish standing, the movant must prove the existence of a current or prior attorney-client relationship between the moving party and opposing counsel (*see Tekni-Plex, Inc.*, 89 NY2d at 131; *Consumers Beverages, Inc.*, 227 AD3d at 1383-1384; *Benevolent & Protective Order of Elks of United States of Am.*, 175 AD3d at 889). However, where, as here, "the firm sought to be disqualified had never represented the moving party, that firm owed no duty to that party," therefore precluding any standing to seek disqualification (*Rowley v Waterfront Airways*, 113 AD2d 926, 927 [2d Dept 1985]).

It is undisputed that neither TMG nor its owner was ever directly represented by HSE. Thus, TMG seeks to establish that it has standing on a theory that it is a corporate affiliate of the facilities that were directly represented by HSE—i.e., essentially on a theory that TMG is the alter ego of the facilities. We reject that contention. In support of its argument that the facilities were corporate affiliates of TMG such that they had standing to disqualify HSE, TMG relied primarily on the Second Circuit's decision in *GSI Commerce Solutions, Inc. v BabyCenter, L.L.C.* (618 F3d 204 [2d Cir 2010] [*GSI*]). In *GSI*, the Second Circuit affirmed the District Court's order granting a disqualification motion, concluding that it was not an abuse of discretion (*see id.* at 209-212). However, even assuming, arguendo, that the analytical framework of *GSI* applies here, a dispositive difference exists between *GSI* and this case, because there the court was evaluating whether there was a corporate affiliate conflict in the context of a *wholly-owned subsidiary* of the parent corporation (*see id.* at 206-209). Here, on the other hand, we conclude that TMG is not the alter ego of the facilities. In contrast to *GSI*, the record conclusively establishes that the facilities are not owned by TMG and are separate legal entities from TMG. Indeed, the services agreement that forms the basis of the relationship between TMG and the facilities expressly states that TMG would remain, at all relevant times, "an independent contractor," and that the facilities would, inter alia, "retain all managerial and supervising responsibilities, and authority with respect to the operation of the" facilities, and that "all services rendered pursuant to [the a]greement shall be provided subject to the ultimate direction and control of the" facilities. In short, unlike in *GSI* and the cases that it relies on, here there is simply no parent-subsidiary relationship to parse for purposes of disqualification.

TMG and the facilities structured their relationship in a particular way, with TMG seeking to set itself out as an independent contractor of the facilities. Courts "have expressed concern that . . . disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused" (*Solow*, 83 NY2d at 310). Here, we note indications that TMG was engaging in a litigation tactic by moving to disqualify HSE inasmuch as, inter alia, TMG waited months after the commencement of this action to call attention to the purported conflict, even though in the previous year, in a prior separate matter, there had been some discussions of a similar conflict.

Even assuming, arguendo, that TMG had standing to seek disqualification of HSE on an alter ego theory based on the attorney-client relationship that existed between HSE and the facilities, we also conclude that the court properly concluded that any conflict was waived in the engagement letters signed by the facilities when they retained HSE (*see Gem Holdco, LLC v Ridgeline Energy Servs., Inc.*, 130 AD3d 506, 506 [1st Dept 2015]; *Grovick Props., LLC v 83-10 Astoria Blvd., LLC*, 120 AD3d 471, 472-474 [2d Dept 2014]). In the engagement letters signed by the facilities, the facilities expressly agreed, inter alia, to waive potential future conflicts that "may arise in the future between [the] facility and one of [HSE's] other health care clients," and that they "consent[ed] to [HSE's] continuing representation of both [the facility] and [HSE's] clients in the event of any such future conflict on unrelated matters." The waiver indicated that the facilities had "been informed of and [understood] the relevant implications, advantages and risks of providing such consent." TMG's contention that it, via the facilities, did not waive any such conflicts "is belied by the clear language of the [engagement letters]," and it "cannot now compel the disqualification of . . . [HSE] simply because the representation to which [the facilities] consented has since devolved into litigation" (*Gem Holdco, LLC*, 130 AD3d at 506 [internal quotation marks omitted]; *see Grovick Props., LLC*, 120 AD3d at 474).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

215

CA 23-01963

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

ZELKA H.V.A.C. MAINTENANCE SOLUTIONS, INC.,
PLAINTIFF-APPELLANT,

V ORDER

G.M. CRISALLI & ASSOCIATES, INC.,
CHRISTOPHER COFFEE, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

DECANDIDO & ASACHI, PLLC, FOREST HILLS (WILLIAM DECANDIDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SHEATS & BAILEY, PLLC, LIVERPOOL (EDWARD J. SHEATS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Jason L. Cook, J.), entered October 17, 2023. The order granted the motion of defendants G.M. Crisalli & Associates, Inc., Christopher Coffee, and United States Fire Insurance Company to, among other things, dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 20, 2025,

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

216

KA 23-00100

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW LOVEALL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Armen J. Nazarian, J.), rendered July 19, 2022. The judgment convicted defendant upon a jury verdict of attempted rape in the first degree, attempted criminal sexual act in the first degree, and unlawful imprisonment 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 rape in the first degree (Penal Law §§ 110.00, former 130.35 [1]), attempted criminal sexual act in the first degree (§§ 110.00, former 130.50 [1]), and unlawful imprisonment in the second degree (§ 135.05). We affirm.

Defendant's contention that County Court violated CPL 270.15 (2) with respect to the sequence for exercising peremptory challenges is not preserved for our review (*see People v Stewart*, 231 AD3d 1480, 1481 [4th Dept 2024], *lv denied* 42 NY3d 1054 [2024]; *see generally People v Mancuso*, 22 NY2d 679, 680 [1968], *cert denied* 393 US 946 [1968], *rearg denied* 27 NY2d 670 [1970]). 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's contention that he was deprived of a fair trial based on extraneous comments to defense counsel by the victim and remarks made by a witness is unpreserved for our review (*see* CPL 470.05 [2]; *see generally People v Szatanek*, 169 AD3d 1448, 1449-1450 [4th Dept 2019], *lv denied* 33 NY3d 981 [2019]).

Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349

[2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable, we cannot conclude that " 'the jury failed to give the evidence the weight it should be accorded' " (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018]; *see People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). Ultimately the jury was in the best position to assess the victim's credibility (*see generally People v Ruiz*, 159 AD3d 1375, 1375 [4th Dept 2018]), and we perceive no reason to reject the jury's credibility determination.

Contrary to defendant's contention, the People did not commit a *Brady* violation with respect to inconsistencies in the statements the witness made to police. The People learned from the witness only days before her trial testimony that some of the information in the police statement was wrong and that there were some things typed incorrectly by the stenographer. The People immediately provided that information to the defense. Thus, defendant failed to establish that "the evidence was suppressed by the prosecution" as required to establish a *Brady* violation (*People v Fuentes*, 12 NY3d 259, 263 [2009], *rearg denied* 13 NY3d 766 [2009]; *see People v Carrasquillo-Fuentes*, 142 AD3d 1335, 1339 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). In any event, even assuming, arguendo, that there was a delay in disclosing the evidence, "[i]t is well settled that a defendant's constitutional right to a fair trial is not violated when, as here, he is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case" (*Carrasquillo-Fuentes*, 142 AD3d at 1339 [internal quotation marks omitted]; *see People v Vickio*, 50 AD3d 1479, 1480 [4th Dept 2008]).

Defendant's sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

219

KA 21-01630

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMARCUS MILLER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. TRESMOND 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 (James F. Bargnesi, J.), rendered November 4, 2021. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree, robbery 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 his guilty plea, of assault in the first degree (Penal Law § 120.10 [1]), robbery in the first degree (§ 160.15 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Foumakoye*, 229 AD3d 1380, 1380 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024]; *see also People v Roberto*, 224 AD3d 1367, 1367-1368 [4th Dept 2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

230

CA 23-02152

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

ROBERT THOMPSON AND TAMI THOMPSON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DEREK KUHANECK, MP CONSTRUCTION, MARK PETTIT,
DOING BUSINESS AS MP CONSTRUCTION,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (JAMES J. NAVAGH OF COUNSEL), FOR DEFENDANT-APPELLANT DEREK KUHANECK.

RUPP PFALZGRAF LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS MP CONSTRUCTION, AND MARK PETTIT, DOING BUSINESS AS MP CONSTRUCTION.

CAMPBELL & ASSOCIATES, HAMBURG (JASON M. TELAAK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Craig D. Hannah, J.), entered December 8, 2023. The order denied in part the motion of defendants MP Construction and Mark Pettit, doing business as MP Construction to preclude evidence or, in the alternative, to compel plaintiffs to produce certain discovery.

It is hereby ORDERED that said appeal by defendant Derek Kuhaneck is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this personal injury action arising from a slip-and-fall accident suffered by Robert Thompson (plaintiff) at a work site, defendants MP Construction and Mark Pettit, doing business as MP Construction (collectively, MP Construction defendants), and defendant Derek Kuhaneck, each appeal from an order insofar as it denied in part the MP Construction defendants' motion to preclude evidence or, in the alternative, to compel plaintiffs to produce certain discovery. As an initial matter, we conclude that Kuhaneck is not aggrieved by the order from which he purports to appeal because the order neither granted relief against him nor denied any affirmative relief on his own behalf (*see* CPLR 5511; *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 664 n 4 [2014]; *Krause v Industry Matrix, LLC*, 227 AD3d 1560, 1561 [4th Dept 2024]; *Kavanaugh v Kavanaugh*, 200 AD3d 1568, 1571 [4th Dept 2021]). Contrary to Kuhaneck's suggestion, although he supported the MP Construction

defendants' motion, he did not formally join that motion in compliance with CPLR 2215 (*see Kavanaugh*, 200 AD3d at 1571-1572; *Morales v 1415, LLC*, 171 AD3d 913, 916 [2d Dept 2019]). Consequently, Kuhaneck's appeal must be dismissed (*see Fabrizi*, 22 NY3d at 664; *Kavanaugh*, 200 AD3d at 1571-1572).

With respect to the merits of the MP Construction defendants' appeal, we conclude that Supreme Court did not abuse its discretion in denying in part the motion (*see Spencer v Willard J. Price Assoc., LLC*, 155 AD3d 592, 592 [1st Dept 2017]; *Manzella v Provident Life & Cas. Co.*, 273 AD2d 923, 924 [4th Dept 2000]; *cf. Boyea v Benz*, 96 AD3d 1558, 1559-1560 [4th Dept 2012]; *see generally Reading v Fabiano* [appeal No. 2], 126 AD3d 1523, 1525 [4th Dept 2015]). Insofar as the motion relates to the disclosure of plaintiff's Social Security Disability records, the court "properly conducted an in camera review to redact irrelevant information . . . , and properly limited disclosure to the 'conditions affirmatively placed in controversy' " (*Reading*, 126 AD3d at 1525; *see Mayer v Cusyck*, 284 AD2d 937, 938 [4th Dept 2001]). Further, the court properly denied the motion insofar as it relates to the disclosure of plaintiff's tax returns inasmuch as the MP Construction defendants "failed to make the requisite showing that [the] tax returns were indispensable to [the] litigation and that [the] relevant information possibly contained therein was unavailable from other sources" given that plaintiff's past earnings were reflected in his employer's wage verification from his Workers' Compensation file (*Lauer's Furniture Stores v Pittsford Place Assoc.*, 190 AD2d 1054, 1055 [4th Dept 1993]; *cf. Has K'Paw Mu v Lyon*, 158 AD3d 1084, 1085-1086 [4th Dept 2018]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

237

KA 22-01540

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN TAYLOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered May 2, 2022. The judgment convicted defendant upon a nonjury verdict of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the seventh degree (§ 220.03), defendant contends that Supreme Court abused its discretion in issuing a protective order pursuant to CPL 245.70 that allowed the People to withhold from defendant, until 10 days before trial, the identity of a confidential informant. We reject that contention. "[T]he legislature, when enacting CPL 245.70, created an exception for disclosure relating to confidential informants" that "permits the People to withhold and redact from discovery materials the name and contact information of a confidential informant without the need for a motion for a protective order" (*People v Singh*, 187 AD3d 691, 693 [2d Dept 2020]; *see* CPL 245.20 [1] [c]; *People v Artis*, 179 AD3d 1440, 1442 [3d Dept 2020]). Nevertheless, the court may issue a protective order for "good cause," which includes "danger to . . . the safety of a witness" or "risk of intimidation" (CPL 245.70 [4]). Here, the People submitted an ex parte motion that provided "a sufficiently detailed factual predicate to enable the court[ ] to evaluate the applicability of the statutory factors governing the issuance of protective orders, assess the weight to be given to each factor, and draw an appropriate balance" (*People v Beaton*, 179 AD3d 871, 875 [2d Dept 2020]; *see also People v Eaves*, 152 AD3d 1226, 1227 [4th Dept

2017], *lv denied* 30 NY3d 949 [2017]). Based on that factual predicate, the court determined that there was good cause for a protective order, and we see no reason to disturb the court's exercise of discretion (*see Eaves*, 152 AD3d at 1227).

Defendant further contends that the court erred in refusing to suppress physical evidence based on its determination following an in camera *Darden* hearing with respect to the confidential informant that was relied upon by the police (*see generally People v Edwards*, 95 NY2d 486, 493-494 [2000]; *People v Darden*, 34 NY2d 177, 181-182 [1974], *rearg denied* 34 NY2d 995 [1974]). We reject that contention. We have reviewed the sealed transcript of the *Darden* hearing, as well as the court's requisite "summary report as to the existence of the informer and with respect to the communications made by the informer to the police to which the police testify" (*Darden*, 34 NY2d at 181). Based on those documents, we conclude that the court properly determined that "the confidential informant existed and that he provided the information to the police concerning defendant's possession of the handgun at the location where defendant was stopped by the police and subsequently arrested" (*People v Brown* [appeal No. 1], 93 AD3d 1231, 1231 [4th Dept 2012], *lv denied* 19 NY3d 958 [2012]; *see People v Jones*, 149 AD3d 1580, 1581 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]). Defendant failed to preserve for our review his further contention that the court erred in failing sua sponte to reopen the suppression hearing (*see People v Angona*, 119 AD3d 1406, 1407 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015]; *People v Highsmith*, 259 AD2d 1006, 1007 [4th Dept 1999]), 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]).

We agree with defendant, however, that the judgment of conviction should be reversed and a new trial granted because the court erred in summarily denying his request to proceed pro se (*see generally People v McIntyre*, 36 NY2d 10, 14 [1974]). It is well established that a defendant in a criminal case may invoke the right to proceed pro se provided that "(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*id.* at 17). Here, the record establishes that defendant requested to represent himself before the start of trial, stating: "I would like to go pro se, and I would like to bring something to the [c]ourt's attention if I may, your Honor." The court initially ignored the request, but defense counsel raised the issue twice more, causing the court to tell defendant: "We are not going to address the issue of pro se. You are here with [defense counsel]," whom the court described as "one of the most experienced defense attorneys in town." Given that the court "recognized defendant as having unequivocally requested to proceed pro se," it was then required to conduct a "searching inquiry to ensure that . . . defendant's waiver [of the right to counsel was] knowing, intelligent, and voluntary" (*People v Holmes*, 40 NY3d 947, 948 [2023] [internal quotation marks omitted]; *see generally People v Silburn*, 31 NY3d 144, 150 [2018]). Because the court erred in summarily denying

the request without conducting the requisite inquiry, we reverse the judgment and grant a new trial (*see Holmes*, 40 NY3d at 948; *People v Coleman*, 210 AD2d 977, 977 [4th Dept 1994]).

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

243

KA 23-01076

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AUSTIN M. GARDNER, DEFENDANT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered June 15, 2023. The judgment convicted defendant, upon a guilty plea, of criminal sexual act 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 criminal sexual act in the third degree (Penal Law former § 130.40 [3]). We affirm.

Defendant contends that his plea was involuntary because his statements at sentencing negated an essential element of the crime and County Court failed to conduct a further inquiry to ensure that the plea was voluntary. 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]; *People v Wilson*, 59 AD3d 975, 975 [4th Dept 2009], *lv denied* 12 NY3d 861 [2009]). The narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply in this case. Defendant said "[n]othing . . . during the plea colloquy itself" that negated an element of the pleaded-to crime or otherwise called into doubt the voluntariness of his plea (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see Cunningham*, 213 AD3d at 1271), and the court therefore had no duty to conduct further inquiry with respect to the plea (*see Lopez*, 71 NY2d at 666). 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 Brown*, 204 AD3d 1519, 1519 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *see Mobayed*, 158 AD3d at 1223). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends that his sentence is unduly harsh and severe. Defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see Thomas*, 34 NY3d at 559-564; *People v Benjamin*, 216 AD3d 1457, 1457 [4th Dept 2023]) and that waiver encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Defendant's contention that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney[']s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]). " 'In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Brown*, 305 AD2d 1068, 1069 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]). Here, defense counsel secured a favorable plea bargain for defendant, and nothing in the record casts doubt on the apparent effectiveness of defense counsel (*see People v Ford*, 86 NY2d 397, 404 [1995]; *People v Smith*, 198 AD3d 1347, 1348 [4th Dept 2021]).

Entered: April 25, 2025 Ann Dillon Flynn
Clerk of the Court

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

247

CA 24-00256

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

SINCERRAY KEARSE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

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

COOKE DOYLE LLC, BUFFALO (JESSE J. COOKE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered January 19, 2024. The order granted the motion of defendant for summary judgment seeking, inter alia, dismissal of the complaint.

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

Memorandum: Plaintiff commenced this breach of contract action alleging that defendant was required pursuant to the terms of its insurance contract with plaintiff to pay for damage to plaintiff's property caused by a fire. Supreme Court granted defendant's motion for summary judgment seeking, inter alia, dismissal of the complaint on the ground that plaintiff made material factual misrepresentations in her application for the insurance contract at issue. We agree with plaintiff on appeal that, under the facts of this case, the court erred in granting the motion. We therefore reverse.

"Whether a misrepresentation in an application for insurance constitutes a material misrepresentation that would allow an insurer to avoid the resulting insurance contract is generally a question of fact" (*Iacovangelo v Allstate Life Ins. Co. of N.Y.*, 300 AD2d 1132, 1133 [4th Dept 2002]; *see generally* Insurance Law § 3105). Here, the underwriting guidelines on which defendant relied in support of its motion do not unequivocally support the conclusion that plaintiff's application would have been denied had it contained accurate information, and the supporting affidavit of defendant's representative contained insufficient further detail to support that conclusion as a matter of law (*see Iacovangelo*, 300 AD2d at 1133; *Carpinone v Mutual of Omaha Ins. Co.*, 265 AD2d 752, 755 [3d Dept

1999]). Inasmuch as defendant failed to meet its initial burden, we need not review the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

251

CA 24-01427

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

IN THE MATTER OF STEPHEN F. GUTHMANN,
RESPONDENT-APPELLANT,
---------- MEMORANDUM AND ORDER
ONONDAGA COUNTY SHERIFF'S DEPARTMENT,
PETITIONER-RESPONDENT.

STEPHEN F. GUTHMANN, RESPONDENT-APPELLANT PRO SE.

Appeal from an order of the Onondaga County Court (Michael L. Dwyer, A.J.), dated February 20, 2024. The order, inter alia, revoked the pistol license of respondent.

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

Memorandum: Respondent appeals from an order that, inter alia, revoked respondent's pistol license. "The appropriate procedure for the review of a determination of a County Court Judge, acting in [their] administrative capacity as the firearms licensing officer for the County of [Onondaga] under Penal Law § 400.00 (11) and § 265.00 (10), is not a direct appeal, but the commencement of a CPLR article 78 proceeding in this Court" (*Matter of Shuler*, 67 AD3d 1020, 1020 [2d Dept 2009]; *see* CPLR 506 [b] [1]; 7801; *Matter of Wiegand v Crandall*, 118 AD3d 1355, 1356 [4th Dept 2014]; *Matter of Dalton v Drago*, 72 AD3d 1243, 1243 [3d Dept 2010]). The appeal "cannot be converted into an original proceeding commenced in this Court since the County Court Judge who made the determination is a necessary party and was not named or served" (*Shuler*, 67 AD3d at 1020; *see Matter of Panaro [County of Westchester]*, 250 AD2d 616, 616-617 [2d Dept 1998]; *Matter of County of Westchester v D'Ambrosio*, 244 AD2d 334, 334-335 [2d Dept 1997]). We therefore dismiss the appeal (*see Shuler*, 67 AD3d at 1020; *Panaro*, 250 AD2d at 617; *D'Ambrosio*, 244 AD2d at 334).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

252.1

CA 24-00878

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

ISABELLA VITAGLIANO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ELLIOT WEINER, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

ROSSI & ROSSI, NEW YORK MILLS (EVAN ROSSI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), entered June 3, 2024. The order granted the cross-motion of defendant for leave to renew and reargue and, upon renewal and reargument, denied plaintiff's motion insofar as it sought, inter alia, to dismiss defendant's counterclaim for defamation.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained as a result of an alleged sexual assault committed against her by Elliot Weiner (defendant). Defendant answered and asserted, among other things, a counterclaim for defamation premised on a social media "story" posted by plaintiff in which she asserted that defendant "is a rapist." Plaintiff now appeals from an order that granted defendant's cross-motion for leave to renew and reargue and, upon renewal and reargument, denied plaintiff's motion insofar as it sought to dismiss defendant's counterclaim for defamation based on the social media "story" under CPLR 3211 (g) and insofar as it sought attorneys' fees and costs pursuant to Civil Rights Law § 70-a (1) (a). We affirm.

Initially, we note that the parties do not dispute on appeal that the "counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of [Civil Rights Law § 76-a (1)]" (CPLR 3211 [g] [1]), i.e., one subject to the protections of New York's anti-SLAPP statutes (*see generally Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26, 28-32 [1st Dept 2022]). Thus, as relevant here, the limited issue before this Court is whether defendant, as "the party responding to the motion[,] demonstrate[d] that the cause of action has a substantial basis in

law" (CPLR 3211 [g] [1]). Plaintiff contends that CPLR 3211 (g) requires defendant to meet the "clear and convincing evidence" standard set out in Civil Rights Law § 76-a (2). We reject that contention. Although we have not previously been called upon to determine what constitutes a "substantial basis in law" for the purpose of avoiding dismissal under the burden-shifting framework of CPLR 3211 (g), we agree with the First Department that " 'substantial basis' under the anti-SLAPP law means 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' " (*Reeves v Associated Newspapers, Ltd.*, 232 AD3d 10, 12 [1st Dept 2024]; *see also Zeitlin v Cohan*, 220 AD3d 631, 632 [1st Dept 2023], *lv denied* 42 NY3d 905 [2024]; *Smartmatic USA Corp. v Fox Corp.*, 213 AD3d 512, 512 [1st Dept 2023]).

Our conclusion is supported by the plain language of CPLR 3211 (g), which uses a distinctly different standard than the "clear and convincing evidence" standard found in Civil Rights Law § 76-a (2), and, as the First Department noted in *Reeves*, by the legislative history. The sponsor's memorandum in support of the 1992 enactment of CPLR 3211 (g) and related statutes stated that the law "would change the standard for obtaining dismissal . . . in certain actions . . . [and] the standard for obtaining attorneys' fees . . . by requiring that an action be supported by a 'substantial' basis, which is more support than the 'reasonable' basis required in other actions" (Assembly Mem in Support, Bill Jacket, L 1992, ch 767 at 8; *see Reeves*, 232 AD3d at 20-23). Further, the legislative history of CPLR 3211 (h), which addresses motions to dismiss in certain cases involving licensed architects, engineers, land surveyors, or landscape architects, is illuminating. The sponsor's memorandum in support of that 1996 amendment expressly equated the "substantial basis" standard with the concept of "substantial evidence," the standard applied in judicial review of administrative findings, by concluding that it "mean[s] such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (Mem in Support, Bill Jacket, L 1996, ch 682 at 13, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *see Reeves*, 232 AD3d at 22). Thus, "the Legislature's intention to 'import the substantial evidence standard' as the measure of the 'substantial basis' standard is clear" (*Reeves*, 232 AD3d at 23, quoting *Castle Vil. Owners Corp. v Greater N.Y. Mut. Ins. Co.*, 58 AD3d 178, 183 [1st Dept 2008]). This standard "is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt . . . The standard demands only that a given inference is reasonable and plausible, not necessarily the most probable" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks omitted]).

Applying that standard, we now consider whether defendant proffered a substantial basis from which to conclude that plaintiff's statement on social media "was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue" (Civil Rights Law § 76-a [2]), i.e., actual malice (*see Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 353 [2009]). Here, we agree

with plaintiff that a mere conclusory denial of her allegation that defendant sexually assaulted her would be insufficient to support the conclusion that plaintiff knowingly posted a false statement on social media or did so with a reckless disregard for the truth (*see Gillespie v Kling*, 217 AD3d 566, 567 [1st Dept 2023]). Defendant, however, opposed the motion with a detailed statement recounting his version of the sexual encounter underlying the present litigation, including the specific facts on which he relied for his assertions that plaintiff was not intoxicated at the time and that the encounter was consensual (*see Smartmatic USA Corp.*, 213 AD3d at 512-513). A reasonable mind could therefore conclude that the differences between the parties' versions of events could not be accounted for by, for example, differences in perception, mistake, faulty memory, or alcohol impairment, but instead that plaintiff knowingly made a false statement, even if such a conclusion is "not necessarily the most probable" in light of all the evidence (*Ridge Rd. Fire Dist.*, 16 NY3d at 499). We conclude that Supreme Court properly denied plaintiff's motion insofar as it sought to dismiss defendant's counterclaim for defamation based on plaintiff's social media "story." Inasmuch as defendant established a substantial basis for his defamation counterclaim, plaintiff is not entitled to attorneys' fees pursuant to Civil Rights Law § 70-a (1) (a).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

256

KA 23-01696

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS W. YEOMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered August 15, 2023. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: In these consolidated appeals, defendant appeals, in appeal No. 1, from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [2]) and, in appeal No. 2, defendant appeals from a separate judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (§ 220.16 [7]). Both pleas were entered in a single plea proceeding.

Contrary to defendant's contention with respect to both appeals, the record establishes that the oral colloquy, together with the written waiver of the right to appeal, was adequate to ensure that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Giles*, 219 AD3d 1706, 1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]; *People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *see generally People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The valid waiver forecloses defendant's challenge in each appeal to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v*

Malcolm, 231 AD3d 1503, 1504 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *Giles*, 219 AD3d at 1707).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

257

KA 23-01698

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS W. YEOMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered August 15, 2023. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Yeoman* ([appeal No. 1] — AD3d — [Apr. 25, 2025] [4th Dept 2025]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

261

CAF 23-01201

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

IN THE MATTER OF CATHERINE M.C.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW P.C., JR., RESPONDENT-RESPONDENT.

MARYBETH BARNET, ESQ., ATTORNEY FOR THE CHILDREN,
APPELLANT.

TYSON BLUE, MACEDON, FOR PETITIONER-APPELLANT.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

Appeals from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered July 3, 2023, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Wayne County, for further proceedings in accordance with the following memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 6 seeking to modify a prior order of custody and visitation, entered upon the parties' consent, pursuant to which the parties shared joint legal custody with primary physical residence with the mother and supervised visitation to respondent father. The mother sought, among other things, sole legal custody of the subject children and termination of the father's visitation. The mother and the children each appeal from an order granting the father's motion to dismiss the petition. We now reverse.

We note at the outset that, although the children's notice of appeal was filed by the appellate Attorney for the Children (AFC) over a year after entry of the order appealed from, it cannot be said that the children's appeal is untimely inasmuch as " '[t]here is no evidence in the record that the [trial AFC] was served with the order of [dismissal] by a party . . . , that [the trial AFC] received the order in court, or that the Family Court mailed the order to the [trial AFC]' " (*Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1311 [4th Dept 2022]; *see* Family Ct Act § 1113; *Matter of Bukowski v Florentino*, 210 AD3d 1520, 1521 [4th Dept 2022]; *see also Matter of Parvati D. [Roman D.]*, 227 AD3d 605, 605 [1st Dept 2024], *lv dismissed*

43 NY3d 926 [2025]).

"A hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417 [4th Dept 2003] [internal quotation marks omitted]; *see Matter of Kriegar v McCarthy*, 162 AD3d 1560, 1560 [4th Dept 2018]; *Matter of Farner v Farner*, 152 AD3d 1212, 1213 [4th Dept 2017]). Rather, "[t]he petitioner must make a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody [and visitation] order should be modified" (*Di Fiore*, 2 AD3d at 1417-1418 [internal quotation marks omitted]; *see Farner*, 152 AD3d at 1213; *Matter of Gelling v McNabb*, 126 AD3d 1487, 1487-1488 [4th Dept 2015]). "In order to survive a motion to dismiss and warrant a hearing, a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child" (*Kriegar*, 162 AD3d at 1560 [internal quotation marks omitted]; *see Gelling*, 126 AD3d at 1487; *Di Fiore*, 2 AD3d at 1417-1418). "When faced with such a motion, 'the court must give the pleading a liberal construction, accept the facts alleged therein as true, accord the nonmoving party the benefit of every favorable inference, and determine only whether the facts fit within a cognizable legal theory' " (*Kriegar*, 162 AD3d at 1560; *see Matter of Little v Little*, 175 AD3d 1070, 1071 [4th Dept 2019]).

Preliminarily, we conclude, contrary to the children's contention, that the mother's allegation that the father caused a disruption in the children's health insurance coverage does not adequately set forth a change in circumstances inasmuch as the mother also asserted that the issue had been resolved before she filed the petition (*see Matter of Hoffmeier v Byrnes*, 101 AD3d 1666, 1667 [4th Dept 2012]).

We nonetheless agree with the mother and the children that Family Court erred in summarily dismissing the petition inasmuch as the mother otherwise alleged a change in circumstances sufficient to survive the father's motion to dismiss and warrant a hearing. The mother alleged that the father had repeatedly and consistently neglected to exercise his right to supervised visitation and had not seen or spoken with the children in over two years (*see Kriegar*, 162 AD3d at 1560). To the extent that the father disputed that allegation by blaming his lack of contact with the children entirely on the mother and accusing her of parental alienation, "determinations affecting custody [and visitation] should be made following a full evidentiary hearing, not on the basis of conflicting allegations" (*Farner*, 152 AD3d at 1215 [internal quotation marks omitted]).

The mother further alleged that, subsequent to entry of the prior order, the older child newly disclosed that, in addition to the previously known sexual abuse to which he and the younger child had been subjected by their paternal uncle at the father's home, the father too had sexually abused him. That allegation was supported by a psychological evaluation ordered by the court at the trial AFC's

request, which showed that, during treatment following entry of the prior order, the older child was experiencing psychological issues arising from his memories of being sexually abused and disclosed to a treatment provider that the father had also sexually abused him. The psychological evaluation also noted, among other things, that both children had been diagnosed with PTSD. We thus conclude that the allegation constitutes a sufficient evidentiary showing of a change in circumstances to warrant a hearing (*see Matter of Attorney for the Children v Barbara N.*, 152 AD3d 903, 904-905 [3d Dept 2017]; *see generally Farner*, 152 AD3d at 1215).

Additionally, the mother adequately alleged a change in circumstances based on information—which she received directly from child protective services personnel from the county where the father resides—that the father and his paramour had engaged in conduct that led to the removal of the father's other children from his care (*see Matter of Brockel v Martin*, 153 AD3d 1654, 1654-1655 [4th Dept 2017]; *Matter of Hamilton v Anderson*, 143 AD3d 1086, 1088-1089 [3d Dept 2016]). We also agree with the children that the mother adequately alleged a change in circumstances "based on the increasing animus between the parties, the deterioration of the father's relationship with the children and the psychological issues that had arisen with . . . the children" (*Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]).

Based on the foregoing, we reverse the order, deny the motion, reinstate the petition, and remit the matter to Family Court for further proceedings on the petition. In light of our determination, we need not address the mother's remaining contention.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

262

CAF 24-00557

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

IN THE MATTER OF RACHEL CAVITT, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH CAVITT, RESPONDENT-APPELLANT.

JOSEPH CAVITT, RESPONDENT-APPELLANT PRO SE.

ASSAF & SIEGAL PLLC, ALBANY (DAVID M. SIEGAL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered December 12, 2023, in a proceeding pursuant to Family Court Act article 4. The order denied the objection of respondent to an order of the Support Magistrate.

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 4, respondent father appeals from an order denying his written objection to the order of the Support Magistrate, which increased the amount of the father's child support obligation and directed him to pay additional medical and college expenses. We affirm.

Contrary to the father's contention, Family Court properly denied his objection that the Support Magistrate's "order was obtained by way of fraudulent acts and testimony" of petitioner mother during the fact-finding hearing. It is well settled that "deference should be given to the credibility determinations of the [S]upport [M]agistrate, who was in the best position to evaluate the credibility of the witnesses" (*Matter of Bashir v Brunner*, 169 AD3d 1382, 1383 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of DeNoto v DeNoto*, 96 AD3d 1646, 1648 [4th Dept 2012]). Inasmuch as the father's remaining contentions were not raised in his written objection to the Support Magistrate's order, they are not properly before us (*see* Family Ct Act § 439 [e]; *Matter of Wyoming County Dept. of Social Servs. v Kates*, 199 AD3d 1369, 1369 [4th Dept 2021]; *Matter of Farruggia v Farruggia*, 125 AD3d 1490, 1490 [4th Dept 2015]; *Matter of White v Knapp*, 66 AD3d 1358, 1359 [4th Dept 2009]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

272

KA 22-01841

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

QUANTIC MATTHEWS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 4, 2022. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

273

KA 22-01842

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

QUANTIC MATTHEWS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 4, 2022. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

274

KA 23-01130

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM TRISVAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered July 19, 2022. 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]). We affirm. Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see generally People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *People v Witherow*, 203 AD3d 1595, 1595 [4th Dept 2022]).

Defendant's valid waiver of the right to appeal forecloses his contention challenging County Court's summary denial of that part of his motion seeking to suppress tangible evidence (*see People v Edmonds*, 229 AD3d 1275, 1278 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]; *People v Giles*, 219 AD3d 1706, 1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]; *see also People v Anderson*, 63 AD3d 1191, 1193 [3d Dept 2009], *lv denied* 13 NY3d 794 [2009]). Defendant's contention that defense counsel was ineffective does not survive his plea or the valid waiver of the right to appeal inasmuch as defendant did not assert that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Babagana*, 176 AD3d 1627, 1627 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019] [internal quotation marks omitted]; *cf. People v Williams*, 228 AD3d 1316, 1316-1317 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024],

reconsideration denied 42 NY3d 1055 [2024]; *People v Wood*, 217 AD3d 1407, 1409 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

275

KA 21-01381

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALFRED J. THOMAS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered September 10, 2021. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [1]). Defendant contends that he did not validly waive his right to appeal because County Court, despite mentioning and receiving acknowledgment from defendant prior to entry of the plea that the waiver of the right to appeal would be a condition of the plea bargain, did not engage in the appeal waiver colloquy during the plea proceeding until after defendant had pleaded guilty. We reject that contention.

"A waiver of the right to appeal is not effective where . . . it '[is] not mentioned until after [the] defendant plead[s] guilty' " (*People v Weir*, 174 AD3d 1465, 1466 [4th Dept 2019], *lv denied* 34 NY3d 1020 [2019]; *see People v Willis*, 161 AD3d 1584, 1584 [4th Dept 2018]; *People v Blackwell*, 129 AD3d 1690, 1690 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]). By contrast, a waiver of the right to appeal is valid where the court informs the defendant, before entering the plea, that the waiver will be a condition of the plea bargain, and the court assures itself "prior to the completion of the plea proceeding . . . that [the] defendant adequately understood the right that [the defendant] was forgoing" (*People v Bradshaw*, 18 NY3d 257, 265 [2011]; *see People v Cromie*, 187 AD3d 1659, 1659-1660 [4th Dept 2020], *lv denied* 36 NY3d 971 [2020]; *People v Love*, 179 AD3d 1541, 1542 [4th Dept 2020], *lv denied* 35 NY3d 994 [2020]; *cf. Willis*, 161 AD3d at 1584; *Blackwell*, 129 AD3d at 1690; *see also People v Bryant*, 28 NY3d

1094, 1095-1096 [2016]).

Here, the record establishes that the court informed defendant, before he entered his plea, that the waiver would be a condition of the plea (*see People v Vandusen*, 235 AD3d 1254, 1255 [4th Dept 2025]; *Cromie*, 187 AD3d at 1659; *Love*, 179 AD3d at 1542; *People v Rohadfox*, 175 AD3d 1813, 1814 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]). The record also establishes that the court assured itself "prior to the completion of the plea proceeding . . . that defendant adequately understood the right that he was forgoing" (*Bradshaw*, 18 NY3d at 265; *see Bryant*, 28 NY3d at 1095-1096; *Cromie*, 187 AD3d at 1659-1660; *Love*, 179 AD3d at 1542). Indeed, as defendant correctly concedes, the court used the appropriate model colloquy with respect to the waiver of the right to appeal (*see* NY Model Colloquies, Waiver of Right to Appeal; *see generally People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Figueroa*, 230 AD3d 1581, 1582-1583 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]; *People v Edmonds*, 229 AD3d 1275, 1276-1277 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]; *Cromie*, 187 AD3d at 1659). Contrary to defendant's further suggestion, " '[t]he fact that the appeal waiver was not reduced to writing is of no moment where, as here, the oral waiver was adequate' " (*Rohadfox*, 175 AD3d at 1814; *see People v Lopez*, 6 NY3d 248, 257 [2006]).

We conclude that defendant's waiver of the right to appeal forecloses our review of his challenge to the court's adverse suppression ruling (*see Thomas*, 34 NY3d at 564-565; *People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Kemp*, 94 NY2d 831, 833 [1999]; *Rohadfox*, 175 AD3d at 1814).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

276

KA 22-00178

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC SMITH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered January 7, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. We agree with defendant that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Harold*, 233 AD3d 1503, 1503 [4th Dept 2024]) and thus does not preclude our review of his challenge to the severity of his sentence (*see Harold*, 233 AD3d at 1503). However, we conclude that defendant's sentence is not unduly harsh or severe.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

279

KA 23-01107

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID HUNTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered January 31, 2020. The judgment convicted defendant upon a plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Stephens*, 189 AD3d 2142, 2142 [4th Dept 2020]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see Stephens*, 189 AD3d at 2142; *Alls*, 187 AD3d at 1515), we conclude that the sentence is not unduly harsh or severe.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

280

KA 22-01181

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OSHEA BURNS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Gordon J. Cuffy, A.J.), rendered June 1, 2022. The judgment convicted defendant of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, and the indictment is dismissed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (*id.*). The conviction of each of those crimes stems from defendant's alleged possession of a gun outside of his home or place of business on May 14 and May 29, 2021.

With respect to appeal No. 1, as defendant contends and the People correctly concede, defendant's conviction of criminal possession of a weapon in the second degree related to the May 14 incident is illegal because defendant did not plead guilty to that count of the indictment (*see People v Allen*, 267 AD2d 982, 982 [4th Dept 1999]; *People v Irwin*, 166 AD2d 924, 924-925 [4th Dept 1990]). Indeed, the CPL defines a "conviction" as "the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument" (CPL 1.20 [13]). Here, there could be no conviction because defendant did not plead guilty to any count of the indictment with respect to appeal No. 1, and that matter never proceeded to trial. Consequently, in appeal No. 1, we reverse the judgment and dismiss the indictment.

With respect to appeal No. 2, we conclude that the sentence is not unduly harsh or severe.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

281

KA 22-01182

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OSHEA BURNS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Gordon J. Cuffy, A.J.), rendered June 1, 2022. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Burns* ([appeal No. 1] — AD3d — [Apr. 25, 2025] [4th Dept 2025]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

282

CAF 24-00294

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

IN THE MATTER OF JAYDEN M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CARLOS M., RESPONDENT-APPELLANT.

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

MADISON OZZELLA, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (REBECCA L. CONSIDINE OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), dated September 29, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudicated the subject child to be permanently neglected by the father and terminated the father's parental rights. As a preliminary matter, we agree with the father that the appeal should not be dismissed as untimely. Inasmuch as the record and information before us "indicate that the [father] may have been served the order[ ] by [Family Court] via email only, which is not a method of service provided for in Family Court Act § 1113, and the record does not otherwise demonstrate that [he] was served by any of the methods authorized by the statute," we cannot determine when, if ever, the time to take the appeal began to run, and thus it cannot be said that the father's appeal is untimely (*Matter of Bukowski v Florentino*, 210 AD3d 1520, 1521 [4th Dept 2022]; *see Matter of Robert M. v Barbara L.*, 227 AD3d 141, 144 [3d Dept 2024]; *Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1310-1311 [4th Dept 2022]).

We nonetheless reject the father's further contention that the order was not entered upon his default. Subject to limited exceptions not applicable here, a party "may prosecute or defend a civil action

in person *or* by attorney," including such an action in Family Court (CPLR 321 [a] [emphasis added]; *see* Family Ct Act § 165 [a]; *Matter of Kwasi S.*, 221 AD2d 1029, 1030 [4th Dept 1995]; Merril Sobie, Prac Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 165). Thus, it is well established that a party's "failure to appear [in person] at the hearing on [a] petition does not automatically constitute a default" (*Matter of David A.A. v Maryann A.*, 41 AD3d 1300, 1300 [4th Dept 2007]; *see Matter of Gabriel VV. [Joni TT.]*, — AD3d —, —, 2025 NY Slip Op 01412, *1 [3d Dept 2025]; *Matter of Yakov T. v Tracy S.*, 227 AD3d 633, 633 [1st Dept 2024]; *Matter of O'Leary v Frangomihalos*, 89 AD3d 948, 949 [2d Dept 2011]). We have held, consistent with that principle, that in the absence of additional circumstances, " '[w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded' " (*Matter of Pollard v Pollard*, 63 AD3d 1628, 1628 [4th Dept 2009], quoting *Kwasi S.*, 221 AD2d at 1030; *see e.g. Matter of Bailey v Bailey*, 213 AD3d 1329, 1329 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Hilton v Hilton*, 173 AD3d 1674, 1674 [4th Dept 2019]; *Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th Dept 2017]). We have nonetheless clarified that "a party's failure to appear may, under certain circumstances, constitute a default, particularly where the party's attorney, although present, declines to participate in the hearing in the party's absence and instead elects to stand mute" (*Matter of Reardon v Krause*, 219 AD3d 1710, 1711 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]; *see Matter of Bianca F. [Terrald F.]*, 191 AD3d 1491, 1491 [4th Dept 2021], *lv denied* 37 NY3d 901 [2021]; *Matter of Lastanzea L. [Lakesha L.]*, 87 AD3d 1356, 1356 [4th Dept 2011], *lv dismissed in part & denied in part* 18 NY3d 854 [2011]; *cf. Matter of Clausell v Salame*, 156 AD3d 1401, 1401 [4th Dept 2017]; *Cameron B.*, 149 AD3d at 1503). As we previously suggested (*see Reardon*, 219 AD3d at 1711), the other Appellate Division departments have applied the same rule (*see e.g. Matter of Anastasia N.A. [Latonia J.]*, 218 AD3d 563, 564 [2d Dept 2023]; *Matter of Jaylen Derrick Jermaine A. [Samuel K.]*, 125 AD3d 535, 536 [1st Dept 2015]; *Matter of Naomi KK. v Natasha LL.*, 80 AD3d 834, 835 [3d Dept 2011], *lv denied* 16 NY3d 711 [2011]).

Here, we conclude that the father's refusal to appear at the fact-finding hearing constituted a default (*see Matter of Larae L. [Heather L.]*, 202 AD3d 1454, 1455 [4th Dept 2022], *lv denied* 38 NY3d 907 [2022]; *Matter of Harold L.S. [Harold S.]*, 89 AD3d 1447, 1447 [4th Dept 2011]). The record establishes that the father, who had a history of intermittent attendance, failed to appear at the fact-finding hearing despite having been made aware of the scheduled court date. The father's attorney initially explained that he had received an email from the father on the morning of the fact-finding hearing in which the father indicated that he lacked transportation. A foster care caseworker further explained, however, that the father had previously expressed his preference to skip the scheduled court date concerning his parental rights to the child rather than reschedule a conflicting appointment regarding a benefits program application. When the caseworker spoke with the father on the morning

of the fact-finding hearing to offer him transportation to court, the father responded with an expletive-filled diatribe expressing his displeasure with petitioner's caseworkers, emphatically refusing to appear in court, and representing that the parental rights termination proceeding could proceed "by default." The father's attorney, having explained that he was not authorized to proceed in the father's absence, declined to participate in the fact-finding hearing and instead elected to stand mute (*see Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403 [4th Dept 2016]; *cf. Matter of Bradley M.M. [Michael M.—Cindy M.]*, 98 AD3d 1257, 1258 [4th Dept 2012]; *see also Larae L.*, 202 AD3d at 1455). Under these circumstances, as the court indicated in the order and contrary to the father's contention, we conclude that the order was entered upon the father's default (*see Larae L.*, 202 AD3d at 1455; *Harold L.S.*, 89 AD3d at 1447; *see also Matter of Corey MM. [Cassandra LL.]*, 177 AD3d 1119, 1120-1121 [3d Dept 2019]; *see generally* CPLR 5511). We also note that the record supports the additional conclusion that the father willfully failed to appear at the fact-finding hearing (*see Matter of Malachi S. [Michael W.]*, 195 AD3d 1445, 1446 [4th Dept 2021], *lv dismissed* 37 NY3d 1081 [2021]; *Matter of Scott KK. v Patricia LL.*, 110 AD3d 1260, 1261 [3d Dept 2013], *lv dismissed in part & denied in part* 22 NY3d 1054 [2014]; *cf. Matter of Kendra M.*, 175 AD2d 657, 657-658 [4th Dept 1991]).

"[N]otwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal from [such an] order [or judgment] brings up for review those 'matters which were the subject of contest' before the [trial court]" (*Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004], quoting *James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]; *see Reardon*, 219 AD3d at 1712; *Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080 [4th Dept 2019]). Thus, the father's contention that the court abused its discretion in denying his attorney's request for an adjournment is reviewable on this appeal (*see Larae L.*, 202 AD3d at 1455; *Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1413 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]; *Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386-1387 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]).

We nonetheless reject that contention. "The grant or denial of a motion for 'an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *see Matter of Aniyah J. [Katara J.]*, 221 AD3d 1472, 1472 [4th Dept 2023]). Here, the father's attorney "failed to demonstrate that the need for the adjournment to [arrange transportation or avoid a scheduling conflict] was not based on a lack of due diligence on the part of the [father] or [his] attorney" (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011]; *see Matter of Grice v Harris*, 114 AD3d 1276, 1276 [4th Dept 2014]; *see generally Steven B.*, 6 NY3d at 889). Consequently, we conclude that the court did not abuse its discretion in denying the request of the father's attorney for an adjournment (*see Matter of Tyrone O. [Lillian G.]*, 199 AD3d 1386, 1387 [4th Dept 2021], *lv denied* 38 NY3d 904 [2022]; *Grice*, 114 AD3d at 1276).

Finally, the remaining issues raised by the father are not reviewable on appeal from the order entered upon his default because neither issue was a subject of contest before the court (*see Reardon*, 219 AD3d at 1713; *Larae L.*, 202 AD3d at 1455; *cf. DiNunzio*, 175 AD3d at 1080-1082).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

283

CAF 23-01677

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

IN THE MATTER OF CHANDLER W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

DEENA MUELLER-FUNKE, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 19, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had abused 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 10, respondent mother appeals in appeal No. 1 from an order of fact-finding and disposition determining that she abused her younger child. In appeal No. 2, the mother appeals from an order of fact-finding and disposition determining that she derivatively abused her older child. We affirm.

Contrary to the mother's contention in appeal No. 1, petitioner established a prima facie case of abuse. In so concluding, we emphasize that it is well settled that "the court's determination regarding credibility of the witnesses is entitled to great weight on appeal" (*Matter of Charity M. [Warren M.]* [appeal No. 2], 145 AD3d 1615, 1616-1617 [4th Dept 2016] [internal quotation marks omitted]; *see Matter of Amire B. [Selika B.]*, 95 AD3d 632, 632 [1st Dept 2012], *lv denied* 20 NY3d 855 [2013]). On this record and affording such deference to Family Court's credibility determinations, there is a sound and substantial basis in the record for the court's finding of abuse (*see Matter of Daniel D. [Tara D.]*, 232 AD3d 1220, 1220 [4th Dept 2024]; *Matter of Dorika S. [Baseme M.]*, 222 AD3d 1445, 1446 [4th Dept 2023]).

It is well settled that a prima facie case of abuse may be

established by adducing evidence "(1) [of] an injury to a child which would ordinarily not occur absent an act or omission of respondent[ ], and (2) that respondent[was] the caretaker[ ] of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *see* Family Ct Act § 1046 [a] [ii]). "Although the petitioner bears the burden of proving child abuse by 'a preponderance of evidence' (§ 1046 [b] [i]), the statute 'authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur' and, therefore, once the petitioner 'has established a prima facie case, the burden of going forward shifts to [the] respondent[ ] to rebut the evidence of parental culpability' " (*Matter of Kevin V. [Sarah L.]*, 229 AD3d 1159, 1160 [4th Dept 2024]).

Here, we conclude that petitioner established that the younger child suffered multiple injuries that "would ordinarily not occur absent an act or omission of [the mother]" (*Philip M.*, 82 NY2d at 243). Petitioner adduced evidence from a physician, certified in child abuse pediatrics, who examined the then-five-month-old younger child and testified that the child had rib fractures, as well as multiple other fractures and injuries, that were highly specific for abuse. The physician explained that the mother provided no history of accidental trauma that could explain the younger child's injuries. Specifically, the physician concluded that it was unlikely that a "non-cruising infant" such as the younger child would be able to generate the amount of force necessary to cause the bruising observed and that being left in a swing at daycare would not cause the type of bruising and fractures that she observed on the child. The physician testified that, based upon her findings, the younger child's case was "diagnostic of abuse to a reasonable degree of medical certainty."

We further conclude that petitioner established that the mother was a "caretaker[ ] of the [younger] child at the time the injur[ies] occurred" (*id.*). It is undisputed that at least one of the younger child's injuries occurred when the child was solely in the mother's care. With respect to the other injuries, section 1046 (a) (ii) of the Family Court Act creates a presumption of culpability for all of the child's caregivers, including the mother in this case, especially where as here the caregivers are few and well defined (*see Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]). Consequently, petitioner's "inability . . . to pinpoint the time and date of each injury and link it to an individual respondent [is not] fatal to the establishment of a prima facie case" of abuse (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 73 [1st Dept 2012]; *see Avianna M.-G.*, 167 AD3d at 1524).

In response to petitioner's demonstration of a prima facie case of abuse, the mother failed to rebut the presumption of parental culpability. Indeed, the mother "fail[ed] to offer any [credible] explanation for the [younger] child's injuries" and simply denied inflicting them (*Philip M.*, 82 NY2d at 246; *see Amire B.*, 95 AD3d at 632; *Matter of William W.*, 125 AD2d 976, 976 [4th Dept 1986]). We conclude that "[t]here is no basis to disturb the court's credibility determinations with respect to the mother's varying accounts of the occurrence, nor the court's decision to credit" the testimony of the

daycare workers and the physician that the injuries were not caused by the daycare (*Amire B.*, 95 AD3d at 632).

With respect to appeal No. 2, we conclude that the court's finding of derivative abuse of the older child is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [a] [i]; [b] [i]; *Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1536 [4th Dept 2018]). The abuse of the younger child "is so closely connected with the care [of his sibling] as to indicate that [his sibling] is equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]). The abuse of the younger child " 'demonstrates such an impaired level of judgment by the [mother] as to create a substantial risk of harm for any child in her care' " (*Matter of Dorian C. [Cyncere G.]* [appeal No. 3], 233 AD3d 1516, 1519 [4th Dept 2023]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

284

CAF 23-01678

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

IN THE MATTER OF KYLER M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

DEENA MUELLER-FUNKE, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 19, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had derivatively abused the subject child.

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

Same memorandum as in *Matter of Chandler W. (Caitlyn M.)* ([appeal No. 1] — AD3d — [Apr. 25, 2025] [4th Dept 2025]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

291

CA 24-00702

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

CHARLENE Y. STRASBURG, AS EXECUTOR OF THE ESTATE OF BRUCE H. STRASBURG, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

MILIND CHAUDHARI, M.D., ET AL., DEFENDANTS-RESPONDENTS, CHIEMEK J. NWOKONKO, M.D., AND KEYSTONE MEDICAL SERVICES OF NIAGARA FALLS, P.C., DEFENDANTS-APPELLANTS.

HUTCHESON, AFFRONTI & DEISINGER, P.C., NIAGARA FALLS (MARK R. AFFRONTI 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, Niagara County (Frank A. Sedita, III, J.), entered April 16, 2024. The order, insofar as appealed from, denied the motion of defendants Chiemek J. Nwokonko, M.D., and Keystone Medical Services of Niagara Falls, P.C., for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 13, 2025,

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

299

KA 20-01479

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VLADIMIR V. VERIN, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered June 18, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal contempt in the first degree (Penal Law § 215.51 [b] [vi]). On appeal, defendant contends that he received ineffective assistance of counsel during the plea process inasmuch as defense counsel allegedly failed to advise him of the deportation consequences of his plea. Although defendant purportedly waived his right to appeal in this matter, that contention survives both defendant's guilty plea and a valid waiver of the right to appeal (*see generally People v Seymore*, 188 AD3d 1767, 1769 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Molski*, 179 AD3d 1540, 1540-1541 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]). Nevertheless, defendant's contention "is predicated on factors such as [defense] counsel's strategy, advice, or preparation that do not appear on the face of the record, [and thus] defendant must raise his [contention] via a CPL 440.10 motion" (*People v Peque*, 22 NY3d 168, 202 [2013]; *see generally People v Goodwin*, 159 AD3d 1433, 1435 [4th Dept 2018]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

301

KA 23-00110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL WENTLING, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered September 7, 2022. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

305

CAF 23-01102

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

IN THE MATTER OF SALVATORE Y.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHANDEL Y., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered June 6, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, revoked a suspended judgment and terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from two orders by which Family Court revoked a suspended judgment entered upon her admission that she had permanently neglected the two subject children and terminated her parental rights with respect to those children. In both appeal No. 1 and appeal No. 2, we affirm. We conclude in each appeal that there is a sound and substantial basis in the record to support the court's determination that the mother failed to comply with the terms of the suspended judgment and that the interests of each child are best served by terminating the mother's parental rights (*see Matter of Carter B. [Heather B.]*, 219 AD3d 1700, 1701 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]; *Matter of Terry L.G.*, 6 AD3d 1144, 1145 [4th Dept 2004]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

306

CAF 23-01108

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

IN THE MATTER OF ANGELINA G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHANDEL Y., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered June 6, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, revoked a suspended judgment and 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 Salvatore Y. (Chandel Y.)* ([appeal No. 1] — AD3d — [Apr. 25, 2025] [4th Dept 2025]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

307

CAF 23-01970

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

IN THE MATTER OF JEMMA M.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND
FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ASHLEY M., AND GREGORY M., RESPONDENTS-APPELLANTS.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR RESPONDENT-APPELLANT ASHLEY M.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT GREGORY M.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL), FOR PETITIONER-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered September 19, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father and respondent mother appeal from an order that, inter alia, terminated their parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption.

With respect to the father's appeal, the father refused to attend the fact-finding and dispositional hearing and his attorney was not present. The father's refusal to appear constituted a default, and "[i]t is well settled that no appeal lies from an order that is entered upon the default of the appealing party" (*Matter of David P.S. [Grace C.L.]*, 222 AD3d 1332, 1332 [4th Dept 2023] [internal quotation marks omitted]). We therefore dismiss the father's appeal (*see id.* at 1332-1333; *Matter of Paul S. [Ingrid D.]*, 191 AD3d 1421, 1422 [4th Dept 2021]; *Matter of Harold L.S. [Harold S.]*, 89 AD3d 1447, 1447 [4th Dept 2011]).

With respect to the mother's appeal, we affirm. Contrary to the

mother's contention, petitioner established that it exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[ ] to overcome problems that prevent the discharge of the child into their care, and informing the parent[ ] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; *see* § 384-b [7] [f]). Petitioner is not required, however, to "guarantee that the parent succeed in overcoming [their] predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]; *see Matter of Jamie M.*, 63 NY2d 388, 393 [1984]). Rather, the parent must "assume a measure of initiative and responsibility" (*Jamie M.*, 63 NY2d at 393). Here, petitioner established by clear and convincing evidence (*see* § 384-b [3] [g] [i]) that it exercised diligent efforts to encourage and strengthen the mother's relationship with the child (*see Matter of Janette G. [Julie G.]*, 181 AD3d 1308, 1308-1309 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]). Petitioner developed a plan for services addressing the mother's needs; reviewed and discussed the service plan with the mother and apprised the mother of her progress on a regular basis; referred her to substance abuse treatment and family therapy; and encouraged the mother to visit the child.

Contrary to the further contention of the mother, we conclude that, despite petitioner's diligent efforts, the mother failed to plan for the child's future. " '[T]o plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (Social Services Law § 384-b [7] [c]). Here, the evidence established that the mother failed to obtain suitable housing and failed to progress to unsupervised visitation with the child. She also failed to complete substance abuse treatment, and thus did not "take steps to correct the conditions that led to the removal of the child from [her] home" (*Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986] [internal quotation marks omitted]; *see Matter of Jacob A. [Robert G.N.]*, 231 AD3d 1485, 1486 [4th Dept 2024]; *Matter of Giohna R. [John R.]*, 179 AD3d 1508, 1509 [4th Dept 2020], *lv dismissed in part & denied in part* 35 NY3d 1003 [2020]).

Contrary to the mother's further contention, we conclude that "the record supports [Family Court's] determination that termination of her parental rights is in the best interests of the child, and that a suspended judgment was not warranted under the circumstances inasmuch as any progress made by the mother prior to the dispositional determination was insufficient to warrant any further prolongation of the child's unsettled familial status" (*Matter of Kendalle K. [Corin K.]*, 144 AD3d 1670, 1672 [4th Dept 2016]).

We reject the mother's contention that she was denied effective assistance of counsel. She raised many of the same alleged failures by counsel in a related proceeding, and we concluded that they were without merit (*Matter of Nedia M. v Ashley M.*, — AD3d —, —, 2025 NY Slip Op 01731, *2 [4th Dept 2025]). We conclude that "the record, viewed in totality, reveals that the [mother] received meaningful

representation" (*Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360 [4th Dept 2021]; *see Matter of Nykira H. [Chellsie B.-M.]*, 181 AD3d 1163, 1165 [4th Dept 2020]).

The mother further contends that the court erred in sua sponte conforming the pleading to the proof by amending the one-year period stated in the petition by six days. We reject that contention. The petition alleged that the mother failed for a period of one year, from October 2, 2019, until October 2, 2020, to plan for the future of the child, but in fact the child was not removed from the mother's home until October 8, 2019. Family Court has the authority to conform the pleadings to the proof, sua sponte (*see Matter of Pandora S.D. [Isabelle D.]*, 231 AD3d 575, 575-576 [1st Dept 2024], *lv denied* 43 NY3d 901 [2025]; *Matter of Jackalyne WW. [Kevin VV.]*, 195 AD3d 1092, 1092-1093 [3d Dept 2021]; *see generally* CPLR 3025 [c]). The court did not abuse its discretion inasmuch as the mother was neither surprised nor prejudiced by the amendment (*see Jackalyne WW.*, 195 AD3d at 1092-1093; *Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1438-1439 [4th Dept 2011]).

The mother's contention that the court erred when it proceeded to a dispositional hearing prior to making the required findings for permanent neglect (*see* Family Ct Act § 625 [a]) is not preserved for our review (*see* CPLR 5501 [a] [3]; Family Ct Act § 1118; *see generally Matter of Kasprowicz v Osgood*, 101 AD3d 1760, 1761 [4th Dept 2012]).

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

314

CA 24-00127

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

DJP DEVELOPMENT, LLC, PLAINTIFF-RESPONDENT,

V ORDER

MACERICH NIAGARA, LLC, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Emilio Colaiacovo, J.), entered December 5, 2023. The order and judgment, inter alia, awarded plaintiff money damages against defendant Macerich Niagara, LLC.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 3, 2025,

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

315

CA 24-01676

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

DJP DEVELOPMENT, LLC, PLAINTIFF-RESPONDENT,

V ORDER

MACERICH NIAGARA, LLC, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Emilio Colaiacovo, J.), entered December 5, 2023. The judgment, inter alia, awarded plaintiff money damages against defendant Macerich Niagara, LLC.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 3, 2025,

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

316

CA 24-00128

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

DJP DEVELOPMENT, LLC, PLAINTIFF-RESPONDENT,

V ORDER

MACERICH NIAGARA, LLC, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Emilio Colaiacovo, J.), entered January 3, 2024. The order denied the posttrial motion of defendant Macerich Niagara, LLC.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 3, 2025,

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

319

KA 22-01830

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAEVON HAYES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered October 24, 2022. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree and sexual abuse in the first degree.

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

363

KA 23-00063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SANTIAGO ALFONSO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered June 13, 2022. The judgment convicted defendant upon his plea of guilty of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Bailey*, 230 AD3d 1543, 1543-1544 [4th Dept 2024], *lv denied* 42 NY3d 1034 [2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Although defendant contends that the language used by Supreme Court in its oral colloquy suggested that waiving the right to appeal was mandatory, in fact the court "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439 [4th Dept 2010], *lv denied* 15 NY3d 920 [2010], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Giles*, 219 AD3d 1706, 1706 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]). Defendant also contends that the waiver of the right to appeal was invalid because the court did not specifically mention that defendant was waiving a constitutional double jeopardy claim. Defendant's contention is without merit inasmuch as no particular litany regarding the claims that survive or do not survive a waiver of the right to appeal is required for the waiver to be valid (*see People v Edmonds*, 229 AD3d 1275, 1277 [4th

Dept 2024], *lv denied* 43 NY3d 930 [2025]; *Giles*, 219 AD3d at 1706-1707; *People v Wood*, 217 AD3d 1407, 1408 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023]). We have examined defendant's remaining contentions regarding the waiver of the right to appeal and conclude that "all the relevant circumstances," including both the oral and the written waiver, "reveal a knowing and voluntary waiver" (*Thomas*, 34 NY3d at 563; *see Edmonds*, 229 AD3d at 1278).

Defendant's valid waiver of the right to appeal encompasses his constitutional double jeopardy claim (*see People v Muniz*, 91 NY2d 570, 574-575 [1998]; *People v Rivera*, 226 AD3d 929, 931 [2d Dept 2024], *lv denied* 42 NY3d 1021 [2024]; *People v Dale*, 142 AD3d 1287, 1290 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

367

CAF 24-00019

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

IN THE MATTER OF NIASIA S. JIGGETTS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RAJEA S. THOMAS, SR., RESPONDENT-RESPONDENT.

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

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-RESPONDENT.

MINDY L. MARRANCA, BUFFALO, ATTORNEY FOR THE CHILD.

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

Appeal from an order of the Family Court, Genesee County (Thomas D. Williams, J.), entered December 13, 2023, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking permission to relocate with two of the parties' children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that dismissed her petition seeking permission to relocate with two of the parties' children (subject children) to North Carolina. We affirm.

Based on our review of the evidence at the fact-finding hearing, we conclude that Family Court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) in determining that the mother failed to meet her burden of establishing by a preponderance of the evidence that the proposed relocation is in the subject children's best interests (*see Matter of Williams v Luczynski*, 134 AD3d 1576, 1576 [4th Dept 2015]). The court properly determined that the mother "failed to establish that the [subject] child[ren]'s li[ves] would 'be enhanced economically, emotionally and educationally' by the proposed relocation" (*Matter of Hill v Flynn*, 125 AD3d 1433, 1434 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]; *see Matter of Shepherd v Stocker*, 159 AD3d 1441, 1442 [4th Dept 2018]). At the hearing, the mother testified that she was attending community college and was receiving public assistance in New York. Her proposed plan was to transfer to a college in North Carolina but she had not

applied to any college in that state nor had she conducted any investigation of financial assistance there. Additionally, while the mother testified that she and the subject children would reside with the maternal grandmother, she submitted no proof of her mother's ability to support her financially and declined to disclose her mother's income or employment information. The mother also failed to establish that the subject children would receive a better education in North Carolina (*see Gasdik v Winiarz*, 188 AD3d 1760, 1761 [4th Dept 2020]). Finally, the court properly concluded that the mother lacked a feasible plan for preserving the relationships between respondent father and the subject children and between the subject children and their brother inasmuch as her proposed visitation arrangement upon relocation required the father, who did not have a motor vehicle, to provide transportation to and from North Carolina (*see Matter of Hirschman v McFadden*, 137 AD3d 1612, 1613 [4th Dept 2016], *lv denied* 27 NY3d 909 [2016]). Inasmuch as the court's determination that the best interests of the subject children will not be served by permitting the mother to relocate with them to North Carolina is supported by a sound and substantial basis in the record, it will not be disturbed (*see Williams*, 134 AD3d at 1576).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

368

CAF 24-01077

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

IN THE MATTER OF CAROLYN J. ARCURI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. RUBIN, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered July 3, 2024, in a proceeding pursuant to Family Court Act article 4. The order, inter alia, confirmed the determination of the Support Magistrate that respondent willfully violated a prior child support order and committed respondent to jail for 20 days.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is denied, and the order of commitment is vacated.

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent father appeals from an order that, inter alia, confirmed the determination of the Support Magistrate that the father willfully violated a prior child support order and committed him to jail for 20 days. It is well settled that parents are presumed to have sufficient means to support their minor children (*see* Family Ct Act § 437; *Matter of Powers v Powers*, 86 NY2d 63, 68-69 [1995]). "Thus, proof that respondent has failed to pay support as ordered alone establishes petitioner's direct case of willful violation, shifting to respondent the burden of going forward" (*Powers*, 86 NY2d at 69; *see Matter of Movsovich v Wood*, 178 AD3d 1441, 1441-1442 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020]). To meet that burden, the respondent must "offer some competent, credible evidence of [their] inability to make the required payments" (*Powers*, 86 NY2d at 69-70). Where, as here, the respondent contends that they were unable to meet the support obligation because a physical disability interfered with their ability to maintain employment, the respondent must "offer competent medical evidence to substantiate that claim and establish that the alleged physical disability affected [their] ability to work" (*Matter of Monroe County Child Support Enforcement Unit v Hemminger*, 186 AD3d 1093, 1093 [4th Dept 2020] [internal quotation marks omitted]; *see Matter of Fogg v Stoll*, 26 AD3d 810, 810-811 [4th Dept 2006]).

We agree with the father that Family Court erred in confirming the Support Magistrate's determination that the father willfully violated the support order. In her October 2023 violation petition, petitioner mother alleged that the father willfully failed to obey an order of support in that the father's last payment on the account was a payment received in late February 2023. The mother set forth a prima facie case by establishing that the father was required to pay biweekly support pursuant to a 2016 order of support and he had not made any payments since February 2023 (*see Movsovich*, 178 AD3d at 1442). The court erred, however, in determining that the father had not met his burden of demonstrating an inability to make the required payments due to a physical disability. The father testified that, since January 2023, he had not been employed because he had been in and out of the hospital for six months for various ailments and had congestive heart failure. The father's testimony was supported by competent medical evidence consisting of hospital records and records from a cardiology practice to support his contention that his medical condition prevented him from maintaining employment (*cf. id.*). In addition, the evidence before the court established that the father was receiving public assistance from the county and was notified by the Social Security Administration that he met the medical requirements for disability payments (*see generally Matter of Mosher v Woodcock*, 160 AD3d 1085, 1086-1087 [3d Dept 2018]). Indeed, during the pendency of the proceeding, the order of support was modified upon the father's petition to $0.

The court further erred in focusing only on the father's failure to pay, particularly in the past, instead of whether he was presently able to work and make the required payments (*see id.* at 1087). In addition, the court's reliance on *Matter of Hwang v Tam* (158 AD3d 1216 [4th Dept 2018]) is misplaced. In that case, we determined that the respondent "failed to offer any medical evidence to substantiate his claim that his disability prevented him from making any of the required payments" and we observed that "[t]he fact that the father was receiving Social Security benefits does not preclude a finding that he was capable of working where, as here, his claimed inability to work was not supported by the requisite medical evidence" (*id.* at 1217-1218). In this case, however, the father *did* submit extensive medical evidence to substantiate his claim.

We therefore reverse the order, deny the petition, and vacate the order of commitment. In light of our determination, we do not address the father's remaining contention.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

369

CAF 23-01838

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

IN THE MATTER OF DENNIMNICOLE H.-C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DIONNA C., RESPONDENT-APPELLANT.

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

LINDSEY PASTUSZYNSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered October 6, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected 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 10, respondent mother appeals from an order of fact-finding and disposition that, inter alia, adjudged that she neglected the subject child. We affirm.

After an acquaintance drove the mother and her then two-year-old child to a grocery store in a car without a car seat, the mother left the child in the car with the acquaintance while she attempted to shoplift approximately $700 worth of groceries. The mother, who had outstanding warrants, was detained by police officers but was released on an appearance ticket as the officers were unable to run a warrant check. The mother did not have any identification, money, or debit or credit cards on her person at the time she was detained by police.

A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof . . ." (Family Ct Act § 1012 [f] [i] [B]). "The statute thus imposes two requirements for a

finding of neglect, which must be established by a preponderance of the evidence" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]; *see* Family Ct Act § 1046 [b] [i]). "First, there must be 'proof of actual (or imminent danger of) physical, emotional or mental impairment to the child' " and "[s]econd, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care" (*Afton C.*, 17 NY3d at 9, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]; *see* Family Ct Act § 1012 [f] [i]).

"In order for danger [of impairment to the child] to be 'imminent,' it must be 'near or impending, not merely possible' . . . Further, there must be a 'causal connection between the basis for the neglect petition and the circumstances that allegedly produce the . . . imminent danger of impairment' . . . This requirement is intended to 'focus [neglect proceedings] on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior' " (*Afton C.*, 17 NY3d at 9, quoting *Nicholson*, 3 NY3d at 369; *see Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1277-1278 [4th Dept 2014]). Further, "[i]n reviewing a determination of neglect, we must accord great weight and deference to the determination of Family Court, including its drawing of inferences and assessment of credibility, and we should not disturb its determination unless clearly unsupported by the record" (*Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]).

Here, contrary to the mother's contention, petitioner established by a preponderance of the evidence that the physical, mental, or emotional condition of the child was in imminent danger of becoming impaired as a result of the mother's failure to exercise a minimum degree of care in providing the child with proper supervision or guardianship (*see* Family Ct Act § 1012 [f] [i] [B]). The mother transported the child to a grocery store, without a car seat, even though she had outstanding warrants for her arrest and, while shoplifting at the store, she left the child in the care of a relative stranger, whose address she did not know. That the mother was not arrested, potentially leaving the child stranded with a relative stranger, was solely the result of the inability of the police officers to run a warrant check.

To the extent that the mother contends that the child was not at imminent risk of harm because the child was not present for the actual act of shoplifting or the mother's detention and was not screaming, crying, or otherwise acting out, we reject that contention. Indeed, "it is well established that the statutory requirement of imminent danger . . . does not require proof of actual injury . . . , and that [a] single incident where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm can sustain a finding of neglect" (*Raven B.*, 115 AD3d at 1278 [internal quotation marks omitted]).

We have reviewed the mother's remaining contentions and conclude

that none warrants modification or reversal of the order.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

371

TP 24-01831

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

IN THE MATTER OF ADAM BROADWELL, PETITIONER,

V MEMORANDUM AND ORDER

ONTARIO COUNTY AND ONTARIO COUNTY SHERIFF
DAVID CIRENCIONE, RESPONDENTS.

TREVETT CRISTO P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR PETITIONER.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (LEA T. NACCA 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, Ontario County [Craig J. Doran, J.], entered September 11, 2024) to review a determination of respondent Ontario County Sheriff David Cirencione. The determination suspended petitioner for 30 days without pay.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination of respondent Ontario County Sheriff David Cirencione, made after a hearing conducted pursuant to Civil Service Law § 75, finding him guilty of four disciplinary charges and imposing as a penalty a 30-day unpaid suspension from his employment as a correction officer in the Sheriff's Office of respondent Ontario County. "It is well established that substantial evidence is generally the applicable evidentiary standard for disciplinary matters involving public employees under Civil Service Law § 75" (*Matter of Marentette v City of Canandaigua*, 159 AD3d 1410, 1411 [4th Dept 2018], *lv denied* 31 NY3d 912 [2018]). Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *see Matter of Lundy v City of Oswego*, 59 AD3d 954, 955 [4th Dept 2009]). "[T]he substantial evidence standard is a minimal standard . . . and demands only that a given inference is reasonable and plausible" (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045-1046 [2018] [internal quotation marks and citations omitted]).

Contrary to petitioner's contention, the determination finding

him guilty of all four disciplinary charges is supported by substantial evidence including, inter alia, the testimony of a fellow officer who observed petitioner use a mechanical device to eavesdrop on the deliberations of a jury that the officers had been assigned to guard. Although petitioner challenges the Sheriff's determination to credit the testimony of the fellow officer and not petitioner, we note that "[i]ssues of witness credibility are . . . for the administrative agency to resolve in the exercise of its exclusive fact-finding authority" (*Matter of Barhite v Village of Medina*, 23 AD3d 1114, 1115 [4th Dept 2005]).

We reject petitioner's further contention that the penalty imposed constituted an abuse of discretion. It is well settled that "a penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001], quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237 [1974]). In light of the " 'higher standard of fitness and character [that] pertains to [law enforcement] officers' " (*Matter of Bassett v Fenton*, 68 AD3d 1385, 1387-1388 [3d Dept 2009]), coupled with the fact that the substantiated misconduct involved petitioner's duties pertaining to jury service (*see generally People v Rivera*, 15 NY3d 207, 212 [2010]), we conclude that the penalty imposed does not shock one's sense of fairness (*see Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO v New York State Unified Ct. Sys.*, 138 AD3d 1444, 1445-1446 [4th Dept 2016]).

We have reviewed petitioner's remaining contentions and conclude that none warrants modification or annulment of the determination.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

372

CA 24-00721

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

IN THE MATTER OF RACHEL BARNHART,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE AND JOHN P. BRINGEWATT,
IN HIS OFFICIAL CAPACITY, RESPONDENTS-APPELLANTS.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (MARIA E. RODI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (James A. Vazzana, J.), entered April 10, 2024, in a proceeding pursuant to CPLR article 78. The judgment granted the petition to the extent of directing respondents to provide petitioner a defense.

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

Memorandum: Petitioner, a county legislator employed by respondent County of Monroe, commenced this proceeding pursuant to CPLR article 78 to challenge the determination of respondent John P. Bringewatt, the county attorney, denying her request that the County defend and indemnify her in a defamation action. The defamation action related to statements made by petitioner at a press conference and in a post on social media, calling for an official investigation of allegations made by a firefighter who attended a party at a house in her legislative district. Respondents appeal from a judgment that, inter alia, granted the petition to the extent of directing respondents to provide petitioner a defense in the defamation action. We affirm.

The County has a duty to provide a defense and indemnification to petitioner if her conduct occurred or allegedly occurred "while [she] was acting within the scope of [her] public employment or duties" (*Matter of Riehle v County of Cattaraugus*, 17 AD3d 1029, 1029 [4th Dept 2005]; *see* Monroe County Code §§ 39-3 [A], 39-4 [A]), and the determination that petitioner was not acting within the scope of her public employment or duties "may be set aside only if it lacks a factual basis, and in that sense, is arbitrary and capricious" (*Matter*

of Williams v City of New York, 64 NY2d 800, 802 [1985]).

Here, Bringewatt determined that petitioner was not acting within the scope of her employment or duties because the complaint in the defamation action does not sue petitioner in her official capacity and does not make specific reference to County business. We conclude that the determination was arbitrary and capricious because it relied on aspects of the defamation complaint that are not determinative of the issue and failed to consider whether the alleged conduct actually occurred while petitioner was acting within the scope of her public employment or duties (*see Beare v Byrne*, 103 AD2d 814, 815 [2d Dept 1984], *affd for reasons stated* 67 NY2d 922 [1986]; *Merrill v County of Broome*, 244 AD2d 590, 592 [3d Dept 1997]; *Matter of Polak v City of Schenectady*, 181 AD2d 233, 236 [3d Dept 1992]). Here, the record reveals that the alleged conduct occurred while petitioner was acting within the scope of her public employment inasmuch as petitioner addressed the public in her capacity as a Monroe County legislator at the time she made the statements at the press conference and when she posted on social media. Bringewatt's further rationale that petitioner addressed City employees and the misuse of City, and not County, resources fails to recognize that petitioner's legislative district falls within the City. Addressing public concerns, supporting constituents, and calling for official investigations, regardless of the specific municipality performing the investigation, are functions of a legislator (*see generally People v Ohrenstein*, 77 NY2d 38, 47 [1990]). Moreover, it cannot be said that petitioner's statements were made for wholly personal reasons unrelated to her job (*cf. Matter of Krug v City of Buffalo*, 34 NY3d 1094, 1096 [2019]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

382

KA 23-01254

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE I. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 22, 2021. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We affirm.

Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Kelly*, 231 AD3d 1515, 1516 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]). Further, we reject defendant's related contention that his "waiver [of the right to appeal] is . . . invalid on the ground that [Supreme Court] did not specifically inform [him during the oral colloquy] that his general waiver of the right to appeal encompassed the court's suppression ruling[ ]" (*People v Edmonds*, 229 AD3d 1275, 1277 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025] [internal quotation marks omitted]; *see People v Babagana*, 176 AD3d 1627, 1627 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019]). Defendant's valid waiver of the right to appeal encompasses his challenge to the court's suppression ruling (*see*

Edmonds, 229 AD3d at 1278; *People v Giles*, 219 AD3d 1706, 1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]).

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

387

CA 23-01627

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

MONIQUE H., PLAINTIFF-APPELLANT,

V ORDER

ERIE COUNTY, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

HERMAN LAW, NEW YORK CITY (STUART S. MERMELSTEIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JEREMY C. TOTH, COUNTY ATTORNEY, BUFFALO (ERIC W. MARRIOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered August 8, 2023. The order, among other things, granted the motion of defendant Erie County for summary judgment dismissing plaintiff's complaint.

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

390

CA 24-00758

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

IN THE MATTER OF TOBIAS SHELLEY, AS SHERIFF
OF ONONDAGA COUNTY, PETITIONER-APPELLANT,

V ORDER

ONONDAGA COUNTY LEGISLATURE AND COUNTY OF ONONDAGA,
RESPONDENTS-RESPONDENTS.

ADAMS LECLAIR LLP, ROCHESTER (RYAN LEFKOWITZ OF COUNSEL), FOR PETITIONER-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN W. WILLIAMS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered April 9, 2024, in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

392

CA 23-01628

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

I.H., PLAINTIFF-APPELLANT,

V ORDER

ERIE COUNTY, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

HERMAN LAW, NEW YORK CITY (STUART S. MERMELSTEIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JEREMY C. TOTH, COUNTY ATTORNEY, BUFFALO (ERIC W. MARRIOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered August 8, 2023. The order, among other things, granted the motion of defendant Erie County for summary judgment dismissing plaintiff's complaint.

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

402

KA 24-01386

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KIRK COTTOM, DEFENDANT-APPELLANT.

KIRK COTTOM, DEFENDANT-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), dated January 5, 2024. The order denied the petition of defendant to reduce his risk level pursuant to the Sex Offender Registration Act.

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

405

KA 23-01851

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BREANNA L. REED, 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 (Frederick G. Reed, A.J.), rendered June 8, 2023. The judgment convicted defendant upon a jury verdict of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of grand larceny in the fourth degree (Penal Law § 155.30 [1]). We reject defendant's contention that her right to present a defense was violated when County Court precluded defendant from testifying about an incident of domestic violence committed against her several years previously by her then boyfriend as a result of which he was prosecuted and convicted. A defendant's right to present a defense is not absolute (*see People v Williams*, 94 AD3d 1555, 1556-1557 [4th Dept 2012]). "[C]ourts . . . have the discretion to exclude evidence sought to be introduced by a defendant where such evidence is irrelevant or constitutes hearsay, and its probative value is 'outweighed by the dangers of speculation, confusion, and prejudice' . . . , or where such evidence is 'too slight, remote or conjectural to have any legitimate influence in determining the fact in issue' " (*id.* at 1556; *see People v Roach*, 147 AD3d 1423, 1425 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *People v Martinez*, 177 AD2d 600, 601 [2d Dept 1991], *lv denied* 79 NY2d 829 [1991]). Here, the court providently exercised its discretion in precluding the proffered testimony, as it was "too remote or speculative" to suggest that defendant did not act with the requisite intent (*People v Johnson*, 109 AD3d 1187, 1188 [4th Dept 2013], *lv denied* 22 NY3d 1041 [2013]; *see People v Ragland*, 240 AD2d 598, 598 [2d Dept 1997], *lv denied* 91 NY2d 929 [1998]).

Contrary to defendant's further contention, 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 (*see People v Robinson*, 193 AD3d 1393, 1394 [4th Dept 2021], *lv denied* 37 NY3d 968 [2021]). Furthermore, 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]).

We reject defendant's contention that defendant's sentence is unduly harsh and severe and should be reduced to time served. Finally, we have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court

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

407

CAF 23-00456

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

IN THE MATTER OF DOMINICK B., MICHAEL B., AND MATTHEW B.

---------- ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

DONALD M., RESPONDENT-APPELLANT.

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered January 30, 2023, in a proceeding pursuant to Family Court Act article 10. The order determined that respondent neglected the subject children.

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

Entered: April 25, 2025

Ann Dillon Flynn
Clerk of the Court