SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 15, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MARCH 15, 2024

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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

804

CA 23-00285

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

IN THE MATTER OF THE ESTATE OF KATHRYN W. BUCK,
DECEASED.

RICHARD M. BUCK, III, PETITIONER-APPELLANT. MEMORANDUM AND ORDER
(PROCEEDING NO. 1.)

JOSEPH J. TIMPANO, TEMPORARY ADMINISTRATOR OF
THE ESTATE OF KATHRYN W. BUCK, DECEASED,
PETITIONER-RESPONDENT.
(PROCEEDING NO. 2.)

RICHARD M. BUCK CONSTRUCTION CORPORATION,
PETITIONER-RESPONDENT,
STEVEN G. BUCK AND BUCK CONSTRUCTION LLC,
INTERESTED PARTIES-APPELLANTS.
(PROCEEDING NO. 3.)

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), AND LAW OFFICES OF DONALD R. GERACE, UTICA, FOR INTERESTED PARTIES-APPELLANTS AND PETITIONER-APPELLANT.

STEATES REMMELL STEATES & DZIEKAN, UTICA (F. PAUL STEATES OF COUNSEL), FOR PETITIONER-RESPONDENT JOSEPH J. TIMPANO, TEMPORARY ADMINISTRATOR OF THE ESTATE OF KATHRYN W. BUCK, DECEASED.

THE LAW OFFICE OF KEVIN G. MARTIN, P.C., UTICA (KEVIN G. MARTIN OF COUNSEL), GOLDBAS & LAREAUX, AND GETNICK LIVINGSTON ATKINSON & PRIORE, LLC, FOR INTERESTED PARTIES-RESPONDENTS MICHAEL G. BUCK, LISA BUCK POTTER AND KIMBERLY BUCK DIMICK.

Appeals from an order and decree of the Surrogate’s Court, Oneida County (Louis P. Gigliotti, S.), entered December 30, 2022. The order and decree, inter alia, denied the petition for probate and granted the discovery petition.

It is hereby ORDERED that said appeal insofar as taken by interested party Buck Construction LLC is unanimously dismissed and the order and decree is modified on the law and facts by vacating the first decretal paragraph, granting in part the petition of Richard M. Buck, III, and admitting to probate the Last Will and Testament of Kathryn W. Buck and by denying in part the petition of Joseph J. Timpano, temporary administrator of the estate of Kathryn W. Buck, deceased, and striking from the second decretal paragraph the language “GRANTED in all respects” and substituting therefor the language

"denied insofar as it seeks rescission of Stock Transfer Acknowledgments dated January 17, 2011 and May 2011 and is otherwise granted" and, as modified, the order and decree is affirmed without costs.

Memorandum: Petitioner in proceeding No. 1, Richard M. Buck, III (Buck), commenced proceeding No. 1 seeking, inter alia, admission to probate of the will of Kathryn W. Buck (decedent). Petitioner in proceeding No. 2, the temporary administrator of decedent's estate, commenced proceeding No. 2 pursuant to SCPA 2103, seeking discovery and return of assets allegedly belonging to decedent's estate from, among others, Buck and interested party Steven G. Buck (collectively, Buck Brothers). The Buck Brothers and interested party Buck Construction LLC appeal from an order and decree (decree) that, inter alia, denied the petition in proceeding No. 1 based on the determination of Surrogate's Court that decedent's will was duly executed but that decedent lacked testamentary capacity and granted the petition in proceeding No. 2.

Preliminarily, we note that Buck Construction LLC is not aggrieved by the decree, and we thus dismiss the appeal insofar as taken by that party (*see* CPLR 5511; *Walker v Erie Ins. Co.*, 210 AD3d 1375, 1376 [4th Dept 2022]).

We agree with appellants that the Surrogate erred in denying the petition in proceeding No. 1 insofar as it sought to admit decedent's will to probate, and we therefore modify the decree accordingly. In a will contest, the proponent of the will must establish that the testator possessed testamentary capacity, and the Surrogate must consider whether the testator "understood the nature and consequences of executing a will; . . . whether [the testator] knew the nature and extent of the property [he or] she was disposing of; and . . . whether [the testator] knew those who would be considered the natural objects of [his or] her bounty and [his or] her relations with them" (*Matter of Kumstar*, 66 NY2d 691, 692 [1985], *rearg denied* 67 NY2d 647 [1986] [internal quotation marks omitted]; *see Matter of Burrows*, 203 AD3d 1699, 1700 [4th Dept 2022], *lv denied* 39 NY3d 903 [2022]; *Matter of Alibrandi*, 104 AD3d 1175, 1175 [4th Dept 2013]). "Old age and bad health, including dementia, when a will is executed are not necessarily inconsistent with testamentary capacity . . . as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made" (*Matter of Makitra*, 101 AD3d 1579, 1580 [4th Dept 2012] [internal quotation marks omitted]; *see Alibrandi*, 104 AD3d at 1175-1176). "The determination of the Surrogate, who presided at the trial and heard all of the testimony, is entitled to great weight," particularly where the case "hinge[s] on the credibility of the witnesses" (*Matter of Chiurazzi*, 296 AD2d 406, 406 [2d Dept 2002]), but will be reversed where it is against the weight of the evidence (*see Matter of McCloskey*, 307 AD2d 737, 738 [4th Dept 2003], *lv denied* 100 NY2d [2003]; *Matter of Buckten*, 178 AD2d 981, 982 [4th Dept 1991], *lv denied* 80 NY2d 752 [1992]).

Here, we conclude that the Surrogate's determination with respect

to decedent's testamentary capacity is against the weight of the evidence inasmuch as Buck established, through the testimony of decedent's attorney, the paralegal who prepared the will and witnessed its execution, and decedent's caretaker, that decedent possessed testamentary capacity at the time she executed her will (*see Burrows*, 203 AD3d at 1700). Decedent's attorney testified that, at the time decedent executed the will, she was of "[n]ormal demeanor," was "good with questions," and was able to "confirm . . . what her intentions were." He further testified that he reviewed the will with decedent "paragraph by paragraph." The paralegal similarly testified that decedent was "alert," "seemed okay," and did not appear to be confused at the time she executed her will and that she responded appropriately to questions and indicated that she understood what was in the will. Decedent's caretaker gave similar testimony. Moreover, it is clear that the Surrogate credited the testimony of those disinterested witnesses inasmuch as it concluded, based on their testimony, that the will was properly executed.

We further agree with the Buck Brothers that the Surrogate erred in granting the petition in proceeding No. 2 insofar as it sought rescission of the stock transfer acknowledgments dated January 17, 2011 and May 2011, and we further modify the decree accordingly. We conclude that the Surrogate's determination that those stock transfer acknowledgments should be rescinded for lack of consideration is against the weight of the evidence. Pursuant to the stock transfer acknowledgments, decedent transferred her shares in the Richard M. Buck Construction Corporation to the Buck Brothers "in return for their assumption of the *outstanding balance* of" a particular bank loan (emphasis added). The documents, on their face, called for the assumption of the balance of the bank loan, not, as determined by the Surrogate, the assumption of a separate personal guaranty executed by decedent. Inasmuch as the language of the stock transfer acknowledgments is subject to only one interpretation, it is unambiguous, and the Surrogate thus erred in relying on outside documentation to conclude that the actual bargained-for benefit was the Buck Brothers' assumption of decedent's personal guaranty (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]). Further, the record is clear that the outstanding balance of the loan was paid off.

We have considered the parties' remaining contentions and have found them to be without merit.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

804.1

CA 23-01365

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

IN THE MATTER OF THE ESTATE OF KATHRYN W. BUCK, DECEASED.

RICHARD M. BUCK, III, PETITIONER-APPELLANT. MEMORANDUM AND ORDER
(PROCEEDING NO. 1.)

JOSEPH J. TIMPANO, TEMPORARY ADMINISTRATOR OF THE ESTATE OF KATHRYN W. BUCK, DECEASED, PETITIONER-RESPONDENT.
(PROCEEDING NO. 2.)

RICHARD M. BUCK CONSTRUCTION CORPORATION, PETITIONER,
STEVEN G. BUCK AND BUCK CONSTRUCTION LLC, INTERESTED PARTIES-APPELLANTS.
(PROCEEDING NO. 3.)

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), AND LAW OFFICES OF DONALD R. GERACE, UTICA, FOR INTERESTED PARTIES-APPELLANTS AND PETITIONER-APPELLANT.

STEATES REMMELL STEATES & DZIEKAN, UTICA (F. PAUL STEATES OF COUNSEL), FOR PETITIONER-RESPONDENT JOSEPH J. TIMPANO, TEMPORARY ADMINISTRATOR OF THE ESTATE OF KATHRYN W. BUCK, DECEASED.

THE LAW OFFICE OF KEVIN G. MARTIN, P.C., UTICA (KEVIN G. MARTIN OF COUNSEL), GOLDBAS & LAREAUX, AND GETNICK LIVINGSTON ATKINSON & PRIORE, LLC, FOR INTERESTED PARTIES-RESPONDENTS MICHAEL G. BUCK, LISA BUCK POTTER AND KIMBERLY BUCK DIMICK.

Appeals from an order of the Surrogate's Court, Oneida County (Louis P. Gigliotti, S.), entered August 10, 2023. The order denied the cross-motion of Richard M. Buck, III, Steven G. Buck and Buck Construction LLC for recusal.

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

Memorandum: In this contested probate proceeding, appellants appeal from an order of Surrogate's Court denying their posttrial cross-motion seeking recusal of the Surrogate. We affirm.

Appellants contend that recusal was required pursuant to Judiciary Law § 14. We reject that contention. Section 14 provides,

in relevant part, that "[a] judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree." That provision is jurisdictional and therefore parties may not consent to allow a judge to sit on a case where disqualification is required under the statute (*see Matter of Beer Garden v New York State Liq. Auth.*, 79 NY2d 266, 278-279 [1992]; *Matter of Harkness Apt. Owners Corp. v Abdus-Salaam*, 232 AD2d 309, 309-310 [1st Dept 1996]; *Casterella v Casterella*, 65 AD2d 614, 615 [2d Dept 1978], *appeal dismissed* 46 NY2d 939 [1979]). Based on its plain language, section 14 is inapplicable here inasmuch as the Surrogate was not a party or an attorney with respect to the probate proceeding, nor did he have any relation to a party or an interest in the outcome (*see Schreiber-Cross v State of New York*, 31 AD3d 425, 425 [2d Dept 2006]).

We also reject appellants' contention that recusal was required pursuant to 22 NYCRR 100.3 (E) (1) (a) (ii), which provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has personal knowledge of disputed evidentiary facts concerning the proceeding." However, "a party's unsubstantiated allegations of bias are insufficient to require recusal" (*Tripi v Alabiso*, 189 AD3d 2060, 2061 [4th Dept 2020] [internal quotation marks omitted]). Here, the issue before the Surrogate was the testamentary capacity of the decedent at the time she executed her will, not her mental status at the time the Surrogate represented her in unrelated litigation, which occurred years earlier and was not the subject of dispute during the probate proceeding (*see id.*).

Appellants further contend that the Surrogate should have recused himself to avoid the appearance of impropriety generally. We reject that contention. "Absent a legal disqualification, . . . a Judge is generally the sole arbiter of recusal" (*Matter of Murphy*, 82 NY2d 491, 495 [1993]), and "a court's recusal decision will not be overturned absent an abuse of discretion" (*Matter of Indigo S. [Rajea S.T.]*, 213 AD3d 1205, 1205 [4th Dept 2023], citing, inter alia, *People v Moreno*, 70 NY2d 403, 405-406 [1987]). Based on our review of the record, we conclude that none of the reasons proffered by appellants concerning the alleged appearance of impropriety, "either alone or in combination, suggested any judicial bias that would warrant recusal" (*Schwartzberg v Kingsbridge Hgts. Care Ctr., Inc.*, 28 AD3d 465, 466 [2d Dept 2006]; *see Tripi*, 189 AD3d at 2062).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

811

CA 22-01231

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

CONNOR B. JESMAIN,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

TIME CAP DEVELOPMENT CORP., 980 JAMES STREET, LLC, AND INTERIOR BUILDERS FRAMING AND DRYWALL LLC,
DEFENDANTS-RESPONDENTS-APPELLANTS.

TIME CAP DEVELOPMENT CORP., AND 980 JAMES STREET, LLC, THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

SYRACUSE ENERGY SYSTEMS, INC., THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

LYNN LAW FIRM, LLP, SYRACUSE (KELSEY W. SHANNON OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

TREVETT CRISTO, ROCHESTER (ALAN J. DEPETERS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS TIME CAP DEVELOPMENT CORP., AND 980 JAMES STREET, LLC.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MATTHEW P. GERMAIN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT INTERIOR BUILDERS FRAMING AND DRYWALL LLC.

Appeals from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered July 12, 2022. The order, among other things, granted in part and denied in part the motion of defendants-third-party plaintiffs Time Cap Development Corp. and 980 James Street, LLC for summary judgment dismissing the amended complaint as against them and for contractual indemnification against third-party defendant, denied plaintiff's motion for partial summary judgment on the first and second causes of action as against defendants Time Cap Development Corp. and 980 James Street, LLC, and denied the motion of defendant Interior Builders Framing and Drywall,

LLC for summary judgment seeking dismissal of plaintiff's amended complaint and all cross-claims against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendants-third-party plaintiffs Time Cap Development Corp. and 980 James Street, LLC, seeking summary judgment dismissing the Labor Law § 240 (1) cause of action and the Labor Law § 241 (6) cause of action insofar as it is based on the alleged violation of 12 NYCRR 23-2.1 (a) (1) and reinstating those causes of action, granting that part of the motion of Time Cap Development Corp. and 980 James Street, LLC, seeking summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against 980 James Street, LLC, denying that part of the motion of Time Cap Development Corp. and 980 James Street, LLC, seeking summary judgment on their claim for contractual indemnification against third-party defendant Syracuse Energy Systems, Inc., and granting that part of the motion of defendant Interior Builders Framing and Drywall LLC seeking summary judgment dismissing the cross-claim of Time Cap Development Corp. and 980 James Street, LLC, for contractual indemnification against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking to recover damages for injuries that he sustained at a construction site on property owned by defendant-third-party plaintiff 980 James Street, LLC (980 James). At the time of the injury, plaintiff and a supervisor for the general contractor, defendant-third-party plaintiff Time Cap Development Corp. (Time Cap), were moving a stack of drywall panels that was leaning against a wall and partially obstructing the doorway of a room that plaintiff needed to access in order to perform certain HVAC work. As plaintiff and the Time Cap supervisor moved several of the drywall panels from their position against the wall, the panels tilted too far and fell, striking plaintiff's ankle.

Plaintiff moved for partial summary judgment on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) causes of action, which were asserted against Time Cap and 980 James (collectively, 980 James defendants) only. The 980 James defendants moved for summary judgment dismissing the amended complaint against them and also sought summary judgment on their third-party claim for contractual indemnification against plaintiff's employer, third-party defendant Syracuse Energy Systems, Inc. (Syracuse Energy). Defendant Interior Builders Framing and Drywall LLC (Interior Builders) moved for summary judgment dismissing the amended complaint and all cross-claims against it.

Supreme Court, inter alia, denied plaintiff's motion; denied the 980 James defendants' motion insofar as it sought summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action against them; granted those parts of the 980 James defendants' motion with respect to the Labor Law §§ 240 (1) and 241 (6) causes of action and the third-party claim for contractual indemnification; and, in effect, denied Interior Builders' motion.

Plaintiff, the 980 James defendants, Interior Builders, and Syracuse Energy each appeal.

Plaintiff contends on his appeal that the court erred in granting that part of the motion of the 980 James defendants with respect to plaintiff's Labor Law § 240 (1) cause of action. We agree, and we therefore modify the order accordingly. Although the drywall that fell on plaintiff was located on the floor and was not being hoisted or secured, issues of fact exist whether section 240 (1) applies to this case (*see Padilla v Touro Coll. Univ. Sys.*, 204 AD3d 415, 416 [1st Dept 2022]).

We also agree with plaintiff that the court erred in granting that part of the 980 James defendants' motion with respect to plaintiff's Labor Law § 241 (6) cause of action insofar as it is premised on an alleged violation of 12 NYCRR 23-2.1 (a) (1), and we further modify the order accordingly. Issues of fact exist whether the drywall was stored safely at the construction site and whether the drywall was a material pile that blocked a passageway (*see Padilla*, 204 AD3d at 416). We further conclude that a question of fact exists whether plaintiff was a recalcitrant worker.

The 980 James defendants contend on their appeal that the court erred in denying those parts of their motion seeking summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence causes of action against Time Cap. We reject that contention. Initially, we note that those causes of action assert that the placement of the drywall panels constituted a dangerous condition and that plaintiff's injuries resulted from the manner in which the drywall panels were moved. "Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Collver v Fornino Realty, LLC*, 213 AD3d 1229, 1230 [4th Dept 2023] [internal quotation marks omitted]). With respect to both common-law negligence and section 200 claims based on an allegedly dangerous premises condition, a defendant seeking summary judgment has the initial burden of establishing "that it did not create or have actual or constructive notice of the dangerous condition" (*Carpentieri v 1438 S. Park Ave. Co., LLC*, 215 AD3d 1236, 1238 [4th Dept 2023]; *see Burns v Lecesse Constr. Servs. LLC*, 130 AD3d 1429, 1434 [4th Dept 2015]). Here, even assuming, arguendo, that the 980 James defendants met their initial burden on the motion with respect to plaintiff's claim that the placement of the drywall panels constituted a dangerous condition, we conclude that plaintiff raised a triable issue of fact through his expert, who opined that the placement of the drywall was dangerous. Plaintiff also raised an issue of fact as to who created the alleged dangerous condition. Where a claim arises from the manner in which the work was performed, liability will attach only where the defendant exercised supervisory control over the work performed (*see Gomez v 670 Merrick Rd. Realty Corp.*, 189 AD3d 1187, 1191 [2d Dept 2020]; *Selak v Clover Mgt., Inc.*, 83 AD3d 1585, 1587 [4th Dept 2011]). Here, we conclude that the 980 James defendants failed to meet their initial burden on the motion with respect to plaintiff's theory that the drywall was

moved in an unsafe manner inasmuch as their own submissions raise a question of fact whether plaintiff was injured while following the instructions of a supervisor employed by Time Cap.

As the 980 James defendants contend on their appeal and as plaintiff correctly concedes, even if Time Cap may be held liable under Labor Law § 200 or on a theory of common-law negligence, 980 James cannot. We therefore further modify the order by granting the 980 James defendants' motion insofar as it sought summary judgment dismissing those causes of action against 980 James.

Syracuse Energy contends on its appeal that the court erred in granting the motion of the 980 James defendants insofar as it sought summary judgment on their claim in the third-party action for contractual indemnity. We agree, and we further modify the order accordingly. The broad language in the indemnity clause encompasses plaintiff's actions in moving items so that he could engage in the specific work Syracuse Energy contracted to perform (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]), but the indemnity clause specifically excludes coverage for claims due to the sole negligence of indemnified parties. In light of our determination that questions of fact exist as to which entity placed the drywall and whether that alleged conduct caused plaintiff's injury, we conclude that the motion of the 980 James defendants with respect to the issue of contractual indemnity should have been denied (*see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2d Dept 2009]; *see generally Tanksley v LCO Bldg. LLC*, 201 AD3d 1323, 1325-1326 [4th Dept 2022]).

We reject the contention of Interior Builders on its appeal that the court erred in denying that part of its motion seeking summary judgment dismissing the amended complaint against it. Only the common-law negligence cause of action is asserted against Interior Builders, and questions of fact exist with respect to whether the placement of the drywall panels constituted a dangerous condition and who was responsible for creating that condition (*see Carpentieri*, 215 AD3d at 1238; *Burns*, 130 AD3d at 1434). We agree with Interior Builders that, inasmuch as the 980 James defendants did not oppose its motion insofar as it sought summary judgment dismissing the 980 James defendants' cross-claim for contractual indemnification, the court erred in denying that part of the motion (*see generally Narvaez v City of New York*, 190 AD3d 649, 650 [1st Dept 2021]). We therefore further modify the order accordingly.

Finally, we reject the contentions of Interior Builders that the court erred in denying those parts of its motion with respect to the 980 James defendants' cross-claims for common-law indemnification (*see Lagares v Carrier Term. Servs., Inc.* [appeal No. 2], 204 AD3d 1456, 1459 [4th Dept 2022]; *McKay v Weeden*, 148 AD3d 1718, 1721 [4th Dept 2017]; *see also McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]) and contribution (*see Held v Pike Co.*, 140 AD3d 1664, 1665

[4th Dept 2016]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

869

CA 22-01590

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

JILL G. MEISSNER, AS THE EXECUTOR OF THE ESTATE OF WAYNE W. MEISSNER, DECEASED, AND INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RIDGE CONSTRUCTION CORPORATION, ET AL., DEFENDANTS, AND CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), AND MENDES & MOUNT LLP, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

LIPSITZ, PONTERIO & COMERFORD, LLC, BUFFALO (JOHN N. LIPSITZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), entered September 2, 2022. The judgment awarded plaintiff money damages against defendant Certain Underwriters at Lloyd's, London.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated without costs, the order entered July 18, 2022 is modified on the law by denying plaintiff's motion and renewed motion, and as modified the order is affirmed.

Memorandum: Wayne W. Meissner (decedent) and his wife, plaintiff Jill G. Meissner (collectively, Meissners), commenced this Insurance Law § 3420 and declaratory judgment action seeking coverage from defendant Certain Underwriters at Lloyd's, London (defendant), the excess carrier for defendant Ridge Construction Corporation (Ridge Construction), for damages awarded following a toxic tort action against Ridge Construction relating to decedent's exposure to asbestos and subsequent development of mesothelioma (underlying action). Defendant now appeals, in appeal No. 1, from a judgment awarding the Meissners $3,913,172.57, plus interest. Defendant also appeals, in appeal No. 2, from an intermediate order addressing various motions of the Meissners and cross-motions and motions of defendant.

In the underlying action, the Meissners sued, among others, Ridge Construction, a dissolved subsidiary of decedent's employer, Eastman Kodak Company, that installed asbestos-containing fireproofing

insulation in decedent's workplace in 1970-1971. The Meissners alleged that decedent was exposed to the asbestos during the installation and then through the late 1970s. During discovery, the Meissners' counsel demanded information concerning Ridge Construction's insurance coverage for the relevant period, and was initially advised that the only coverage available with respect to each of the pertinent years was a $1 million policy issued by Lumbermens Mutual Casualty Company (Lumbermens) that had been cancelled pursuant to an order of liquidation with a finding of insolvency. Subsequently, counsel for Ridge Construction disclosed three excess policies issued by defendant that were in place during the relevant period: a $1 million policy, a $4 million policy above that, and a $25 million policy above that. Sixty-three days after disclosure of the existence of the excess policies, the Meissners' counsel was further advised by Ridge Construction's counsel that defendant may not have been given notice of the claim. Five days later, the Meissners' counsel sent a letter to defendant's counsel providing notice of the claim. In response, defendant's counsel and third-party administrator each wrote to the Meissners' counsel disclaiming coverage on the grounds of, inter alia, late notice. The underlying action proceeded to trial without defendant's involvement and the Meissners were awarded a judgment, upon a jury verdict, of $6,440,007.98, plus interest, against Ridge Construction. The Meissners served the judgment on defendant and demanded payment pursuant to Insurance Law § 3420, which defendant refused.

The Meissners then commenced the instant action, seeking, inter alia, an award of damages against defendant in the full amount of the judgment in the underlying action and a declaration that defendant was liable to pay the same. Subsequently, the Meissners moved, in effect, for summary judgment on the complaint, by seeking a declaration that defendant "must cover Ridge Construction[ ]'s liability for asbestos exposure during the[excess] policy periods, and [is] subject to all sums/vertical exhaustion allocation with respect to insurance coverage for the underlying judgment at issue." Defendant cross-moved for summary judgment dismissing the complaint based on late notice. The motions were held while the parties engaged in discovery, and were subsequently renewed, at which time defendant filed a new motion for summary judgment dismissing the complaint on additional grounds, including that the Meissners had failed to establish a covered "occurrence" with respect to their claims and had failed to establish exhaustion of the underlying policies. Supreme Court then directed a limited hearing with expert witness testimony on certain issues that had been raised in the motion papers. Following the hearing, defendant moved for a directed verdict. The court, in effect, granted the Meissners' motion and renewed motion for summary judgment on the complaint, awarded the Meissners damages against defendant in the amount of $3,913,172.57, plus interest, declared that defendant was liable to pay that amount, plus interest, and denied defendant's motions and cross-motion to the extent inconsistent with its order. The court subsequently issued a judgment.

As a preliminary matter, we conclude that the appeal from the order in appeal No. 2 must be dismissed inasmuch as that intermediate

order is subsumed in the final judgment in appeal No. 1. The appeal from the judgment brings up for review the propriety of the order in appeal No. 2 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *see also* CPLR 5501 [a] [1]).

With respect to appeal No. 1, we note that the role of the court was limited to determining the motions for summary judgment pending before it, and thus there was no basis to schedule a hearing because "it is not the function of the court to determine what could have or should have been provided to raise a triable issue of fact," but, rather, merely "to determine whether what has been provided is sufficient to raise a triable issue of fact" (*Stache Invs. Corp. v Ciolek*, 174 AD3d 1393, 1395-1396 [4th Dept 2019]). Moreover, to the extent that the court considered defendant's motion for a directed verdict, there was no basis to do so, inasmuch as a trial was not held in this action (*see* CPLR 4401). In short, "[i]ssue finding rather than issue determination is the function of the court on a motion for summary judgment" (*Stache Invs. Corp.*, 174 AD3d at 1395), and we conclude that the applicable standard of review here is that of a summary judgment motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

Regarding the merits, contrary to defendant's contention, the court did not err in determining as a matter of law that the primary policy issued by Lumbermens had been exhausted. We agree with the court that the proper method of allocation for the primary policy was the "joint and several" or "all sums" approach, inasmuch as defendant's excess policies contained non-cumulation clauses, which are consistent with utilizing that approach, as opposed to the "pro rata" method of allocation for underlying policies (*see Matter of Viking Pump, Inc.*, 27 NY3d 244, 260-264 [2016]; *Carrier Corp. v Allstate Ins. Co.*, 187 AD3d 1616, 1621 [4th Dept 2020]). An all sums allocation permits an insured "to collect its total liability . . . under any policy in effect during the periods that the damage occurred" (*Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 NY3d 139, 154 [2013] [internal quotation marks omitted]; *see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 222 [2002]). Utilizing the all sums approach, the $1 million primary policy issued by Lumbermens was exhausted by means of the $1 million credit against the underlying judgment extended by the Meissners (*see Carrier Corp.*, 187 AD3d at 1621-1622).

Contrary to defendant's further contention, the court also did not err in determining as a matter of law that the damages awarded in the underlying judgment arise out of a covered occurrence. Recovery is not barred by the language in the excess policies limiting a covered "occurrence" to that "which unexpectedly and unintentionally results in personal injury." Such a provision bars recovery "only when the insured intended the damages," because "[r]esulting damage can be unintended even though the act leading to the damage was intentional" (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 649 [1993]; *see Mapfre Ins. Co. of N.Y. v Ferrall*, 214 AD3d 635,

636-637 [2d Dept 2023]). Here, the court properly concluded as a matter of law that Ridge Construction did not intend to cause decedent to contract mesothelioma.

However, we agree with defendant that the court erred in granting the Meissners' motion and renewed motion for summary judgment on the complaint, and we therefore modify the order in appeal No. 2 accordingly. As defendant contends in the alternative, the motion papers submitted by the parties raise a triable issue of fact whether defendant was provided with timely notice of the Meissners' claim. Insurance Law § 3420 (a) (3) gives an injured plaintiff the right to provide written notice of a claim directly to a tortfeasor's insurer. The injured plaintiff who exercises that "independent right" to provide notice "has the burden of proving that [the plaintiff or the plaintiff's counsel], acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer" (*Szczukowski v Progressive Northeastern Ins. Co.*, 100 AD3d 1454, 1455 [4th Dept 2012] [internal quotation marks omitted]). Where, as here, the policy requires notice to be sent "as soon as practicable," notice must be provided to the insurer "within a reasonable period of time" (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]; *see also Wraight v Exchange Ins. Co.*, 234 AD2d 916, 917 [4th Dept 1996], *lv denied* 89 NY2d 813 [1997]).

Defendant contends that the Meissners' delay of 68 days—from when they were first informed that Ridge Construction had excess insurance policies issued by defendant to the date that the Meissners' counsel wrote to provide defendant notice of the claim—was unreasonable as a matter of law. In response, plaintiff asserts that the delay was reasonable because the Meissners were not aware for the first 63 of those days that Ridge Construction had failed to provide defendant with notice. "The reasonableness of the delay in giving notice is ordinarily a question for the fact-finder" (*James v Allstate Ins. Co.*, 177 AD2d 998, 999 [4th Dept 1991]; *see also National Interstate Ins. Co. v Interstate Indem. Co.*, 215 AD3d 593, 594 [1st Dept 2023]). Here, although the court properly rejected defendant's contention that the delay was unreasonable as a matter of law, the court erred inasmuch as it made findings of fact as to the reasonableness of the delay (*see generally Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

We also agree with defendant that the motion papers submitted by the parties raise a triable issue of fact whether decedent suffered an injury-in-fact during the period of time that defendant's excess policies were in effect and that the court therefore erred in granting the Meissners' motion and renewed motion for summary judgment on that basis. We note that "[t]he parties do not dispute that the applicable test in determining what event constitutes personal injury sufficient to trigger coverage is injury-in-fact, 'which rests on when the injury, sickness, disease or disability actually began' " (*Carrier Corp.*, 187 AD3d at 1618-1619, quoting *Continental Cas. Co.*, 80 NY2d at 651). The parties do, however, "dispute when an asbestos-related injury actually begins: plaintiff[ ] assert[s] that injury-in-fact occurs upon first exposure to asbestos, while defendant denies that

assertion and instead maintains that injury-in-fact occurs only when a threshold level of asbestos fiber or particle burden is reached that overtakes the body's defense mechanisms" (*id.* at 1619). Inasmuch as the parties here submitted conflicting expert opinions as to when the injury-in-fact occurs in an asbestos-related injury, summary judgment on that basis was not proper (*see id*. at 1619-1620; *see also Rew v County of Niagara*, 115 AD3d 1316, 1318 [4th Dept 2014]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

870

CA 22-01369

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

JILL G. MEISSNER, AS THE EXECUTOR OF THE ESTATE OF WAYNE W. MEISSNER, DECEASED, AND INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RIDGE CONSTRUCTION CORPORATION, ET AL., DEFENDANTS, AND CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), AND MENDES & MOUNT LLP, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

LIPSITZ, PONTERIO & COMERFORD, LLC, BUFFALO (JOHN N. LIPSITZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered July 18, 2022. The order, inter alia, awarded plaintiff damages against defendant Certain Underwriters at Lloyd's, London.

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

Same memorandum as in *Meissner v Ridge Constr. Corp.* ([appeal No. 1] — AD3d — [Mar. 15, 2024] [4th Dept 2024]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

877.1

KA 21-01496

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYREE TRUAX, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NOREEN E. MCCARTHY 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 (Stephen J. Dougherty, J.), rendered August 7, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and tampering with physical evidence (§ 215.40 [2]). As an initial matter, we agree with defendant, and the People correctly concede, that his 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]).

Next, defendant contends that his conviction of criminal possession of a weapon in the second degree is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen*, 597 US 1 [2022]). Defendant failed to raise a constitutional challenge before County Court, however, and therefore any such contention is unpreserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]). Contrary to defendant's contention, his "challenge to the constitutionality of [his conviction under the] statute must be preserved" *(People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, — NY3d —, 2023 NY Slip Op 05968, *2-7 [2023]). We decline to exercise our power to review defendant's constitutional challenge as a matter of

discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends that the court improperly imposed an enhanced sentence without affording him an opportunity to withdraw his plea. That contention is not preserved for our review because defendant did not object to the alleged enhanced sentence, nor did he move to withdraw the plea or to vacate the judgment of conviction (*see People v Fortner*, 23 AD3d 1058, 1058 [4th Dept 2005]; *People v Sundown*, 305 AD2d 1075, 1075 [4th Dept 2003]). In any event, defendant's contention lacks merit. The court promised at the plea proceeding that it would impose "[a] sentence of no worse than seven years determinate," with five years' postrelease supervision. Defendant was later sentenced to an aggregate determinate term of incarceration of seven years, to be followed by five years of postrelease supervision, and therefore he did not receive a sentence greater than what had been promised to him. We reject defendant's contention that the sentence is unduly harsh or severe.

We have considered defendant's remaining contentions, including those concerning the grand jury presentation, and we conclude that they do not require modification or reversal of the judgment.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

878

KA 18-01518

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN H. SPENCER, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

JOHN H. SPENCER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered April 18, 2018. The judgment convicted defendant upon a jury verdict of sex trafficking (eight counts), promoting prostitution in the second degree (three counts), assault in the third degree (three counts), assault in the second degree (two counts), robbery in the second degree (two counts), unlawful imprisonment, menacing in the second degree, promoting prostitution in the third degree and permitting prostitution.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of promoting prostitution in the second degree under counts 15 and 24 of the indictment and dismissing those counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, eight counts of sex trafficking (Penal Law § 230.34 [4], [5] [a], [c], [h]), three counts of promoting prostitution in the second degree (§ 230.30 [1]), and one count of promoting prostitution in the third degree (§ 230.25 [1]).

Defendant contends in his main brief that Supreme Court abused its discretion in its *Sandoval* ruling. Defendant expressly consented to the court's *Sandoval* compromise, however, and thus he waived that contention (*see People v Wright*, 214 AD3d 1327, 1328 [4th Dept 2023], *lv denied* 39 NY3d 1158 [2023], *reconsideration denied* 40 NY3d 953 [2023]; *People v Henry*, 74 AD3d 1860, 1862 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]).

Defendant also contends in his main brief that the court's *Molineux* ruling was an abuse of discretion to the extent that the

court permitted the People to elicit testimony that defendant had previously been to prison and was a known drug dealer. We reject that contention. The testimony that defendant had previously been incarcerated was relevant to the victims' state of mind, and six of the sex trafficking charges of which defendant was convicted contained an element of compulsion or coercion based upon fear of reprisal from defendant (*see* Penal Law § 230.34 [5] [a], [c], [h]; *see generally People v Bradford*, 118 AD3d 1254, 1256 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]). Similarly, the testimony that defendant was a known drug dealer was necessary to complete the narrative of the victims' testimony and was inextricably interwoven with the evidence of the crimes charged (*see People v Resek*, 3 NY3d 385, 389-390 [2004]). Further, we conclude that the challenged *Molineux* evidence was highly probative and that the probative value of that evidence was not outweighed by its potential for prejudice (*see generally People v Alvino*, 71 NY2d 233, 242 [1987]). Moreover, the court minimized the prejudicial effect of the *Molineux* evidence by providing appropriate limiting instructions to the jury (*see generally People v Morris*, 21 NY3d 588, 598 [2013]).

Defendant further contends in his main brief that the evidence is legally insufficient to support his conviction of eight counts of sex trafficking, three counts of promoting prostitution in the second degree, and one count of promoting prostitution in the third degree. To the extent that defendant preserved his contention for our review, we conclude that it is without merit. Viewing the facts "in a light most favorable to the People," we conclude that " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]). Contrary to defendant's further contention in his main brief, we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Arnold*, 107 AD3d 1526, 1528 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013]). We also reject defendant's contention in his main brief that the sentence is unduly harsh and severe.

Contrary to defendant's contention in his pro se supplemental brief, we conclude that there is "nothing in the record to indicate that defendant was deprived of meaningful representation" at any stage of the proceedings (*People v Eckerd*, 161 AD3d 1508, 1509 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). We note, however, that count 15 of the indictment, charging defendant with promoting prostitution in the second degree (Penal Law § 230.30 [1]), is an inclusory concurrent count of sex trafficking as charged in counts 12, 13, and 14 (§ 230.34 [5] [a], [c], [h]; *see generally* CPL 1.20 [37]; 300.30 [4]). Similarly, count 24 of the indictment, charging defendant with promoting prostitution in the second degree, is an inclusory concurrent count of sex trafficking as charged in counts 21, 22, and 23. We therefore conclude that counts 15 and 24 must be dismissed as a matter of law because defendant was found guilty of counts 12 through 14 and 21 through 23, and "a verdict of guilty upon the greater [counts] is deemed a dismissal of every lesser [inclusory

concurrent count]" (*People v Wright*, 85 AD3d 1642, 1643 [4th Dept 2011], *lv denied* 17 NY3d 863 [2011] [internal quotation marks omitted]). We have reviewed defendant's remaining contentions in his pro se supplemental brief and conclude that none warrants reversal or further modification of the judgment.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

882

KA 19-01174

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES TAYLOR, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered May 23, 2019. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Erie County Court for further proceedings in accordance with the following 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]). The conviction arises from an incident in which a patrol lieutenant and other police officers approached a vehicle in which defendant was a passenger while the vehicle was parked at a gas station. During the encounter, the patrol lieutenant directed defendant and the other occupants to exit the vehicle, at which time the officers observed the firearm in question in the back seat of the vehicle.

Although defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence, " 'we necessarily review the evidence adduced as to each of the elements of the crime[ ] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). We nonetheless conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that County Court erred in refusing to suppress the firearm. In its decision following the suppression hearing, the court determined that the patrol lieutenant "had an

objective credible reason to approach and request information from each occupant and to have them step out of the car to do so," and that the conduct of the patrol lieutenant and the other officers in that regard was thus lawful under the first level of the *De Bour* hierarchy (*see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]). The court further determined that, after having the occupants exit the vehicle, the officers lawfully observed the firearm in plain view, thus providing probable cause to seize the firearm.

Defendant contends on appeal, and the People correctly concede, that the patrol lieutenant engaged in a level three intrusion under *De Bour* when he ordered the occupants out of the vehicle (*see People v Wofford*, 115 AD3d 1332, 1333 [4th Dept 2014], *lv denied* 24 NY3d 966 [2014]). Although an "officer's initial approach of [a person] and request for identification [may constitute] a permissible level one encounter" under *De Bour*, it is well established that an "officer's request that [a person] exit [a] parked vehicle elevate[s] the situation to a level three encounter under *De Bour*" and requires reasonable suspicion that criminal activity is afoot (*id.*; *see People v Atwood*, 105 AD2d 1055, 1055 [4th Dept 1984]; *see generally People v Harrison*, 57 NY2d 470, 475-476 [1982]).

Because the court erroneously concluded that the patrol lieutenant engaged in only a level one intrusion when he directed defendant to step out of the vehicle, the court had no occasion to consider whether the patrol lieutenant had reasonable suspicion justifying that directive (*cf. Wofford*, 115 AD3d at 1333). Although the People concede that the patrol lieutenant lacked reasonable suspicion, we are precluded "from reviewing an issue that . . . was not decided by the trial court" (*People v Ingram*, 18 NY3d 948, 949 [2012]). Therefore, we hold the case and remit the matter to County Court to determine based on the evidence presented at the suppression hearing whether the patrol lieutenant had reasonable suspicion to direct defendant to exit the vehicle.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

888

CA 22-01128

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

IN THE MATTER OF 16 MAIN STREET PROPERTY, LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF GENESEO, VILLAGE OF GENESEO ZONING
BOARD OF APPEALS AND CRAIG WADSWORTH, IN HIS
CAPACITY AS CODE ENFORCEMENT OFFICER OF VILLAGE
OF GENESEO, RESPONDENTS-DEFENDANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, BUFFALO (CHARLES D. GRIECO OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (MATTHEW M. SIMMONDS OF COUNSEL), FOR RESPONDENTS–DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Kevin Van Allen, A.J.), entered June 27, 2022, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, inter alia, dismissed the amended petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part, reinstating the fifth cause of action, and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that the definitions of "family" in the Zoning Ordinance of the Village of Geneseo and the Geneseo Rental Housing Law are not illegal, discriminatory, void or unenforceable under the New York Constitution and laws of the State of New York or the United States Constitution;

and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Livingston County, for further proceedings in accordance with the following memorandum: In this hybrid CPLR article 78 proceeding and action, petitioner-plaintiff (petitioner) seeks, inter alia, to annul certain determinations of respondent-defendant Village of Geneseo Zoning Board of Appeals (ZBA) relating to a property (property) located in respondent-defendant Village of Geneseo (Village) that petitioner owns.

Petitioner purchased the property in November 2020. Since 2009,

the property has been in the Village's Residential-2 (R-2) zoning district and, in 2011, the Zoning Ordinance of the Village of Geneseo (Zoning Ordinance) was amended, inter alia, to exclude two-family dwellings as a specially permitted use in the R-2 district. Both before and after the Zoning Ordinance was amended in 2011, the property was used by the previous owner as a bed-and-breakfast, a permitted use in the R-2 district.

Shortly after purchasing the property, petitioner applied for a rental housing permit for a boardinghouse, and petitioner received such a permit, with an occupant load of eight, valid through December 2021. Petitioner was informed in March 2021, however, that the permit erroneously listed the occupant load as eight, and that the Zoning Ordinance permitted a maximum of three unrelated persons in boardinghouses. In May 2021, the Village's Code Enforcement Officer (CEO) issued petitioner a notice of violation for having an excess number of occupants at the property.

Thereafter, petitioner, inter alia, appealed the CEO's determination with respect to the notice of violation to the ZBA and made various applications seeking alternative uses of the property. Specifically, petitioner sought permission to use the property as a two-family dwelling with four tenants per unit, as a single-family dwelling to be occupied by eight members of a sorority, or as a bed-and-breakfast with a property manager who would live at the property and serve breakfast. Those applications were denied by the CEO, and petitioner, inter alia, appealed the CEO's determinations with respect to those applications to the ZBA, and also applied to the ZBA for area and use variances allowing for an increased occupancy load. The ZBA denied the various relief sought by petitioner.

Petitioner then commenced this hybrid CPLR article 78 proceeding and action seeking, inter alia, to annul the relevant determinations of the ZBA, damages based on theories of negligence and a regulatory taking, and a declaration that certain portions of the Zoning Ordinance and the Geneseo Rental Housing Law are illegal and unconstitutional. Respondents-defendants (respondents) answered and moved to dismiss the amended petition-complaint pursuant to, inter alia, CPLR 3211. Supreme Court granted the motion and dismissed the amended petition-complaint, and petitioner now appeals.

We conclude, initially, that the court properly granted the motion insofar as it sought to dismiss the CPLR article 78 causes of action (*see generally Matter of Hudson v Town of Orchard Park Zoning Bd. of Appeals*, 218 AD3d 1380, 1382 [4th Dept 2023]). "[L]ocal zoning boards have broad discretion, and [a] determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence" (*Matter of Fox v Town of Geneva Zoning Bd. of Appeals*, 176 AD3d 1576, 1577 [4th Dept 2019] [internal quotation marks omitted]). "So long as [the board's] interpretation is neither 'irrational, unreasonable nor inconsistent with the governing [code],' it will be upheld" (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419

[1998]).

Contrary to petitioner's contention, we conclude that the record "contain[s] sufficient facts to permit intelligent judicial review" of the ZBA's determinations (*Matter of Livingston Parkway Assn., Inc. v Town of Amherst Zoning Bd. of Appeals*, 114 AD3d 1219, 1230 [4th Dept 2014] [internal quotation marks omitted]; *see Matter of Circle T Sterling, LLC v Town of Sterling Zoning Bd. of Appeals*, 187 AD3d 1542, 1544 [4th Dept 2020]; *Matter of Iwan v Zoning Bd. of Appeals of Town of Amsterdam*, 252 AD2d 913, 914 [3d Dept 1998]).

We reject petitioner's contention that the ZBA acted arbitrarily and capriciously in determining that the property was not "grandfathered" for use as a two-family dwelling (*see generally Matter of Mimassi v Town of Whitestown Zoning Bd. of Appeals*, 67 AD3d 1454, 1454-1455 [4th Dept 2009]). Section 130-68 (B) of the Zoning Ordinance provides in pertinent part that, "[i]n any district, whenever a nonconforming use of . . . [a] building or structure . . . has been discontinued for a period of 365 consecutive days, such nonconforming use shall not be reestablished, and all future uses shall be in conformity with the provisions of this chapter." Here, the property was not used as a two-family dwelling between 1997 and 2020; rather, it was operated as a bed-and-breakfast, which is a permitted use in the R-2 district. Thus, any prior nonconforming use as a two-family dwelling was abandoned, and the permit issued to the prior owner "could not confer rights in contravention of the zoning laws" (*Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988], *rearg denied* 71 NY2d 995 [1988], *cert denied* 488 US 801 [1988] [internal quotation marks omitted]).

Similarly, we conclude that, contrary to petitioner's contention, the ZBA's determination affirming the CEO's denial of petitioner's application for a rental permit for a single-family dwelling with an eight-person occupancy load was not arbitrary or capricious. The Geneseo Rental Housing Law includes within the definition of a "family" a group of "[m]ore than four persons occupying a dwelling unit and living together as a traditional family or the functional equivalent of a traditional family" (Geneseo Rental Housing Law § 96-6). However, the Geneseo Rental Housing Law contains a rebuttable presumption that a group of more than four persons living in a dwelling unit "who are not related by blood, marriage or legal adoption do not constitute the functional equivalent of a traditional family" (*id.*). Here, the proposed tenants consisted of a group of eight sorority members who were presumptively not a family under the Geneseo Rental Housing Law, and petitioner did not submit evidence before the ZBA rebutting that presumption (*see Matter of Northwood Sch., Inc. v Joint Zoning Bd. of Appeals for the Town of N. Elba & Vil. of Lake Placid*, 171 AD3d 1292, 1294 [3d Dept 2019]).

We likewise reject petitioner's contention that the ZBA acted arbitrarily and capriciously in affirming the CEO's determination denying petitioner's request to operate the property as a bed-and-breakfast with a live-in property manager. The Zoning Ordinance's definition of a "bed-and-breakfast" requires, among other things, that

a residence used as a bed-and-breakfast be "owner-occupied" (Zoning Ordinance § 130-5). Here, petitioner indicated that its principal member would not be residing at the property and failed to specify how that requirement would be satisfied. Contrary to petitioner's contention, its reliance upon the Geneseo Rental Housing Law's definition of "owner" for the proposition that the property could be operated as a bed-and-breakfast with a "property manager" who lived on-site and served breakfast is misplaced. Section 96-5 of the Geneseo Rental Housing Law—titled "Scope, applicability and exceptions"—specifically states that the provisions of the Geneseo Rental Housing Law "do not apply to . . . bed-and-breakfast dwellings" (Geneseo Rental Housing Law § 96-5 [D] [6]).

Similarly, we reject petitioner's contention that the ZBA acted arbitrarily and capriciously with respect to its determination denying petitioner's application for an area variance allowing petitioner to operate the property as a boardinghouse with eight tenants. The record establishes that the ZBA weighed the benefit to petitioner against the detriment to the welfare of the neighborhood if the variance were granted and considered the appropriate statutory factors (*see* Village Law § 7-712-b [3] [b]). In particular, the ZBA concluded that the increase from three tenants, as permitted in a boardinghouse under the Zoning Ordinance, to eight was significant and, inter alia, would cause more noise and commotion, affect property values nearby, and lead to an increase in applications by landlords for area variances allowing for the housing of more students in smaller places (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 307-308 [2002]; *see also Matter of DeGroote v Town of Greece Bd. of Zoning Appeals*, 35 AD3d 1177, 1178 [4th Dept 2006]). In addition, the ZBA determined that petitioner had not explored other uses for the property, and that the problem was self-created (*see Matter of People, Inc. v City of Tonawanda Zoning Bd. of Appeals*, 126 AD3d 1334, 1335 [4th Dept 2015]).

We also reject petitioner's contention that the ZBA's determination denying petitioner's application for a use variance with respect to certain provisions of the Zoning Ordinance was arbitrary and capricious. Petitioner failed to establish that the alleged hardship is unique (*see Matter of Vomero v City of New York*, 13 NY3d 840, 841 [2009]), or "[t]hat the variance will afford the least intrusive solution" (Zoning Ordinance § 130-17 [C] [3] [e]).

Contrary to petitioner's further contention, the court properly granted the motion insofar as it sought to dismiss petitioner's causes of action for negligence (*see generally Maldovan v County of Erie*, 188 AD3d 1597, 1599-1600 [4th Dept 2020], *affd* 39 NY3d 166 [2022], *rearg denied* 39 NY3d 1067 [2023]) and for a regulatory taking (*see Putnam County Natl. Bank v City of New York*, 37 AD3d 575, 576-577 [2d Dept 2007], *lv denied* 8 NY3d 815 [2007]) for failure to state a cause of action (*see* CPLR 3211 [a] [7]).

With respect to petitioner's fifth cause of action, for a judgment declaring that the definitions of "family" and "boardinghouse" in the Zoning Ordinance and Geneseo Rental Housing Law

are illegal and unconstitutional, we conclude, initially, that the court erred in dismissing that cause of action rather than issuing a declaration (*see generally Matter of Kerri W.S. v Zucker*, 202 AD3d 143, 155 [4th Dept 2021], *lv dismissed* 38 NY3d 1028 [2022]). We reject petitioner's contention that the definitions of "family" are illegal or unconstitutional (*see Village of Brockport v Webster*, 283 AD2d 1010, 1010 [4th Dept 2001]; *see also Grodinsky v City of Cortland*, 163 AD3d 1181, 1182-1183 [3d Dept 2018]). However, inasmuch as "there are no questions of fact" with respect to petitioner's challenge to the definitions of family "and the only issues presented are questions of law or statutory interpretation" (*Kerri W.S.*, 202 AD3d at 155 [internal quotation marks omitted]), the proper procedure for the court was to deny the motion in relevant part "in order to 'retain[ ] jurisdiction of the controversy,' and then immediately 'declare[ ] the rights of the parties, whatever they may be' " (*id.*, quoting *St. Lawrence Univ. v Trustees of Theol. School of St. Lawrence Univ.*, 20 NY2d 317, 325 [1967]).

We agree with petitioner, however, that the court erred in determining as a matter of law that the definition of "boardinghouse" in the Zoning Ordinance is not illegal or unconstitutional. We conclude that "factual issues preclude a summary determination of the parties' rights" with respect to petitioner's challenge to that definition (*id.* at 154; *cf. Pless v Town of Royalton*, 185 AD2d 659, 660 [4th Dept 1992], *affd* 81 NY2d 1047 [1993]). In light of the foregoing, we modify the judgment by denying the motion in part with respect to the fifth cause of action, reinstating that cause of action, and issuing a declaration in respondents' favor with respect to the definitions of "family" in the Zoning Ordinance and Geneseo Rental Housing Law, and we remit the matter to Supreme Court for further proceedings on that part of the fifth cause of action seeking a declaration with respect to the definition of "boardinghouse" in the Zoning Ordinance.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

889

CA 23-00023

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

JAZMON MORRISON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SOUTH UNION RD HC, LLC, AND WILLIAMSVILLE SUBURBAN, LLC, DEFENDANTS-APPELLANTS.

CAITLIN ROBIN & ASSOCIATES PLLC, NEW YORK CITY (DAVID LIM OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 16, 2022. The judgment, inter alia, awarded plaintiff monetary damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying plaintiff's motion for summary judgment in part with respect to the issue of the liability of defendant Williamsville Suburban, LLC and vacating the award of damages against that defendant, and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking to recover for personal injuries she allegedly sustained when she slipped and fell at a property owned by defendant South Union RD HC, LLC (South Union). At the time of plaintiff's fall, defendant Williamsville Suburban, LLC (Suburban) was operating a nursing care facility on the property. Plaintiff, who was employed as a hospice aide for a separate company, was on the property to provide care to a resident of the facility. The cause of plaintiff's fall is not in dispute. A maintenance worker employed by Suburban was using a floor cleaning solution in an adjacent room, and that solution seeped under the wall into the room where plaintiff and her patient were located. According to plaintiff's deposition testimony, plaintiff slipped on the cleaning solution, fell to the ground, and hit her head on the "hard floor," causing her to lose consciousness. The primary dispute during the first five-and-a-half years of this action centered on the severity of plaintiff's injuries.

Following discovery, plaintiff moved for summary judgment on the issue of defendants' liability. Defendants opposed the motion and cross-moved for summary judgment dismissing the amended complaint,

asserting, for the first time, a theory that plaintiff was a special employee of Suburban and that her claims against Suburban should be dismissed under the exclusivity provisions of Workers' Compensation Law §§ 11 and 29 (6). With respect to South Union, defendants contended that it was an out-of-possession landlord with no duty to maintain, operate or manage the premises. Supreme Court granted plaintiff's motion and denied defendants' cross-motion, and the matter proceeded to trial on the issue of damages. Defendants now appeal from a judgment, entered upon a jury verdict, that, inter alia, awarded plaintiff monetary damages against both defendants, jointly and severally.

We agree with defendants that the court erred in granting that part of plaintiff's motion seeking summary judgment with respect to the issue of Suburban's liability, but we further conclude that, contrary to defendants' contention, the court properly denied their cross-motion insofar as it sought summary judgment dismissing the amended complaint against Suburban. Inasmuch as defendants' contentions concerning plaintiff's summary judgment motion and defendants' cross-motion are properly before us on this appeal (*see United Church of Friendship v New York Dist. of Assemblies of God* [appeal No. 2], 220 AD3d 1232, 1233 [4th Dept 2023]; *see also Zane v Corbett*, 82 AD3d 1603, 1607 [4th Dept 2011]), we first address defendants' contention that the court erred in determining that defendants failed to comply with 22 NYCRR former 202.8-g (a)-(c) by failing to submit, in response to the statement of material facts submitted by plaintiff on her motion, a counter statement of material undisputed facts. Although we agree with defendants that the court erred in failing to exercise its discretion in determining whether to deem admitted the assertions set forth in plaintiff's statement of material facts (*see Hart v City of Buffalo*, 218 AD3d 1140, 1150-1151 [4th Dept 2023]; *Montgomery v Burlington Coat Factory of Tex., Inc.*, 217 AD3d 1410, 1411 [4th Dept 2023], *lv denied* 40 NY3d 908 [2023]; *On the Water Prods., LLC v Glynos*, 211 AD3d 1480, 1481 [4th Dept 2022]), we conclude that the error does not affect our determination on this appeal. The three assertions in plaintiff's statement of material facts were not genuinely disputed by defendants, and the evidence submitted by plaintiff *and defendants* established, as a matter of law, all three of those assertions.

With respect to the merits of that part of plaintiff's motion for summary judgment with respect to the issue of Suburban's liability, we conclude that, although plaintiff established as a matter of law that defendants were negligent and that their negligence caused injuries to plaintiff, defendants raised triable issues of fact whether plaintiff was a special employee of Suburban and, as a result, whether her claims against Suburban were precluded by the exclusivity provisions of Workers' Compensation Law §§ 11 and 29 (6) (*see generally Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557-559 [1991]). Despite the fact that defendants failed to raise the Workers' Compensation Law defense in their pleadings or bill of particulars, we agree with defendants that Suburban did not waive its reliance on that defense. "The affirmative defense of workers' compensation may be waived 'only by a defendant ignoring the issue to the point of final disposition

itself' " (*Goodarzi v City of New York*, 217 AD2d 683, 684 [2d Dept 1995], *lv denied* 87 NY2d 803 [1995]; *see Miraglia v H & L Holding Corp.*, 67 AD3d 513, 514 [1st Dept 2009], *lv dismissed in part & denied in part* 14 NY3d 766 [2010], *rearg denied* 14 NY3d 881 [2010]; *Garcia v Pepe*, 42 AD3d 427, 429-430 [2d Dept 2007]). At the time defendants raised that defense, there was no final disposition.

We reject, however, defendants' contention that they were entitled to summary judgment dismissing plaintiff's amended complaint against Suburban. There are triable issues of fact whether plaintiff was a special employee of Suburban (*see generally Thompson*, 78 NY2d at 557-559; *VeRost v Mitsubishi Caterpillar Forklift Am., Inc.*, 124 AD3d 1219, 1221 [4th Dept 2015], *lv dismissed* 25 NY3d 968 [2015]), and those issues of fact must be resolved before either plaintiff or Suburban could be entitled to judgment as a matter of law with respect to each other. Based on the foregoing, we modify the judgment by denying plaintiff's motion for summary judgment in part with respect to the issue of Suburban's liability and by vacating the award of damages against Suburban, and we remit the matter to Supreme Court for further proceedings on the amended complaint as asserted against Suburban.

With respect to the trial, we reject defendants' contention that the court erred in admitting in evidence a life care plan that had been prepared for plaintiff by a registered nurse and in permitting plaintiff's expert economist to testify using that plan. Although the plan was not signed by the nurse, contained errors in medication, and incorrectly stated that it was "based on the recommendations of the treating physicians . . . [and had] been reviewed, discussed, and approved by the treating physicians," the court properly determined that any such deficiencies did not render the plan or the expert economist's testimony related thereto inadmissible (*see Barnhard v Cybex Intl., Inc.*, 89 AD3d 1554, 1556 [4th Dept 2011]; *see also DuPont v State of New York*, 19 Misc 3d 1144[A], 2008 NY Slip Op 51160[U], *21-23 [Ct Cl 2008]; *see generally Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]). Indeed, defendants' contentions "with respect to the accuracy of the entr[ies] in [the life care plan] go[ ] to the weight to be given to the [plan], not [its] admissibility" (*Meegan v Progressive Ins. Co.*, 43 AD3d 182, 187 [4th Dept 2007]; *see Tornatore v Cohen*, 162 AD3d 1503, 1505-1506 [4th Dept 2018]).

We also reject defendants' contentions concerning the awards for past and future pain and suffering, future medical expenses, and future lost earnings. Contrary to defendants' contention, the awards for past and future pain and suffering do not "deviate[ ] materially from what would be reasonable compensation" (*Lai Nguyen v Kiraly* [appeal No. 2], 82 AD3d 1579, 1580 [4th Dept 2011] [internal quotation marks omitted]; *see* CPLR 5501 [c]; *Huff v Rodriguez*, 45 AD3d 1430, 1433 [4th Dept 2007]). "[B]ecause personal injury awards, especially those for pain and suffering, are not subject to precise quantification . . . , we look to comparable cases to determine at what point an award deviates materially from what is considered reasonable compensation" (*Huff*, 45 AD3d at 1433 [internal quotation

marks omitted]; *see Grasha v Town of Amherst*, 191 AD3d 1286, 1287 [4th Dept 2021], *lv denied* 37 NY3d 906 [2021]). Here, the testimony and records admitted in evidence at trial establish that plaintiff's injuries had a profound effect on her physical condition and mental health. The evidence strongly supports the determination that plaintiff sustained severe and permanent injuries to her neck and brain. We conclude that the brain and neck injuries manifested themselves in objectively identifiable symptoms, justifying the awards for past and future pain and suffering (*see e.g. Garrison v Lapine*, 72 AD3d 1441, 1442-1444 [3d Dept 2010]; *see also Grasha*, 191 AD3d at 1288; *Schmidt v Bartolotta*, 17 AD3d 1162, 1163 [4th Dept 2005]; *Reed v City of New York*, 304 AD2d 1, 4, 7 [1st Dept 2003]).

We further conclude that "the award of future medical expenses is supported by the evidence inasmuch as plaintiff presented 'competent proof of necessary, anticipated medical costs' through [several] witnesses and her expert economist" (*Barnhard*, 89 AD3d at 1556; *see McCullough v One Bryant Park*, 189 AD3d 683, 684-685 [1st Dept 2020]; *Tornatore*, 162 AD3d at 1506). Moreover, "[a] jury award need not match the expert's assessment exactly, especially where[, as here,] the award was likely based on an age adjustment" (*Lopez v City of New York*, 192 AD3d 634, 640 [1st Dept 2021] [internal quotation marks omitted]; *see Rivera v Montefiore Med. Ctr.*, 123 AD3d 424, 427 [1st Dept 2014], *affd* 28 NY3d 999 [2016]).

With respect to the award for future lost earnings, we reject defendants' contention that the award was based on speculation and is not supported by the record on appeal. "For a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence, . . . [i]t is necessary to first conclude that there is *simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial*" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978] [emphasis added]). Not only did the proof at trial establish that plaintiff was unable to return to work at her former employment as a hospice aide, testimony and medical evidence established that it was unlikely plaintiff would ever be able to have gainful employment due to the severity of her injuries. Plaintiff and other witnesses testified concerning plaintiff's employment and income before the accident, her inability to function in the most rudimentary levels, and her loss of any potential earnings in the future. We thus conclude that the jury was presented with sufficient evidence about her present condition to reach a conclusion that plaintiff lacked any ability in the future to earn income via other types of employment (*see Huff*, 45 AD3d at 1433). Therefore, we cannot conclude that the jury's verdict on future lost earnings was "utterly irrational" or lacked sufficient evidentiary support (*Cohen*, 45 NY2d at 499).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

895

CA 23-00349

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

LANCE WOLFANGER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ONCE AGAIN NUT BUTTER COLLECTIVE INC., AND
DIMARCO CONSTRUCTORS LLC, DEFENDANTS-RESPONDENTS.

CELLINO LAW, LLP, ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TREVETT CRISTO, ROCHESTER (ALAN J. DEPETERS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered May 18, 2022. The order and judgment, insofar as appealed from, granted in part defendants' motion for summary judgment and denied plaintiff's motion insofar as it sought summary judgment on liability on the third and fourth causes of action.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, defendants' motion is denied in its entirety, the third and fourth causes of action are reinstated, and plaintiff's motion is granted insofar as it seeks summary judgment on the issue of liability on the third and fourth causes of action.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained while working on the construction of a warehouse owned by defendant Once Again Nut Butter Collective Inc. (OANB). Defendant DiMarco Constructors LLC (DiMarco), the general contractor on the project, subcontracted certain painting work to plaintiff's employer. Plaintiff alleged that, while spray-painting at a high elevation in the interior of the building, he experienced dizziness and fell from a boom lift that was exhausting noxious diesel fumes. Plaintiff alleged, among other things, that defendants failed to ensure that the boom lift was properly constructed, placed, or operated as to give proper protection to him. Defendants moved for summary judgment dismissing the complaint, and plaintiff moved for summary judgment on the issue of defendants' liability. As limited by his brief, plaintiff appeals from an order and judgment insofar as it granted that part of defendants' motion with respect to plaintiff's third and fourth causes of action, against OANB and DiMarco, respectively, for

violation of Labor Law § 240 (1), and denied that part of plaintiff's motion with respect to those causes of action. In reaching its decision, Supreme Court concluded that "[p]laintiff's injuries were not caused by an elevation-related risk." The court also concluded that defendants provided plaintiff with necessary safety devices and that any fumes exhausted by the boom lift were an incidental consequence of its physical placement.

We agree with plaintiff that the court erred in denying that part of his motion and granting that part of defendants' motion with respect to the Labor Law § 240 (1) causes of action. "Pursuant to Labor Law § 240 (1), owners and contractors engaged 'in the erection, . . . repairing, . . . [or] painting . . . of a building or structure,' . . . must 'furnish or erect . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person' employed in the performance of such labor" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96 [2015], *rearg denied* 25 NY3d 1195 [2015]). The purpose of that provision is to protect workers by placing the "ultimate responsibility" for worksite safety on the owner and general contractor, instead of the workers themselves (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 [1993] [internal quotation marks omitted]). "The statute is to be interpreted liberally to accomplish its purpose" (*Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 977 [2003]).

A plaintiff demonstrates entitlement to summary judgment under Labor Law § 240 (1) "by establishing that he or she was subject to an elevation-related risk, and [that] the failure to provide any safety devices to protect the worker from such a risk [was] a proximate cause of his or her injuries" (*Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1283 [4th Dept 2015] [internal quotation marks omitted]). " 'To establish a prima facie case, plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he [or she] demonstrate that the risk of some injury from defendants' conduct was foreseeable' " (*Burns v Marcellus Lanes, Inc.*, 169 AD3d 1457, 1458 [4th Dept 2019], quoting *Gordon*, 82 NY2d at 562).

Here, although plaintiff could not recall the incident, it is undisputed that plaintiff fell from the lift while it was raised six to eight feet in the air. In support of his motion, plaintiff submitted evidence establishing that his injuries were causally related to the fall from the lift and that plaintiff was using a boom lift that discharged fumes into the factory. Plaintiff also submitted the affidavit of an expert who opined that defendants violated Labor Law § 240 (1) by failing to ensure that the boom lift was " 'so constructed, placed and operated as to give proper protection' " to plaintiff and by allowing plaintiff to place the boom lift in a position where diesel fumes were likely to accumulate above him and cause dizziness. We conclude that plaintiff thus met his prima facie burden on his motion by establishing that his fall was a "normal and foreseeable" consequence of the placement of the lift, which exhausted noxious fumes too close to plaintiff (*Gordon*, 82 NY2d at 562; *see Cruz*

v Turner Constr. Co., 279 AD2d 322, 322 [1st Dept 2001]; *see generally Villeneuve v State of New York*, 274 AD2d 958, 958 [4th Dept 2000]).

In response, defendants failed to raise a triable issue of fact whether the hazard of fumes is "of such an extraordinary nature or so attenuated from the statutory violation as to constitute a superseding cause sufficient to relieve [them] of liability" (*Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1578 [4th Dept 2016] [internal quotation marks omitted]; *see Lajqi v New York City Tr. Auth.*, 23 AD3d 159, 159 [1st Dept 2005]). Defendants also failed to raise an issue of fact whether plaintiff deliberately unclipped his safety harness, and we note that the issue presents, at best, a question of comparative negligence, which is not a defense to liability under Labor Law § 240 (1) (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]; *Vicki v City of Niagara Falls*, 215 AD3d 1285, 1288 [4th Dept 2023]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

903

KA 22-01003

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVONAIRE KING, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Gordon J. Cuffy, A.J.), rendered June 15, 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.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]).

Contrary to defendant's contention on appeal, his sentence is not unduly harsh or severe. However, both the certificate of conviction and the uniform sentence and commitment form must be corrected to reflect defendant's status as a second violent felony offender rather than a second felony offender (*see People v Nelson*, 206 AD3d 1703, 1704 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]; *People v Mobayed*, 158 AD3d 1221, 1223 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

907

KA 23-00985

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL COOPERMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Stephen T. Miller, A.J.), rendered January 19, 2023. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree and rape 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 a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [2]) and rape in the third degree (§ 130.25 [3]). We affirm.

Defendant contends that Supreme Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). Where, as here, a defendant is charged with a felony, the People must announce readiness for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]). There are two elements to the People's readiness for trial: (1) " 'a statement of readiness by the prosecutor in open court . . . or a written notice of readiness' " and (2) "the People must in fact be ready to proceed at the time they declare readiness" (*People v Chavis*, 91 NY2d 500, 505 [1998]; *see People v Hill*, 209 AD3d 1262, 1264 [4th Dept 2022], *lv denied* 39 NY3d 986 [2022]). "A statement of readiness [made] at a time when the People are not actually ready is illusory and insufficient to stop the running of the speedy trial clock" (*England*, 84 NY2d at 4) and will be deemed invalid (*see* CPL 30.30 [5]).

As relevant here, "[a]ny statement of trial readiness must be accompanied or preceded by a certificate of good faith compliance with the disclosure requirements of [CPL] 245.20" (CPL 30.30 [5]; *see* 245.50 [1]; *People v Gaskin*, 214 AD3d 1353, 1354 [4th Dept 2023]).

A certificate of compliance (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" and must also "identify the items provided" (CPL 245.50 [1]; *see Gaskin*, 214 AD3d at 1354). Notwithstanding the provisions of any other law, and absent an individualized finding of special circumstances by the court before which the charge is pending, the prosecution will not be deemed ready for trial for purposes of CPL 30.30 until it has filed a "proper" COC pursuant to CPL 245.50 (1) (CPL 245.50 [3]).

Here, the criminal action against defendant was commenced on August 4, 2021 (*see* CPL 1.20 [17]). The People filed their COC and statement of readiness on September 28, 2021. On November 14, 2022, defendant moved to dismiss the indictment on speedy trial grounds, arguing that the People's failure to provide all discovery required by CPL 245.20 rendered the COC improper and the statement of readiness illusory. Thus, he argued that the People should be charged with the entirety of that approximately 14-month period, requiring dismissal of the indictment (*see* CPL 30.30 [1]). The court denied the motion, concluding that the COC was proper and that the statement of readiness therefore was not illusory.

We conclude that the court did not err in denying defendant's motion. CPL 245.20 (1) requires the prosecution to disclose "all items and information that relate to the subject matter of the case," which includes, as relevant on this appeal, "[a]ll evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to . . . impeach the credibility of a testifying prosecution witness" (245.20 [1] [k] [iv]) (impeachment materials), as well as "[a]ll tapes or other electronic recordings, including all electronic recordings of 911 telephone calls made or received in connection with the alleged criminal incident" (245.20 [1] [g]) (electronic material).

The Court of Appeals recently stated in *People v Bay* that, in evaluating the propriety of a COC—i.e., whether the People have complied with their disclosure obligations under CPL 245.20—"the key question . . . is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (— NY3d —, —, 2023 NY Slip Op 06407 at *2 [2023]; *see* CPL 245.50 [1]). Due diligence "is a familiar and flexible standard that requires the People to make reasonable efforts to comply with statutory directives" (*Bay*, — NY3d at —, 2023 NY Slip Op 06407 at *2 [internal quotation marks omitted]). That analysis "is fundamentally case-specific . . . and will turn on the circumstances presented" (*id.*). Although the statute does not require a "perfect prosecutor," the Court emphasized that the prosecutor's good faith, while required, "is not sufficient standing alone and cannot cure a lack of diligence" (*id.*).

On a CPL 30.30 motion to dismiss on the ground that the People

failed to exercise due diligence and therefore improperly filed a COC, "the People bear the burden of establishing that they did, in fact, exercise due diligence and made reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure" (*id.*). Where the People fail to meet their burden, the COC "should be deemed improper, the readiness statement stricken as illusory, and—so long as the time chargeable to the People exceeds the applicable CPL 30.30 period—the case dismissed" (*id.*). In determining whether the People exercised due diligence, the Court in *Bay* identified the following non-exhaustive list of factors for courts to consider: "the efforts made by the prosecution and the prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" (*id.*).

Here, defendant contends that the COC was invalid because the People did not disclose to him certain law enforcement disciplinary records (*see* Public Officers Law § 86 [6]) for use as impeachment materials (*see* CPL 245.20 [1] [k] [iv]). The law enforcement disciplinary records at issue pertained to individuals who the People indicated would *not* be testifying at trial. Thus, those records were not subject to automatic discovery inasmuch as CPL 245.20 (1) (k) (iv) requires disclosure only of materials that tend to "impeach the credibility of a *testifying* prosecution witness" (emphasis added). Because the People were not required to disclose the impeachment materials, we have no occasion to apply the *Bay* due diligence standard with respect to that allegedly missing category of discovery. To the extent that defendant contends that other portions of CPL 245.20 (1) (k) applied to the personnel files at issue here, we conclude that he did not preserve that contention for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also contends that the COC was improper because the People failed to disclose certain records from the Monroe County Office of Emergency Communication (OEC)—i.e., the electronic material (*see* CPL 245.20 [1] [g]). Even assuming, arguendo, that the requested OEC records constituted material subject to automatic discovery under CPL 245.20 (1) (g), we conclude, under the circumstances of this case and upon considering the relevant factors, 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 CPL article 245" (*Bay*, — NY3d at —, 2023 NY Slip Op 06407 at *2; *see* CPL 245.50 [1]). In particular, we note that it would not have been obvious to the People that the OEC records in question were missing because the People knew that there had been no 911 calls inasmuch as the victim reported the crime by going to the police station in person. Defendant does not contend that the missing electronic material contained any substantive information about the case and, as the People point out, those materials were not used by either side at

trial. In contrast, the missing discovery in *Bay* included an arrest report, a 911 call and the associated call detail report, and a domestic incident report, and the Court of Appeals held that the People's COC was improper based on their failure to establish that they exercised due diligence to identify such routinely produced disclosure material prior to filing the COC (*see Bay*, — NY3d at —, 2023 NY Slip Op 06407 at *3). Unlike the missing material in *Bay*, the electronic material at issue here was not discovery material that would have been obviously missing or critical to the underlying case.

We also note that the People here made substantial efforts to comply with their discovery obligations under CPL article 245, which pertinently included the disclosure of recordings of a controlled call between defendant and the victim and defendant's interview with the police, as well as material relevant to the search warrant executed at defendant's residence. Having automatically disclosed the aforementioned evidence, which was critical to the case against defendant, it is all the more apparent that the absence of the OEC material, which was not critical, would not have been obvious to the People even in the exercise of due diligence.

In *Bay*, the Court of Appeals made clear that whether the People exercised due diligence is not to be examined in a vacuum. To that end, the non-exclusive list of factors articulated by the Court in that case calls for 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 (*see Bay*, — NY3d at —, 2023 NY Slip Op 06407, *2). Applying that assessment, we conclude that the People exercised due diligence to obtain and furnish to defendant materials that were subject to automatic discovery under CPL article 245 (*see generally id.*).

In light of our conclusion that the People's COC was proper and that their statement of readiness therefore was not illusory, the People could be charged with only the approximately 55-day period between the commencement of the criminal action and the filing of their statement of readiness, and the court thus did not err in denying defendant's speedy trial motion (*see* CPL 30.30 [1] [a]; *England*, 84 NY2d at 4).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable "inasmuch as this case rests largely on the jury's credibility findings with respect to the testimony of the victim" (*People v Watts*, 218 AD3d 1171, 1173 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023] [internal quotation marks omitted]), we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495). Where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given

its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]; *see People v McKay*, 197 AD3d 992, 993 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]). The jury here was "entitled to credit the testimony of the People's witnesses, including that of the victim, over the testimony of defendant's witnesses," as well as over defendant's conflicting accounts of the incident, which consisted of statements he provided during a controlled call with the victim and during an interview with the police, and we perceive no reason to disturb the jury's credibility determinations in that regard (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]; *see Watts*, 218 AD3d at 1173; *People v Mercado-Gomez*, 206 AD3d 1643, 1644 [4th Dept 2022]). To the extent that there were any inconsistencies in the victim's testimony, we conclude that her testimony "was not 'so inconsistent or unbelievable as to render it incredible as a matter of law' " (*People v Lewis*, 129 AD3d 1546, 1548 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015]; *see People v O'Neill*, 169 AD3d 1515, 1515-1516 [4th Dept 2019]; *see also People v Mack*, 217 AD3d 1518, 1518-1519 [4th Dept 2023], *lv denied* 40 NY3d 951 [2023]), and "any such inconsistencies merely presented issues of credibility for the jury to resolve" (*Mercado-Gomez*, 206 AD3d at 1644; *see People v Anderson*, 220 AD3d 1223, 1224 [4th Dept 2023]).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

951

KA 22-00446

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH R. SCOTT, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 10, 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: In these consolidated appeals, defendant appeals, in appeal No. 1, from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [2]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the fourth degree (§ 265.01 [2]). In appeal No. 3, defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (§ 140.25 [2]). The three pleas were entered in a single plea proceeding.

Defendant contends in these appeals that his sentences are unduly harsh and severe. We reject that contention. Defendant's plea agreement provided that all three sentences would run concurrently, and thus defendant avoided the possibility that consecutive sentences would be imposed. Under the circumstances, it cannot be said that the sentences are unduly harsh or severe (*see generally People v Engert*, 263 AD2d 959, 959 [4th Dept 1999], *lv denied* 93 NY2d 1017 [1999]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

952

KA 22-00447

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH R. SCOTT, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 10, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree.

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

Same memorandum as in *People v Scott* ([appeal No. 1] — AD3d — [Mar. 15, 2024] [4th Dept 2024]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

953

KA 22-00448

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH R. SCOTT, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 10, 2022. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Same memorandum as in *People v Scott* ([appeal No. 1] — AD3d — [Mar. 15, 2024] [4th Dept 2024]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

968

CA 23-00005

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

WILLIAM METROSE LTD. BUILDER/DEVELOPER,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WASTE MANAGEMENT OF NEW YORK, LLC,
DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (BRIAN D. GINSBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

HEATH & O'TOOLE PLLC, HOLLEY (BRIDGET ANN O'TOOLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered December 2, 2022. The order denied the motion of defendant to dismiss the second amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion to dismiss the second amended complaint is granted and the second amended complaint is dismissed.

Memorandum: Defendant owns and operates the High Acres Landfill, which is the second largest landfill in the State of New York, and has been a defendant in several other cases related to that landfill (*see e.g. Fresh Air for the Eastside, Inc. v Waste Mgt. of N.Y., LLC*, 2023 WL 6121169, 2023 US Dist LEXIS 166618 [WD NY, Sept. 19, 2023, No. 18-CV-6588 (FPG)]; *D'Amico v Waste Mgt. of N.Y., LLC*, 2019 WL 1332575, 2019 US Dist LEXIS 50323 [WD NY, Mar. 25, 2019, No. 6:18-CV-06080 (EAW)]).

Plaintiff is a real estate developer that owns numerous properties near that landfill. As a result of noxious odors emanating from the landfill, plaintiff had difficulty in selling homes that it built on its properties and in developing other such properties. Plaintiff thus commenced this action seeking damages for the diminution in the value of its properties, which allegedly led to lost profits and harm to its business reputation.

After Supreme Court dismissed a trespass cause of action on defendant's motion to dismiss plaintiff's amended complaint, plaintiff filed a second amended complaint asserting three causes of action, i.e., for negligence and gross negligence, private nuisance, and

public nuisance. Defendant thereafter filed a motion to dismiss the second amended complaint (*see* CPLR 3211 [a] [7]). The court denied that motion, and defendant appeals. We now reverse.

As a preliminary matter, we note that the court's order on the prior motion does not preclude our review of the order on appeal. Even assuming, arguendo, that the motion court was bound by the law of the case doctrine, we are not so bound and are free to make our own determination (*see Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1642 [4th Dept 2017]; *see generally Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975]). We therefore address the merits of defendant's contentions.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). We must "accept the facts as alleged in the [second amended] complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88).

With respect to the cause of action sounding in private nuisance, a private nuisance is one that "threatens one person or . . . relatively few" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977], *rearg denied* 42 NY2d 1102 [1977]; *see Davies v S.A. Dunn & Co., LLC*, 200 AD3d 8, 11 [3d Dept 2021], *lv denied* 38 NY3d 902 [2022]). Here, plaintiff's allegations indicate that the noxious odors affected a large number of community residents and, therefore, we conclude that plaintiff's cause of action for private nuisance must be dismissed (*see Davies*, 200 AD3d at 11; *see also D'Amico*, 2019 WL 1332575, *2, 2019 US Dist LEXIS 50323, *6-7).

With respect to the cause of action sounding in public nuisance, a public nuisance consists of "a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons" (*532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001], *rearg denied* 96 NY2d 938 [2001]; *see Davies*, 200 AD3d at 11-12; *Leo v General Elec. Co.*, 145 AD2d 291, 294 [2d Dept 1989]). "A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large" (*532 Madison Ave. Gourmet Foods*, 96 NY2d at 292; *see Davies*, 200 AD3d at 12; *Leo*, 145 AD2d at 294).

Here, plaintiff alleged that it suffered a special injury because it "suffered lost profit[s] and other substantial economic loss," including "irreparable damage to its reputation in the community as a residential home builder." We agree with defendant that plaintiff did not allege facts sufficient to support a public nuisance cause of action. It failed to allege that it sustained any harm or damages that were "different in kind, not merely in degree," from the community at large (*532 Madison Ave. Gourmet Foods*, 96 NY2d at 294; *see Davies*, 200 AD3d at 12; *cf. Leo*, 145 AD2d at 294). Viewing the

second amended complaint liberally and accepting the facts as alleged as true (*see Leon*, 84 NY2d at 87-88), we conclude that the entire community of property owners surrounding the landfill suffered a diminution in the value of their properties. The only difference for plaintiff is that it suffered a greater degree of damages because it owned more of those properties. Thus, plaintiff's damages, while larger in degree, are not "different in kind" (*532 Madison Ave. Gourmet Foods*, 96 NY2d at 294; *cf. Leo*, 145 AD2d at 294). We thus conclude that the public nuisance cause of action must be dismissed.

Finally, we conclude that the cause of action sounding in negligence and gross negligence must also be dismissed. "To recover in negligence [or gross negligence], a plaintiff must sustain either physical injury or property damage resulting from the defendant's alleged negligent conduct . . . This limitation serves a number of important purposes: it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims" (*Davies*, 200 AD3d at 16 [internal quotation marks omitted]; *see generally Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823 [1993]). Although defendant "undoubtedly owes surrounding property owners a duty of care to avoid injuring them . . . , the question is whether plaintiff[ ] sustained the required injury" (*Davies*, 200 AD3d at 16). Here, plaintiff alleges, in essence, "that the noxious odors have physically invade[d] [its] properties, substantially interfering with [its] use and enjoyment thereof and diminishing the[ ] property values" (*id.* [internal quotation marks omitted]). Even if, as plaintiff alleges, the odors "have a continuing physical presence" (*id*. at 16-17), plaintiff "ha[s] not alleged any tangible property damage or physical injury resulting from exposure to the odors" and, "likewise, the economic loss resulting from the diminution of plaintiff[']s property values is not, standing alone, sufficient to sustain a negligence claim under New York law" (*id.* at 17; *see Beck v FMC Corp*., 53 AD2d 118, 120-121 [4th Dept 1976], *affd* 42 NY2d 1027 [1977]; *cf. Dunlop Tire & Rubber Corp. v FMC Corp*., 53 AD2d 150, 154-155 [4th Dept 1976]; *D'Amico*, 2019 WL 1332575, *4, 2019 US Dist LEXIS 50323, *11-12).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

971

CA 22-01312

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

SARAH E. AGGARWAL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VINAY R. AGGARWAL, DEFENDANT-APPELLANT.

CERIO LAW OFFICES, PLLC, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILDREN.

Appeal from a judgment of the Supreme Court, Monroe County (James A. Vazzana, A.J.), entered July 8, 2022. The judgment, among other things, dissolved the marriage of the parties and equitably distributed the marital assets.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the 4th, 13th, 14th, 22nd, 23rd, 29th, 30th, 32nd, and 42nd decretal paragraphs and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant husband appeals from a judgment of divorce that, inter alia, equitably distributed the parties' marital assets and made awards to plaintiff wife for attorney's fees, spousal maintenance, and child support.

We agree with defendant that Supreme Court erred in determining that the premarital value of his medical practice is five percent of the total value "without articulating its reason for doing so" (*Antinora v Antinora*, 125 AD3d 1336, 1339 [4th Dept 2015]; *see* Domestic Relations Law § 236 [B] [5] [g]). We thus modify the judgment by vacating the decretal paragraphs concerning defendant's medical practice, and we remit the matter to Supreme Court for "appropriate findings of fact and conclusions of law as required by statute" with respect to the valuation of the marital component of defendant's medical practice (*Diachuk v Diachuk*, 117 AD2d 985, 986 [4th Dept 1986]).

We also agree with defendant that the court erred in determining that certain real property in Vermont is a marital asset. " '[T]he initial determination of whether a particular asset is marital or separate property is a question of law, subject to plenary review on appeal' " (*Pooler v Pooler*, 154 AD3d 1305, 1305-1306 [4th Dept 2017], quoting *Fields v Fields*, 15 NY3d 158, 161 [2010], *rearg denied* 15 NY3d

819 [2010]). "It is well settled that property [that is] acquired in exchange for [separate] property, even if the exchange occurs during [the] marriage, is separate property" (*Iwasykiw v Starks*, 179 AD3d 1485, 1486 [4th Dept 2020] [internal quotation marks omitted]). Here, defendant established "with sufficient particularity" that the Vermont property was purchased with proceeds from his sale of separate property and, therefore, is not a marital asset (*id.* [internal quotation marks omitted]; *see also Juhasz v Juhasz*, 59 AD3d 1023, 1024 [4th Dept 2009], *lv dismissed* 12 NY3d 848 [2009]). We therefore further modify the judgment by vacating the decretal paragraphs concerning the Vermont property.

We also agree with defendant that the court erred in determining that the value of his premarital contributions to his individual retirement account (IRA) is marital property. A retirement account opened by one spouse prior to marriage consists of marital property only with respect to the value of the contributions made during the marriage, or to the extent that an increase in market value is attributable to the other spouse (*see Iwasykiw*, 179 AD3d at 1485-1486; *see also Antinora*, 125 AD3d at 1340). Here, the premarital balance of defendant's IRA was $94,256.84, and that portion, along with the growth attributable thereto, does not constitute marital property subject to equitable distribution. We therefore further modify the judgment by vacating the decretal paragraph referring to defendant's IRA, and we direct the court on remittal to recalculate the amount of defendant's IRA that is marital property. Contrary to defendant's contention, however, the court did not err in awarding plaintiff one-half of the value of the funds defendant withdrew from his IRA upon the commencement of this action inasmuch as defendant "failed to establish that [the] funds withdrawn from [that] account were used for legitimate marital expenses" (*McGarrity v McGarrity*, 211 AD2d 669, 671 [2d Dept 1995]).

Additionally, we agree with defendant that, with respect to the awards of spousal maintenance and child support, the court erred in imputing income to him in the amount of $250,000 inasmuch as the court did not sufficiently "articulate[ ] the basis for [its] imputation and [there is no] record evidence [that] supports [its] calculations" (*Anastasi v Anastasi*, 207 AD3d 1131, 1132 [4th Dept 2022]; *see also Belkhir v Amrane-Belkhir*, 118 AD3d 1396, 1398 [4th Dept 2014]). Thus, we further modify the judgment by vacating the decretal paragraphs concerning the amounts of spousal maintenance and child support to be paid by defendant to plaintiff, and we direct the court on remittal to articulate a basis for the imputation of income to defendant with "record support for its determination" (*Belkhir*, 118 AD3d at 1398 [internal quotation marks omitted]) and, if necessary, to recalculate those amounts.

We reject defendant's contention that the court erred in awarding plaintiff, as "the non-monied spouse," a portion of her attorney's fees (*Terranova v Terranova*, 138 AD3d 1489, 1489 [4th Dept 2016] [internal quotation marks omitted]). The court has discretionary power to award attorney's fees in a matrimonial action based upon a review of, inter alia, "the financial circumstances of both parties"

(*Caricati v Caricati*, 181 AD3d 1279, 1281 [4th Dept 2020] [internal quotation marks omitted]), and we perceive no abuse of discretion here. Nevertheless, in light of our determination with respect to imputed income, we further modify the judgment by vacating the decretal paragraphs awarding plaintiff attorney's fees, and we direct the court on remittal to recalculate the amount of that award in light of its new determination on remittal of the imputation of income to defendant (*see Hansen v Hansen*, 229 AD2d 960, 961 [4th Dept 1996]).

We further reject defendant's contention that the court erred in determining the value of the marital residence as of the date of the appraisal that was performed in September 2018, approximately six months after the commencement of the action, and not as of the date of the subsequent sale of the property in June 2020. "[V]aluation is an exercise properly within the fact-finding power of the trial courts" (*Ripka v Ripka*, 77 AD3d 1384, 1386 [4th Dept 2010] [internal quotation marks omitted]), and the court has "discretion to determine the appropriate valuation date" (*Fuchs v Fuchs*, 276 AD2d 868, 869 [3d Dept 2000]; *see Wittig v Wittig*, 258 AD2d 883, 884 [4th Dept 1999]). Here, the court properly considered defendant's failure to pay the mortgage on the marital residence and his rejection of substantial purchase offers when it determined the appropriate valuation date (*see generally Fuchs*, 276 AD2d at 869).

Defendant further contends that the court erred in not awarding him an equalizing credit for a portion of plaintiff's IRA. We reject that contention inasmuch as there is "no evidence that [plaintiff] contributed to her retirement account[ ] during the marriage or that any increase in th[at] account['s] value during the marriage was attributable to" defendant (*Iwasykiw*, 179 AD3d at 1485).

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

1020

CA 22-00451

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

SANDRA JONAS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL JONAS, DEFENDANT-RESPONDENT.

FERON POLEON, LLP, AMHERST (KELLY A. FERON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL J. FRENTZEL, ATTORNEY AT LAW, GRAND ISLAND (MICHAEL F. MCPARTLAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered October 21, 2021. The judgment, among other things, dissolved the marriage between the parties and equitably distributed marital property.

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

Memorandum: In this contested matrimonial action, plaintiff wife appeals from a judgment entered following a nonjury trial that, inter alia, equitably distributed marital property.

Initially, the wife's contention that Supreme Court erred in failing to determine defendant husband's child support and maintenance obligations is not properly before us inasmuch as she consented to the referral of those issues to Family Court, and "no appeal lies from that part of an order entered on consent" (*Matter of Lasondra D. [Cassandra D.—Victor S.]*, 151 AD3d 1655, 1656 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *see generally Koziol v Koziol*, 60 AD3d 1433, 1434 [4th Dept 2009], *appeal dismissed* 13 NY3d 763 [2009]).

Contrary to the wife's other contention, the court did not abuse its discretion in its equitable distribution of the marital property. Although the wife contends that the equitable distribution award ignores the husband's dissipation of marital assets, "[the wife's] claims [of dissipation] are conclusory and rely on the credibility of the parties, and in such circumstances, [this Court] shall afford the trial court great deference" (*McPheeters v McPheeters*, 284 AD2d 968, 969 [4th Dept 2001] [internal quotation marks omitted]). The evidence presented at trial established that the parties mutually liquidated

marital assets, and accumulated significant debt, in an unsuccessful attempt to save their family business. "Courts should not second-guess the economic decisions made during the course of the marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 421 [2009]; *see Ferrel v Ferrel*, 132 AD3d 1421, 1422 [4th Dept 2015]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1021

CA 23-00462

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

IN THE MATTER OF STEVEN L.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Gerard J. Neri, J.), entered February 16, 2023, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner in a secure treatment facility.

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

Memorandum: On appeal from an order determining that he remains a dangerous sex offender requiring confinement under Mental Hygiene Law § 10.03 (e), petitioner contends that Supreme Court's determination, made following an annual review hearing pursuant to section 10.09 (d), is against the weight of the evidence. More specifically, petitioner contends that, although the evidence established that he continues to suffer from a mental abnormality as defined by section 10.03 (i), respondent failed to meet its burden of establishing by clear and convincing evidence that he remains a dangerous sex offender requiring confinement, as opposed to a regimen of strict and intensive supervision and treatment. We reject that contention. Respondent's expert and an independent expert both opined that petitioner continues to require confinement in a secure treatment facility, and we perceive no basis in the record to disturb the court's determination to credit the opinions of those experts (*see Matter of Nushawn W. v State of New York*, 215 AD3d 1227, 1230 [4th Dept 2023], *lv denied* 40 NY3d 901 [2023]; *Matter of State of New York v Robert T.*, 214 AD3d 1405, 1407 [4th Dept 2023], *lv denied* — NY3d — [2024]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

1023

CA 22-00860

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

GARY J. SKALYO, PLAINTIFF,

V MEMORANDUM AND ORDER

DONALD ALESSI, SR., ESQ., ALESSI LAW FIRM,
DEFENDANTS-APPELLANTS,
WILLIAM ILECKI, ESQ., ILECKI & OSTROWSKI, LLP,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

RICHARD G. COLLINS, WEST SENECA, FOR DEFENDANTS-APPELLANTS.

CONNORS LLP, BUFFALO (CHRISTINA M. EATON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 23, 2022. The order granted the motion of defendants William Ilecki, Esq., and Ilecki & Ostrowski, LLP, to dismiss plaintiff's first cause of action against them and the cross-claim against them.

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

Memorandum: Plaintiff was represented by defendant Donald Alessi, Sr., Esq. (Alessi) and defendant Alessi Law Firm (collectively, Alessi defendants) in settlement negotiations in a divorce proceeding with his now-former wife, who was represented by defendant William Ilecki, Esq. (Ilecki) and defendant Ilecki & Ostrowski, LLP (collectively, Ilecki defendants). Plaintiff commenced this action seeking to recover damages allegedly arising when an unknown third party gained unauthorized access to email exchanges between Alessi and Ilecki concerning plaintiff's promise to pay a lump sum of money to plaintiff's former wife in exchange for mutual releases. The unknown third party, who posed as Ilecki in the email exchanges, induced Alessi to wire transfer plaintiff's money to the unknown third party's account. The Alessi defendants asserted a cross-claim against the Ilecki defendants based on allegations that the loss of plaintiff's money was caused by the Ilecki defendants' negligence. The Alessi defendants now appeal from an order granting the Ilecki defendants' motion to dismiss plaintiff's cause of action for negligence and the cross-claim against them for failure to state a cause of action (*see* CPLR 3211 [a] [7]). We affirm.

"It is settled law that 'absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties not in privity for harm caused by professional negligence' " (*Deni v Air Niagara*, 190 AD2d 1011, 1011 [4th Dept 1993]; *see Ginther v Jones*, 35 AD3d 1224, 1224 [4th Dept 2006], *lv denied* 8 NY3d 810 [2007]; *Andrewski v Devine*, 280 AD2d 992, 992 [4th Dept 2001]). Here, it is undisputed that plaintiff, who was not a client of the Ilecki defendants, is not in privity with them. Moreover, plaintiff's complaint and the Alessi defendants' cross-claim allege only that the Ilecki defendants had a duty of care to plaintiff based on plaintiff's role as the adverse party to a client represented by the Ilecki defendants, but those allegations do not support liability against the Ilecki defendants (*see Ginther*, 35 AD3d at 1224; *see generally Deni*, 190 AD2d at 1011), and plaintiff and the Alessi defendants failed to allege any fraud, collusion, or malicious acts by the Ilecki defendants or other special circumstances that would give rise to liability for harm caused by professional negligence (*see generally Deni*, 190 AD2d at 1011).

In light of our determination, we do not consider the Ilecki defendants' remaining contention.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

1024

CA 23-00378

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

RON HOWARD AND LISA HOWARD,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

THE RESERVE AT SPAULDING GREEN AND
JUREK CUSTOM BUILDERS, DEFENDANTS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SCHOP POWELL & ASSOCIATES, WILLIAMSVILLE (DONALD G. POWELL OF COUNSEL), FOR DEFENDANT-RESPONDENT THE RESERVE AT SPAULDING GREEN.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF COUNSEL), FOR DEFENDANT-RESPONDENT JUREK CUSTOM BUILDERS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 30, 2022. The order granted the motions of defendants to dismiss the complaint and dismissed the complaint.

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

Memorandum: Plaintiffs own a condominium home in a condominium development community, and defendant Reserve Development, LLC, incorrectly sued as the Reserve at Spaulding Green, is the developer sponsor of the applicable Condominium Offering Plan (Plan). Defendant HDJ Builders, Inc., doing business as Jurek Builders, incorrectly sued as Jurek Custom Builders (Jurek), is a building co-sponsor of the Plan. Plaintiffs commenced this action for breach of contract and private nuisance after Jurek built an adjacent single-family condominium home (new home) to plaintiffs' home that was much larger than plaintiffs' home. Plaintiffs alleged that the new home did not conform to the requirements of the Plan and thus defendants were in breach of their contract with plaintiffs. Plaintiffs further alleged that the new home substantially interfered with plaintiffs' right to use and enjoy their property inasmuch as the configuration of the new home and its landscaping caused water to drain onto plaintiffs' property, and the new home "ruin[ed] virtually every view" from plaintiffs' home and "block[ed] . . . sunlight." Defendants separately moved to dismiss the

complaint, and Supreme Court granted the motions in their entirety.

We agree with plaintiffs that the court erred in granting those parts of the motions seeking dismissal of the first cause of action, for breach of contract, and we therefore modify the order by denying the motions in part and reinstating that cause of action. "A CPLR 3211 (a) (1) motion 'may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law' " (*Jesmer v Retail Magic, Inc.*, 55 AD3d 171, 180 [2d Dept 2008], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see NCA Comp, Inc. v 1289 Clifford Ave.*, 151 AD3d 1544, 1544 [4th Dept 2017]). In seeking dismissal of the first cause of action, defendants argued that plaintiffs were not parties to the Plan and there was therefore no enforceable contract between plaintiffs and defendants. We conclude that the documentary evidence did not conclusively establish that plaintiffs were not contractual parties to the Plan (*see Watts v Champion Home Bldrs. Co.*, 15 AD3d 850, 851 [4th Dept 2005]; *see generally 511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 285 AD2d 244, 247 [1st Dept 2001], *affd* 98 NY2d 144 [2002]; *Caprer v Nussbaum*, 36 AD3d 176, 200 [2d Dept 2006]; *Schiller v Community Tech.*, 78 AD2d 762, 762-763 [4th Dept 1980]). Although plaintiffs were not signatories to the Plan, the Plan states that any person "desiring to purchase a Unit will be *required* to execute a Purchase Agreement in the form contained herein" (emphasis added). The Plan further provides that "a Co-Sponsor will not commence construction of a Unit until it enters into a Purchase Agreement with a prospective Purchaser." The Plan was fully incorporated and made a part of all purchase agreements. Defendants do not dispute that plaintiffs contracted with a co-sponsor of the Plan for the construction and purchase of their unit, and thus plaintiffs necessarily entered into a purchase agreement that incorporated the Plan (*see generally Plaza PH2001, LLC v Plaza Residential Owners LP*, 79 AD3d 587, 587 [1st Dept 2010]; *Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1076 [2d Dept 2007]).

As an alternative ground for affirmance (*see generally Dutton v Young Men's Christian Assn. of Buffalo Niagara*, 207 AD3d 1038, 1044-1045 [4th Dept 2022]), defendants contend that documentary evidence established that they did not breach the Plan. We reject that contention. Plaintiffs allege in their complaint that the new home does not conform with model designs indicated in the Plan and that defendants were required to obtain permission from plaintiffs before amending the Plan and building the new home, and plaintiffs rely on the Rights and Obligations of Co-Sponsors section of the Plan in support of their allegations. In a CPLR 3211 (a) (1) motion, "our role is not to interpret the contract, but to determine whether defendants met their burden of proffering documentary evidence conclusively refuting plaintiff[s'] allegations" (*Shephard v Friedlander*, 195 AD3d 1191, 1194 [3d Dept 2021]), and we conclude that defendants did not meet their burden (*see University Hill Realty, Ltd. v Akl*, 214 AD3d 1467, 1468-1469 [4th Dept 2023]; *Thomas A. Sbarra Real Estate, Inc. v Lavelle-Tomko*, 84 AD3d 1570, 1571 [3d Dept 2011]).

Contrary to plaintiffs' contention, however, the court properly granted those parts of the motions seeking dismissal of the second cause of action, for private nuisance, for failure to state a cause of action. The elements of a private nuisance cause of action are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, [and] (5) caused by another's conduct in acting or failure to act" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977], *rearg denied* 42 NY2d 1102 [1977]; *see Vacca v Valerino*, 16 AD3d 1159, 1160 [4th Dept 2005]). Insofar as plaintiffs alleged that the new home ruined plaintiffs' view from their home and blocked the sunlight, we conclude that plaintiffs have failed to state a cause of action for private nuisance (*see generally Schaefer v Dehauski*, 71 AD3d 1571, 1571-1572 [4th Dept 2010]; *Ruscito v Swaine, Inc.*, 17 AD3d 560, 561 [2d Dept 2005], *lv denied* 5 NY3d 704 [2005], *cert denied* 546 US 978 [2005]). We further conclude that plaintiffs failed to state a cause of action for private nuisance based on the allegation that the configuration of the new home and its landscaping caused water to drain onto plaintiffs' property. A property owner has no right "to collect the surface-water from its lands . . . into an artificial channel, and discharge it upon the lands of another" (*Noonan v City of Albany*, 79 NY 470, 476 [1880]; *see Bono v Town of Humphrey*, 188 AD3d 1744, 1745 [4th Dept 2020]). Here, however, plaintiffs failed to allege that defendants drained water onto their property by artificial means (*see generally Bono*, 188 AD3d at 1745; *Baker v City of Plattsburgh*, 46 AD3d 1075, 1076 [3d Dept 2007]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

1025

CA 23-00079

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

ALEX S. VIAL, PLAINTIFF-APPELLANT

V MEMORANDUM AND ORDER

VELOCITY SERVERS, INC., NOW KNOWN AS WNY IT SERVICES, INC., DOING BUSINESS AS COLORCROSSING, DEFENDANT-RESPONDENT.

COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 22, 2022. The order denied in part the motion of plaintiff for summary judgment and dismissed plaintiff's breach of contract cause of action with respect to a sale bonus.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the first cause of action in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, damages arising from defendant's alleged breach of contract with respect to a retention bonus agreement (agreement) that required payment to plaintiff of, among other things, an annual bonus for the year 2018 and a sale bonus. Pursuant to the agreement, plaintiff was entitled to an annual bonus of 10% of defendant's "net profits" each year, and a sale bonus of 10% of the "net proceeds" of a sale "[i]n the event [defendant] sells all or a substantial portion of its assets ('Assets Sale'), and as a result of said sale [plaintiff] is no longer employed by [defendant], and [plaintiff] following such sale has no ownership interest, directly or indirectly, in the purchaser." In 2018, defendant sold a portion of its assets to non-party Deluxe Small Business Sales, Inc. (Deluxe), with defendant retaining only a leased data center. Plaintiff, with the understanding that he would no longer be able to work for defendant after the sale was completed, accepted a position with Deluxe, as did the majority of defendant's employees. The following year, Deluxe issued nominal shares of stock to plaintiff, along with other employees, as part of a company-wide employee-compensation program. Plaintiff commenced the instant lawsuit when defendant refused to pay him an annual bonus, pro-rated, for 2018, or a

sale bonus. Plaintiff moved for, inter alia, summary judgment on his cause of action for breach of contract arising from defendant's alleged failure to pay the sale bonus and the annual bonus for the year 2018 and dismissing defendant's counterclaims, and plaintiff now appeals from an order that, among other things, denied those parts of plaintiff's motion and sua sponte dismissed plaintiff's breach of contract cause of action with respect to the sale bonus.

We agree with plaintiff that Supreme Court erred in determining as a matter of law that plaintiff voluntarily resigned from defendant after the sale of assets to Deluxe and we therefore conclude that the court further erred in sua sponte dismissing that part of plaintiff's cause of action for breach of contract with respect to the sale bonus. "[T]he role of the courts in resolving summary judgment motions is 'issue finding, not issue determination' " (*Glennon v West Taft Rd. Assoc., LLC*, 215 AD3d 1246, 1248 [4th Dept 2023]), and the court's authority to search the record upon a summary judgment motion pursuant to CPLR 3212 (b) is limited to the "issue[s] that [are] the subject of the motions before the court" (*Delaine v Finger Lakes Fire & Cas. Co.*, 23 AD3d 1143, 1144 [4th Dept 2005]). Defendant did not contend on the motion that the evidence established as a matter of law that plaintiff voluntarily resigned and, indeed, the evidence in the record demonstrates that the sale to Deluxe could have resulted in potentially significant changes to plaintiff's employment duties and compensation, including his annual bonuses, thus establishing that there is an issue of fact whether plaintiff's resignation was voluntary or was a constructive discharge as a result of the sale (*see generally Henrich v Phazar Antenna Corp.*, 33 AD3d 864, 866-867 [2d Dept 2006]; *Romano v Basicnet, Inc.*, 238 AD2d 910, 911 [4th Dept 1997]). We therefore modify the order accordingly.

We reject plaintiff's contention that the court erred in denying his motion insofar as it sought summary judgment on the breach of contract cause of action with respect to the sale bonus and the annual bonus for the year 2018 and dismissal of defendant's counterclaim for overpayment of annual bonuses. With respect to the sale bonus, plaintiff failed to submit evidence establishing the value of the data center that was retained by defendant following the sale of assets to Deluxe, and thus "[t]he evidence submitted by [plaintiff] in support of [that part of his] motion was insufficient to establish as a matter of law that" the sale of assets to Deluxe comprised a substantial portion of defendant's assets (*Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1400 [4th Dept 2018]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). With respect to those parts of plaintiff's motion seeking summary judgment on the cause of action for breach of contract regarding the annual bonus for the year 2018 and dismissal of defendant's counterclaim for alleged overpayment of the annual bonuses, the parties' submissions of conflicting expert opinions regarding the proper method for determining the "net proceeds" to be used to calculate the annual bonuses presents a classic "battle of the experts that is properly left to a jury for resolution" (*Cooke v*

Corning Hosp., 198 AD3d 1382, 1383 [4th Dept 2021] [internal quotation marks omitted]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1037

OP 23-00778

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

IN THE MATTER OF DARRYL CARR AND
PARK AVENUE ESTATES, LLC, PETITIONERS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT.

KAVINOKY COOK LLP, BUFFALO (SCOTT C. BECKER OF COUNSEL), FOR PETITIONERS.

HURWITZ FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent to condemn certain real property.

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

Memorandum: Petitioners commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent, City of Buffalo (City), authorizing the condemnation of two parcels of property owned by petitioners. Pursuant to EDPL 207, the scope of this Court's review of a determination to condemn property is " 'very limited' " (*Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed & lv denied* 14 NY3d 924 [2010], quoting *Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546 [2006]). We must either confirm or reject the condemnor's determination, and our review is "confined to whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with [the State Environmental Quality Review Act ([SEQRA] ECL art 8)] and EDPL article 2; and (4) the acquisition will serve a public use" (*Grand Lafayette Props. LLC*, 6 NY3d at 546; *see* EDPL 207 [C]; *Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 299 [4th Dept 2002], *lv denied* 99 NY2d 609 [2003]). "The burden is on the party challenging the condemnation to establish that the determination was without foundation and baseless . . . Thus, [i]f an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the [condemnor's] determination should be confirmed" (*Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency*, 112 AD3d 1351, 1352 [4th Dept 2013], *appeal dismissed* 22 NY3d

1165 [2014], *lv denied* 23 NY3d 905 [2014] [internal quotation marks omitted]; *see Matter of Eisenhauer v County of Jefferson*, 122 AD3d 1312, 1312 [4th Dept 2014]).

Petitioners' contention that the City violated EDPL article 3 is beyond the scope of our review (*see* EDPL 207 [C] [3]; *Matter of Neptune Assoc. v Consolidated Edison Co. of N.Y.*, 125 AD2d 473, 475 [2d Dept 1986]). We therefore do not address it.

We reject petitioners' contention that the City failed to sufficiently "give notice to the public of the purpose, time and location of its hearing [on the proposed condemnation] setting forth the proposed location of the public project including any proposed alternate locations" as required by EDPL 202 (A) (*see also* EDPL 201). The City's notice complied with the limited requirements of EDPL 202 (A) by identifying the specific parcels it sought to condemn for the purposes of relieving blight, addressing community needs, and promoting economic development in a City historic district (*see Matter of Aspen Cr. Estates, Ltd. v Town of Brookhaven*, 47 AD3d 267, 272 [2d Dept 2007], *affd* 12 NY3d 735 [2009], *cert denied* 558 US 820 [2009]; *Matter of Wechsler v New York State Dept. of Envtl. Conservation*, 76 NY2d 923, 927 [1990]; *Kaufmann's Carousel*, 301 AD2d at 302).

We reject petitioners' further contentions that the proposed taking would not serve a public use or benefit and that the City's post-hearing determination and findings failed to sufficiently identify "the proposed public project" as required by EDPL 204 (B). To the contrary, in its determination and findings the City found that petitioners had neglected the specified parcels and allowed them to deteriorate to the point where they presented a safety risk to the public and constituted a blight within a certified historic district that had "otherwise been improved to become a vibrant commercial and historically significant area, attracting tourists as well as local patrons, businesses and tenants." The City further found that this blight was impairing economic development within the otherwise revitalized historic district. The City therefore determined that it was necessary to acquire the neglected properties for the purpose of redeveloping the existing buildings thereon in keeping with the existing character of the district and preserving the properties' historic value. Thus, contrary to petitioners' contentions, this is not a case where we are precluded from determining whether the taking will serve a public use because the condemnor "professe[d] to have no idea what it intend[ed] to do with the . . . property" to be condemned (*Matter of HBC Victor LLC v Town of Victor*, 212 AD3d 121, 124 [4th Dept 2022]). Instead, "[a]lthough the [City] did not have a [redeveloper] in mind, the [City] made clear what it intended to do with the condemned property" in satisfaction of EDPL 204 (B) (*HBC Victor LLC*, 212 AD3d at 124; *see GM Components Holdings, LLC*, 112 AD3d at 1353). Further, "[r]edevelopment is a valid public purpose" (*Matter of Court St. Dev. Project, LLC v Utica Urban Renewal Agency*, 188 AD3d 1601, 1603 [4th Dept 2020]; *see Matter of United Ref. Co. of Pa. v Town of Amherst*, 173 AD3d 1810, 1811 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]), as are "the remediation of substandard or

insanitary conditions (i.e., urban blight)" (*HBC Victor LLC*, 212 AD3d at 124 [internal quotation marks omitted]; *see Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 524 [2009]) and historic preservation (*see Lubelle v City of Rochester*, 145 AD2d 954, 954 [4th Dept 1988], *lv denied* 74 NY2d 601 [1989]).

We have reviewed petitioners' remaining contentions and conclude that none warrants annulling the determination.

All concur except LINDLEY, J., who dissents and votes to grant the petition and annul the determination. Memorandum: I respectfully dissent. In their first cause of action, petitioners assert that respondent, City of Buffalo (City), did not adequately describe a public project in its notice of public hearing, as required by EDPL 202 (A). I agree. A "public project" is defined as "any program or project for which acquisition of property may be required for a public use, benefit or purpose" (EDPL 103 [G]). Although "[a] condemnor need not describe every detail of the project or the area to be condemned" in its notice, the notice must nevertheless "adequately" describe the project (*Matter of Smithline v Town & Vil. of Harrison*, 131 AD3d 1173, 1174-1175 [2d Dept 2015]; *see Matter of Aspen Cr. Estates, Ltd. v Town of Brookhaven*, 47 AD3d 267, 272 [2d Dept 2007], *affd* 12 NY3d 735 [2009], *cert denied* 558 US 820 [2009]).

Here, the City's notice pursuant to EDPL 202 (A) stated that it was considering taking petitioners' properties "for the purpose of relieving blight, addressing community needs, [and] promoting economic progress in the Cobblestone Historic District." The notice did not, however, give the public any indication what the City intended to do with the properties once the blighted conditions were alleviated. Although relieving blight, addressing community needs, and promoting economic progress may be permissible goals for taking someone's property, that description, standing alone, does not constitute adequate notice of a "public project." The fact that the City later indicated in its determination and findings that it intended to rehabilitate the subject properties, which petitioners sought to demolish so as to alleviate the blighted conditions, does not serve retroactively to cure the defects in the notice of public hearing, and in any event the City did not say what would become of the properties after they were rehabilitated at public expense. Inasmuch as the City failed to meet its statutory obligation to give the public notice of what it planned to do with the properties after alleviating their blighted conditions, I would annul the City's determination and grant the petition.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

1045

CA 23-00031

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

PETERS & ASSOCIATES, CERTIFIED PUBLIC ACCOUNTANTS, P.C., PLAINTIFF-RESPONDENT,

V ORDER

DAVID UPCRAFT, DEFENDANT-APPELLANT.

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered April 14, 2021. The order, insofar as appealed from, denied in part the cross-motion of defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 27 and 29, 2024,

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

1058

KA 22-00855

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD SHOLTZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered November 29, 2021. The judgment convicted defendant upon a plea of guilty of attempted rape in the first degree, sexual abuse in the first degree, criminal obstruction of breathing or blood circulation, assault in the second degree, endangering the welfare of a child (two counts) and resisting arrest.

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, attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]), sexual abuse in the first degree (§ 130.65 [1]), and assault in the second degree (§ 120.05 [12]), arising out of the assault of a woman who was jogging on a trail. We affirm.

Defendant contends that the showup identification procedure involving the victim was unduly suggestive and that County Court thus erred in refusing to suppress the showup identification of him by the victim. To the extent that it is preserved for our review (*see* CPL 470.05 [2]; *People v Ortiz*, 90 NY2d 533, 536-537 [1997]; *People v Johnson*, 192 AD3d 1612, 1613 [4th Dept 2021], *lv denied* 38 NY3d 1071 [2022]), we reject defendant's contention. "The showup procedure was reasonable under the circumstances because it was conducted in geographic and temporal proximity to the crime" (*People v Nance*, 132 AD3d 1389, 1390 [4th Dept 2015], *lv denied* 26 NY3d 1091 [2015] [internal quotation marks omitted]). Moreover, the showup procedure was not rendered unduly suggestive by the fact that defendant was in handcuffs and was in a police vehicle (*see People v Desmond*, 213 AD3d 1356, 1356 [4th Dept 2023]; *People v Wilson*, 104 AD3d 1231, 1232-1233 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013], *reconsideration denied*

21 NY3d 1078 [2013]). Defendant's further contention that the police officer who transported the victim to the showup procedure made suggestive or improper comments to the victim on the ride to the procedure is purely speculative and unsupported by the hearing record (*see generally People v Suber*, 256 AD2d 1086, 1086 [4th Dept 1998], *lv denied* 93 NY2d 979 [1999]; *People v Celestin*, 231 AD2d 736, 736 [2d Dept 1996], *lv denied* 89 NY2d 920 [1996]).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

1059

CAF 22-00305

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

IN THE MATTER OF SOUAD BRACKEN,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ERIC K. BRACKEN,
RESPONDENT-PETITIONER-RESPONDENT.

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

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

ANDREW G. MORABITO, EAST ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Fatimat O. Reid, J.), entered January 25, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded sole custody of the subject child to respondent-petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent mother appeals from an order that, inter alia, modified a prior custody order by awarding respondent-petitioner father sole custody of the subject child. We affirm.

Contrary to the mother's contention, Family Court did not err in refusing to appoint new counsel for her after she released her assigned counsel after two days of the fact-finding hearing, which was held on three days over the course of four months. It is well settled that "[a]n indigent party's right to court-appointed counsel under the Family Court Act is not absolute" (*Matter of Petkovsek v Snyder*, 251 AD2d 1086, 1086 [4th Dept 1998]; *see Matter of Anthony J.A. [Jason A.A.]*, 180 AD3d 1376, 1378 [4th Dept 2020], *lv denied* 35 NY3d 902 [2020]). "In order to have substitute counsel appointed, a party must establish that good cause for release existed necessitating dismissal of assigned counsel" (*Matter of Mooney v Mooney*, 243 AD2d 840, 841 [3d Dept 1997]; *see Matter of Destiny V. [Mark V.]*, 107 AD3d 1468, 1469 [4th Dept 2013]). Here, the mother did not demonstrate that good cause existed for substitution of assigned counsel (*see Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360-1361 [4th Dept 2021]; *Anthony*

J.A., 180 AD3d at 1378; *Matter of Biskupski v McClellan*, 278 AD2d 912, 912 [4th Dept 2000]). Rather, the record shows that there was just a disagreement between the mother and her counsel over trial strategy and the mother's filing of pro se violation petitions (*see generally People v Linares*, 2 NY3d 507, 511 [2004]). Contrary to the mother's further contention, the court advised her of the dangers of self-representation and conducted a searching inquiry to ensure that the mother's waiver of the right to counsel was knowing, intelligent, and voluntary (*see Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1082-1083 [4th Dept 2019]; *Matter of Anthony K.*, 11 AD3d 748, 749-750 [3d Dept 2004]).

We reject the mother's contention that the court abused its discretion in denying her request for an adjournment on the third day of the fact-finding hearing (*see Petkovsek*, 251 AD2d at 1086; *see generally Matter of Steven B.*, 6 NY3d 888, 889 [2006]). The mother's request "resulted from her lack of due diligence in preparing for the hearing" (*Steven B.*, 6 NY3d at 889; *see Matter of Latonia W. [Anthony W.]*, 144 AD3d 1692, 1692-1693 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]; *Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011]).

The contention of the Attorney for the Child (AFC) that the court improperly exercised its discretion in granting the father sole custody is not properly before us inasmuch as the AFC did not file a notice of appeal (*see Matter of Wojciulewicz v McCauley*, 166 AD3d 1489, 1492 [4th Dept 2018], *lv denied* 32 NY3d 918 [2019]; *Matter of Noble v Gigon*, 165 AD3d 1640, 1641 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Matter of Carroll v Chugg*, 141 AD3d 1106, 1106 [4th Dept 2016]).

Entered: March 15, 2024

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 23-00782

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLON J. JOHNSON, DEFENDANT-APPELLANT.

THE LAW OFFICES OF MATTHEW ALBERT, DARIEN CENTER (MATTHEW ALBERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered January 7, 2022. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon 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, after a nonjury trial, of three counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that the evidence is legally insufficient to support the conviction because the People failed to establish that he constructively possessed the three subject firearms. We conclude, however, that there is a "valid line of reasoning and permissible inferences from which a rational [trier of fact] could have found the element[of constructive possession] proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). Contrary to defendant's contention, the People established more than his "mere presence" in the apartment in which the firearms were found (*People v King*, 206 AD3d 1593, 1594 [4th Dept 2022]; *cf. People v Mighty*, 203 AD3d 1687, 1687-1688 [4th Dept 2022]). Rather, the People established through circumstantial evidence (*see People v Torres*, 68 NY2d 677, 678 [1986]; *People v Boyd*, 145 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]) that defendant "exercised 'dominion or control' over the [firearms] by a sufficient level of control over the area in which the [firearms were] found" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see People v Torrance*, 206 AD3d 1722, 1723 [4th Dept 2022]). To the extent that defendant also contends that the evidence is legally insufficient to support the conviction because the testimony of the police witnesses was incredible as a matter of law, defendant failed to preserve the

contention for our review inasmuch as he did not raise that ground in support of his motion for a trial order of dismissal (*see People v Kenney*, 209 AD3d 1301, 1302 [4th Dept 2022], *lv denied* 39 NY3d 986 [2022]; *People v Wilcher*, 158 AD3d 1267, 1267-1268 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]).

In any event, we "necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012] [internal quotation marks omitted]; *see People v Sides*, 215 AD3d 1250, 1251 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]). Nevertheless, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that the firearms in question, which were recovered from a safe pursuant to a search warrant, should have been suppressed because the search warrant application contained false statements. Defendant, however, failed to preserve that contention for our review (*see People v Franklin*, 137 AD3d 550, 552 [1st Dept 2016], *lv denied* 27 NY3d 1132 [2016]), and we decline to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we reject defendant's preserved contention that the search warrant application did not supply the requisite probable cause for the issuance of the search warrant. Contrary to defendant's contention, the information in the search warrant application was provided by an identified citizen, i.e., a resident of the apartment in which the firearms were found, and the application established that the citizen possessed the requisite basis of knowledge for the information she provided. Thus, the statements in the search warrant application were sufficient to establish probable cause inasmuch as the People satisfied both prongs of the *Aguilar-Spinelli* test for evaluating secondhand information (*see People v Bigelow*, 66 NY2d 417, 423 [1985]; *People v Holmes*, 115 AD3d 1179, 1180-1181 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014]).

Entered: March 15, 2024

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 22-01659

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHERYL J. CERRONI, 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 September 8, 2022. The judgment convicted defendant upon a jury verdict of intimidating a victim or witness in the third 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 intimidating a victim or witness in the third degree (Penal Law § 215.15 [1]). The conviction arises from an incident in which defendant repeatedly drove by the residence of a certain individual (victim), yelling threats and racial epithets toward him, just days before the victim was scheduled to provide grand jury testimony against one of defendant's sons in an attempted murder investigation.

Defendant first contends that County Court erred in permitting the People to introduce evidence that she was affiliated with members of a street gang. We reject that contention. It is well settled that "[e]vidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity" (*People v Dorm*, 12 NY3d 16, 19 [2009]). Thus, "[e]vidence regarding gang activity can be admitted to provide necessary background, or when it is 'inextricably interwoven' with the charged crime[ ], or to explain the relationships of the individuals involved" (*People v Kims*, 24 NY3d 422, 438 [2014]; *see People v Tatum*, 204 AD3d 1400, 1402 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]). We conclude that the testimony regarding defendant's affiliation with gang members here provided necessary background information to explain the relationship of defendant, her son who was the subject of the attempted murder investigation, and the victim, and to explain why

defendant's conduct was intimidating (*see People v Savery*, 209 AD3d 1268, 1269 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]), and we further conclude that the prejudicial effect of that testimony did not outweigh its probative value (*see People v Haygood*, 201 AD3d 1363, 1364 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022]).

Defendant next contends that the court improperly abused its discretion, following a *Hinton* hearing (*see generally People v Hinton*, 31 NY2d 71, 75-76 [1972], *cert denied* 410 US 911 [1973]), by excluding from the courtroom a different son of hers and two of his associates during a portion of the victim's testimony. We reject that contention. "[A] trial court's discretion to exclude the public from criminal proceedings must be exercised only when unusual circumstances necessitate it" (*People v Reid*, 40 NY3d 198, 202 [2023] [internal quotation marks omitted]), such as where, as here, a witness has "expressed fear for his safety if he testifie[s] before defendant's family and friends" (*People v Floyd*, 45 AD3d 1457, 1458 [4th Dept 2007], *lv denied* 10 NY3d 811 [2008]). Having "consider[ed] reasonable alternatives . . . and [made] findings adequate to support the [partial] closure," the court properly exercised its discretion in determining that excluding the three individuals in question for the remainder of the victim's testimony "advance[d] an overriding interest that [was] likely to be prejudiced . . . [and was] no broader than necessary to protect that interest" (*id*. [internal quotation marks omitted]; *see People v Frost*, 100 NY2d 129, 137 [2003]; *People v Ming Li*, 91 NY2d 913, 917 [1998]). Contrary to defendant's argument, the court was not required "to explain, on the record, the alternatives . . . that it considered" inasmuch as it can be inferred under the circumstances here that the court "determined that no lesser alternative would protect the articulated interest" (*People v Garay*, 25 NY3d 62, 70 [2015], *cert denied* 577 US 985 [2015] [internal quotation marks omitted]). Contrary to defendant's further argument, the fact that the victim gave some testimony on cross-examination during the hearing in which he disclaimed any fear of testifying in open court does not require reversal. The victim's testimony on direct examination during the hearing reflects that he was fearful of testifying in the presence of the three individuals in question, and the "trial court was in the best position to determine whether the witness'[s] expression of fear rose to a level justifying the [partial] closure" (*People v Williams*, 132 AD3d 439, 440 [1st Dept 2015], *lv denied* 26 NY3d 1093 [2015]; *see People v Squire*, 115 AD3d 454, 455 [1st Dept 2014], *lv denied* 23 NY3d 1043 [2014]).

Defendant additionally contends that she was deprived of a fair trial by the presence of uniformed officers in the courtroom gallery toward the end of one of the days of trial. We reject that contention. A criminal defendant " 'is entitled to have [their] guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial' " (*Holbrook v Flynn*, 475 US 560, 567 [1986]; *see People v Nelson*, 27 NY3d 361, 367 [2016], *cert denied* 580 US 880 [2016]). Thus, a trial court has an "affirmative obligation to control conduct

and decorum in the courtroom, in order to promote the fair administration of justice for all" (*Nelson*, 27 NY3d at 367), including where uniformed officers are present in the courtroom gallery (*see People v Allen*, 183 AD3d 1284, 1285-1286 [4th Dept 2020], *affd* 36 NY3d 1033 [2021]). Inasmuch as the record here is "devoid of any facts establishing where the uniformed officers were located or how many of them were [present], there is no basis for us to conclude that their presence in the courtroom presented" an unacceptable risk "of impermissible factors coming into play" (*id*. at 1286 [internal quotation marks omitted]; *see People v Acosta*, 208 AD3d 1579, 1581 [4th Dept 2022], *lv denied* 39 NY3d 1076 [2023]).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention that the evidence is legally insufficient to support her conviction (*see People v Gamble*, 74 NY2d 904, 905-906 [1989]; *People v Henderson*, 265 AD2d 573, 573 [2d Dept 1999], *lv denied* 94 NY2d 880 [2000]). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). There was nothing about the victim's testimony that rendered it "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*Savery*, 209 AD3d at 1270 [internal quotation marks omitted]), and the conflicting testimony of the victim and defendant's witness merely "raised issues of credibility for the jury to resolve" (*People v Watts*, 218 AD3d 1171, 1173-1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023] [internal quotation marks omitted]).

Defendant further contends that she was denied a fair trial due to prosecutorial misconduct based on statements made by the prosecutor outside the presence of the jury relating to defendant's guilt, and based on purportedly racially charged comments made by the prosecutor during summation. With respect to the statements made by the prosecutor outside the presence of the jury, while we agree with defendant that "a prosecutor's mission is not so much to convict as it is to achieve a just result," we conclude that "there is no indication [here] that the prosecutor's allegedly improper motives affected this case" (*People v Hunt*, 39 AD3d 961, 964 [3d Dept 2007], *lv denied* 9 NY3d 845 [2007] [internal quotation marks omitted]). With respect to the prosecutor's comments during summation, the contention is not preserved for our review inasmuch as defendant did not object to those comments (*see* CPL 470.05 [2]). In any event, we conclude that the comments did not interject improper racial considerations but, rather, were merely "fair comment on the evidence and fair response to defense counsel's summation" (*People v Wagoner*, 195 AD3d 1595, 1600 [4th Dept 2021], *lv denied* 37 NY3d 1030 [2021], *reconsideration denied* 37 NY3d 1100 [2021], *cert denied* — US —, 142 S Ct 867 [2022]; *see People v Lewis*, 46 AD3d 943, 946 [3d Dept 2007]).

Finally, we reject defendant's contention that the sentence is

unduly harsh and severe.

Entered: March 15, 2024

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 21-00639

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAJEE ROUSE, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 April 15, 2021. The judgment convicted defendant upon a guilty plea of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Although defendant's challenge to the constitutionality of Penal Law § 265.03 in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) would survive even a valid waiver of the right to appeal (*see People v Benjamin*, 216 AD3d 1457, 1457 [4th Dept 2023]), defendant failed to raise a constitutional challenge to the statute before Supreme Court and his challenge is therefore not preserved for our review (*see* CPL 470.05 [2]; *People v Cabrera*, — NY3d —, —, 2023 NY Slip Op 05968, *2-7 [2023]; *People v David*, — NY3d —, —, 2023 NY Slip Op 05970, *3-4 [2023]; *Benjamin*, 216 AD3d at 1457). We decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: March 15, 2024

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 23-01180

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

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE ASSURANCE COMPANY, NATIONWIDE PROPERTY & CASUALTY, TITAN INDEMNITY COMPANY, VICTORIA FIRE & CASUALTY COMPANY AND VICTORIA AUTOMOBILE INSURANCE COMPANY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SILVA ACUPUNCTURE, P.C., DEFENDANT-APPELLANT.

THE RYBAK FIRM, PLLC, BROOKLYN (MAKSIM LEYVI OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOLLANDER LEGAL GROUP, P.C., MELVILLE (ALLAN S. HOLLANDER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order and judgment (one paper) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered January 3, 2023. The amended order and judgment, inter alia, granted the motion of plaintiffs for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking a judgment declaring that they are not obligated to pay certain insurance claims and alleging that defendant, by repeatedly failing to appear at requested examinations under oath (EUOs), breached a material condition precedent to coverage. Plaintiffs then moved for summary judgment on the complaint. Supreme Court granted the motion and issued a declaration in plaintiffs' favor. Defendant now appeals, and we affirm.

We conclude upon our review of the record that plaintiffs met their burden as movants and that defendant failed to raise a triable issue of fact (*see Nationwide Affinity Ins. Co. of Am. v Jamaica Wellness Med., P.C.*, 180 AD3d 1379, 1381 [4th Dept 2020]; *Nationwide Affinity Ins. Co. of Am. v Beacon Acupuncture, P.C.*, 175 AD3d 1836, 1837 [4th Dept 2019]). Contrary to defendant's contention, plaintiffs established that they had a "specific objective justification"

supporting the use of EUOs (11 NYCRR 65-3.5 [e]). In addition, defendant's " 'mere hope or speculation' that further discovery will lead to evidence sufficient to defeat [plaintiffs' motion] is insufficient to warrant denial thereof" (*Kaufmann's Carousel, Inc. v Carousel Ctr. Co. LP*, 87 AD3d 1343, 1345 [4th Dept 2011], *lv dismissed* 18 NY3d 975 [2012], *rearg denied* 19 NY3d 938 [2012]; *see Austin v CDGA Natl. Bank Trust & Canandaigua Natl. Corp.*, 114 AD3d 1298, 1301 [4th Dept 2014]; *see generally* CPLR 3212 [f]).

Finally, defendant's contentions concerning the scheduling of EUOs are improperly raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: March 15, 2024

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 23-00200

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

IN THE MATTER OF KERRY K., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Donald A. Greenwood, J.), entered January 11, 2023, in a proceeding pursuant to Mental Hygiene Law article 10. The order continued the confinement of petitioner to a secure treatment facility.

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

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

At the annual review hearing, respondent had the burden to prove, by clear and convincing evidence, that petitioner was currently a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.09 [d], [h]). "A person may be found to be a dangerous sex offender requiring confinement if that person 'suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility' " (*Matter of Ezra B. v State of New York*, 221 AD3d 1597, 1598 [4th Dept 2023], quoting § 10.03 [e]; *see Matter of Nushawn W. v State of New York*, 215 AD3d 1227, 1228 [4th Dept 2023], *lv denied* 40 NY3d 901 [2023]).

Here, contrary to petitioner's contention, Supreme Court's determination that he suffers from a mental abnormality is not against the weight of the evidence. A mental abnormality is "a congenital or acquired condition, disease or disorder that affects the emotional,

cognitive, or volitional capacity of a person in a manner that predisposes [them] to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (Mental Hygiene Law § 10.03 [i]; *see Nushawn W.*, 215 AD3d at 1228-1229). Respondent's expert opined that petitioner suffered from antisocial personality disorder (ASPD) with high psychopathic traits. She also opined that petitioner had a high score on the Severe Sexual Sadism Scale, although she testified that she did not diagnose petitioner with sexual sadism inasmuch as he was one point shy of the level for diagnosis. Furthermore, the record reflects that petitioner refused to allow respondent's expert to interview him, and we note that we may consider that refusal as a factor in our analysis (*see Matter of State of New York v Jesus H.*, 176 AD3d 646, 648 [1st Dept 2019], *appeal dismissed* 35 NY3d 1103 [2020]; *see also* § 10.07 [c]).

As petitioner correctly contends, a diagnosis of ASPD, alone, is insufficient to support a mental abnormality finding under Mental Hygiene Law article 10 (*see Matter of State of New York v Dennis K.*, 27 NY3d 718, 725 [2016], *cert denied* 580 US 1023 [2016]; *Matter of State of New York v Donald DD.*, 24 NY3d 174, 177 [2014]). However, "[w]hen supported by expert testimony, a diagnosis of ASPD and psychopathy is legally sufficient to provide a basis for a finding of mental abnormality" (*Matter of Doy S. v State of New York*, 196 AD3d 1165, 1167 [4th Dept 2021]; *see Matter of Clarence H. v State of New York*, 195 AD3d 1532, 1533 [4th Dept 2021]).

Respondent's expert further opined, based on her comprehensive review of petitioner's psychological records, that petitioner's conditions predisposed him to commit sexual offenses and that he had serious difficulty controlling such conduct. Although the independent expert called as a witness by petitioner opined that petitioner did not have a mental abnormality, the court "was in the best position to evaluate the weight and credibility of the conflicting [expert] testimony presented," and we see no reason to disturb the court's decision to credit the testimony of respondent's expert (*Matter of Derek G. v State of New York*, 174 AD3d 1360, 1361-1362 [4th Dept 2019] [internal quotation marks omitted]).

We similarly reject petitioner's contention that the determination that he is a dangerous sex offender requiring confinement is otherwise against the weight of the evidence (*see* Mental Hygiene Law § 10.03 [e]). Respondent's expert concluded that, as a result of petitioner's mental conditions, diseases or disorders, he had such an inability to control his behavior that he is likely to commit sex offenses if not confined to a secure treatment facility. Respondent's expert also opined that petitioner posed a high risk for sexual violence based on the Violence Risk Scale-Sex Offender version, a test designed to evaluate an individual's risk of sexual violence (*see Matter of Allan M. v State of New York*, 163 AD3d 1493, 1494 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018]). In addition, expert testimony "established that petitioner has made very little progress in sex offender treatment based on his sporadic attendance and superficial participation" and that, in general, "petitioner has shown

a lack of interest in meaningfully discussing his prior offenses and has not been able to develop insight into his offense cycle" (*Matter of Edward T. v State of New York*, 185 AD3d 1423, 1424 [4th Dept 2020]). Again, "[t]he court was 'in the best position to evaluate the weight and credibility of the conflicting [expert] testimony presented,' " and we see no reason to disturb the court's decision to credit the testimony of respondent's expert (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]).

Entered: March 15, 2024

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 23-01293

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

JESSICA TANTALO, AS ADMINISTRATOR OF
THE ESTATE OF PATRICK R. BAKER, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

CLIFTON SPRINGS HOSPITAL & CLINIC
FOUNDATION, INC., DOING BUSINESS AS CLIFTON
SPRINGS HOSPITAL & CLINIC, CLIFTON SPRINGS
SANITARIUM CO., DOING BUSINESS AS CLIFTON
SPRINGS HOSPITAL & CLINIC, ROCHESTER REGIONAL
HEALTH, DOING BUSINESS AS CLIFTON SPRINGS
HOSPITAL & CLINIC, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL C. PRETSCH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LACY KATZEN LLP, ROCHESTER (JACQUELINE M. THOMAS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered April 14, 2023. The order, inter alia, granted plaintiff’s motion to strike the answer of defendants-appellants.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 6, 2024,

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

Entered: March 15, 2024

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 23-01414

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

JESSICA TANTALO, AS ADMINISTRATOR OF
THE ESTATE OF PATRICK R. BAKER, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

CLIFTON SPRINGS HOSPITAL & CLINIC
FOUNDATION, INC., DOING BUSINESS AS CLIFTON
SPRINGS HOSPITAL & CLINIC, CLIFTON SPRINGS
SANITARIUM CO., DOING BUSINESS AS CLIFTON
SPRINGS HOSPITAL & CLINIC, ROCHESTER REGIONAL
HEALTH, DOING BUSINESS AS CLIFTON SPRINGS
HOSPITAL & CLINIC, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL C. PRETSCH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LACY KATZEN LLP, ROCHESTER (JACQUELINE M. THOMAS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered July 14, 2023. The order, inter alia, denied that part of the motion of defendants-appellants seeking leave to renew their opposition to plaintiff's motion to strike the answer of defendants-appellants.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 6, 2024,

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

15

CA 23-00308

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

INEZ MIRCO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOPS MARKETS, LLC, AND TOPS MARKETS, LLC,
DOING BUSINESS AS TOPS FRIENDLY MARKETS,
DEFENDANTS-APPELLANTS.

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

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 1, 2023. The order denied defendants' motion for summary judgment.

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

Memorandum: In this personal injury action arising from injuries plaintiff allegedly sustained when she slipped and fell on chicken grease near the rotisserie chicken display in defendants' supermarket, defendants appeal from an order denying their motion for summary judgment dismissing the complaint. We affirm.

Generally, "landowners and business proprietors have a duty to maintain their properties in reasonably safe condition" (*Andrews v JCP Groceries, Inc.*, 208 AD3d 1607, 1607-1608 [4th Dept 2022] [internal quotation marks omitted]). Thus, as the proponents of a motion for summary judgment, "defendant[s] had the initial burden of establishing that [they] did not create the dangerous condition that caused plaintiff to fall and did not have actual or constructive notice thereof" (*Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 1505 [4th Dept 2015] [internal quotation marks omitted]).

Contrary to defendants' contention, we conclude that they failed to meet their initial burden of establishing that they did not create the allegedly dangerous condition. In support of their motion, defendants submitted the deposition testimony of a former supermarket employee, who testified that the rotisserie chicken display near where plaintiff fell was too hot and caused the bottoms of the chicken packaging to melt and leak grease. Thus, triable issues of fact exist

with respect to whether defendants created the allegedly dangerous condition (*see Lauzon v Stop & Shop Supermarket*, 188 AD3d 856, 857 [2d Dept 2020]; *see also Bregaudit v Loretto Health & Rehabilitation Ctr.*, 211 AD3d 1582, 1585 [4th Dept 2022]; *Britt v Northern Dev. II, LLC*, 199 AD3d 1434, 1436 [4th Dept 2021]).

We likewise conclude that defendants failed to meet their initial burden of establishing that they did not have actual notice of the allegedly dangerous condition. Although defendants submitted the deposition testimony of the manager on duty in which she testified that she did not personally observe any dangerous condition in the area where plaintiff fell, defendants "failed to submit any evidence establishing that other employees did not observe any [grease] on the [floor] before [the accident]" (*Lewis v Carrols LLC*, 158 AD3d 1055, 1056 [4th Dept 2018] [internal quotation marks omitted]; *see Rivera*, 125 AD3d at 1505).

Finally, we conclude that defendants also failed to meet their initial burden of establishing that they did not have constructive notice of the allegedly dangerous condition. "To constitute constructive notice, a defect [or dangerous condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Rivera*, 125 AD3d at 1505). Thus, "[t]o meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (*Clark v Stop & Shop Supermarket Co., LLC*, 204 AD3d 746, 747 [2d Dept 2022]; *see generally Hunt v Dolgencorp of N.Y., Inc.*, 207 AD3d 1172, 1172-1173 [4th Dept 2022]). "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" (*Rodriguez v Shoprite Supermarkets, Inc.*, 119 AD3d 923, 923 [2d Dept 2014] [internal quotation marks omitted]; *see Carr v Midtown Rochester Props., LLC*, 67 AD3d 1469, 1469-1470 [4th Dept 2009]). In this case, although defendants submitted deposition testimony and an affidavit from the manager on duty indicating that she and other employees were responsible for performing inspections every 15 to 20 minutes, defendants' submissions did not establish that the inspections actually occurred. Rather, the manager on duty averred only that she had "walked through" the area where plaintiff fell. Defendants' submissions are devoid of evidence that the manager on duty, or any other employee, performed an inspection, and triable issues of fact therefore remain with respect to whether defendants had constructive notice (*see Clark*, 204 AD3d at 747; *Arghittu-Atmekjian v TJX Cos., Inc.*, 193 AD3d 1395, 1396 [4th Dept 2021]; *Farrauto v Bon-Ton Dept. Stores, Inc.*, 143 AD3d 1292, 1293 [4th Dept 2016]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

26

CAF 22-00533

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

IN THE MATTER OF ADRIAN KIRKLAND,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TANGELINE CRAWFORD, RESPONDENT-APPELLANT.

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

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered February 18, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole legal custody and primary physical custody of the subject child.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent mother appeals from an order that, inter alia, granted petitioner father sole legal custody and primary physical custody of the subject child.

We reject the mother's contention that summary reversal is required where 47 minutes of testimony could not be transcribed due to an audio recording malfunction. Preliminarily, by failing to object to the method used for reconstructing that testimony and failing to allege that the testimony was not properly reconstructed, the mother failed to preserve for our review "any claim of appellate prejudice" as a result thereof (*Matter of China Fatimah S.*, 272 AD2d 138, 138 [1st Dept 2000], *lv denied* 95 NY2d 769 [2000]) and, in any event, summary reversal is not required where, as here, "[t]he record, including the minutes of [the] reconstruction hearing . . . , is adequate for meaningful appellate review" (*Matter of Regina A.*, 43 AD3d 725, 726 [1st Dept 2007]; *see e.g. Wagner v Wagner*, 217 AD3d 1509, 1510 [4th Dept 2023]).

Contrary to the mother's further contention, while Family Court did not make an express finding of a change in circumstances, upon our

own independent review of the matter (*see Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1768 [4th Dept 2016]), we conclude that the father established the requisite change in circumstances. We also conclude that, contrary to the mother's contention, the court did not err in awarding custody of the subject child to the father. It is well settled that " 'a court's determination regarding custody . . . , based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Matter of DeVore v O'Harra-Gardner*, 177 AD3d 1264, 1266 [4th Dept 2019]). Here, we perceive no basis to disturb the court's credibility assessment and factual findings, and we conclude that its custody determination is supported by a sound and substantial basis in the record (*see id*.).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

34

CA 23-00611

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

ROBERT W. KRAMER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES N. KLEIBER AND KATHLEEN J. KLEIBER,
DEFENDANTS-RESPONDENTS.

HUFFMAN LAW FIRM, P.C., AUBURN (JUSTIN T. HUFFMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CARL J. DEPALMA, AUBURN, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered October 5, 2022. The order, insofar as appealed from, granted that part of defendants' motion seeking to dismiss the trespass claim.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of defendants' motion seeking to dismiss the trespass claim is denied, and that claim is reinstated.

Memorandum: Plaintiff commenced this action to quiet title pursuant to RPAPL article 15 and sought equitable relief or, alternatively, monetary damages based on his allegations that defendants trespassed and improperly installed plumbing that encroached on his property when they connected the plumbing from their garage to a septic system on his property in 2014. Defendants moved, inter alia, to dismiss any claims of plaintiff for trespass on the ground that they are time-barred. Plaintiff appeals from the order insofar as it granted the motion to that extent, and we now reverse the order insofar as appealed from.

Contrary to defendants' contention, plaintiff's claim for trespass seeking monetary damages should not be analyzed for statute of limitations purposes in the same way as a claim for the artificial diversion of water onto an adjoining property (*see generally Alamio v Town of Rockland*, 302 AD2d 842, 842, 844 [3d Dept 2003]), inasmuch as plaintiff's trespass claim is based upon a permanent physical encroachment, i.e., the underground plumbing that defendants installed on plaintiff's property. "[The] encroaching structure is a continuing trespass [that] gives rise to successive causes of action, except where barred by acquisition of title or an easement by operation of law" (*509 Sixth Ave. Corp. v New York City Tr. Auth.*, 15 NY2d 48, 52

[1964]). " 'Thus, for purposes of the statute of limitations, suits will only be time-barred by the expiration of such time as would create an easement by prescription or change of title by operation of law,' [namely], by adverse possession" (*O'Connell v Graves*, 70 AD3d 1451, 1452 [4th Dept 2010]). Inasmuch as the complaint, which was filed on July 23, 2021, alleges that defendants' "plumbing material" was unlawfully installed on plaintiff's property in 2014, plaintiff's claim for damages here is not barred by the statute of limitations (*see* RPAPL 501 [2]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

36

KA 22-00752

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAJZHAUN ROUSE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTINE BIALY-VIAU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 28, 2022. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Reyes*, 219 AD3d 1685, 1686 [4th Dept 2023]; *People v Montgomery*, 204 AD3d 1439, 1440 [4th Dept 2022], *lv denied* 38 NY3d 1072 [2022]), we perceive no basis in the record to exercise our power to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Defendant's contention regarding the harshness of his sentence is based largely on the fact that, although defendant had no prior criminal record, his codefendant, who has an extensive criminal record, received a slightly lesser sentence than defendant for his participation in the same shooting incident. The video of the incident shows, however, that even though, as defendant contends, there was likely a third person who shot at the victims' vehicle, defendant fired at least twice as many shots as codefendant did, perhaps as many as eight or nine in total. The shots were fired in a crowded parking lot while the victims were driving away from the scene of a relatively minor physical altercation that did not involve

defendant.

Moreover, the record does not disclose the circumstances of codefendant's case or guilty plea, such as whether he cooperated with the police and prosecution or whether there were any mitigating factors in his favor. The record does demonstrate that defendant did not cooperate with the police and that, after pleading guilty on the eve of trial, he denied guilt when interviewed by the probation department for the presentence report. At no point did defendant express regret or remorse for his highly dangerous conduct. Under the circumstances, we do not find the negotiated sentence to be excessive.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

38

KA 20-01348

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MALCOLM E. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered September 25, 2020. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that his waiver of the right to appeal is invalid and that County Court erred in refusing to suppress physical evidence and statements obtained as the result of an unlawful search and seizure. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the court's suppression ruling (*see People v Potter*, 196 AD3d 1065, 1065-1066 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021], *reconsideration denied* 37 NY3d 1098 [2021]), we conclude that defendant's contention lacks merit. At the time defendant was ordered to stop riding his bicycle, he was seized for constitutional purposes (*see People v Rodriguez*, — NY3d —, —, 2023 NY Slip Op 05972, *6 [2023]). We conclude, however, that at the time the officer seized defendant, he had probable cause to believe that defendant had committed a narcotics offense and, therefore, the seizure was constitutional under the circumstances of this case (*see People v Nichols*, 175 AD3d 1117, 1118 [4th Dept 2019], *lv denied* 34 NY3d 1018 [2019]; *see generally People v De Bour*, 40 NY2d 210, 224 [1976]). "[V]arious factors, when combined with the street exchange of a tell tale sign of narcotics, may give rise to probable cause that a narcotics offense has occurred. Those factors relevant in assessing probable cause include the exchange of currency; whether the

particular community has a high incidence of drug trafficking; the police officer's experience and training in drug investigations; and any additional evidence of furtive or evasive behavior on the part of the participants" (*People v Jones*, 90 NY2d 835, 837 [1997] [internal quotation marks omitted]). Although "the passing of a telltale sign of narcotics strongly suggests an illicit drug transaction," it is not "an indispensable prerequisite to probable cause" (*id.* [internal quotation marks omitted]).

Here, the officer testified that he observed defendant conducting what appeared, based on his training and experience, to be six to eight hand-to-hand drug transactions (*see Nichols*, 175 AD3d at 1118; *People v Kirkland*, 56 AD3d 1221, 1221 [4th Dept 2008], *lv denied* 12 NY3d 785 [2009]). Specifically, even though the officer could not see the items that were exchanged, he saw defendant approach each vehicle and engage in a "hand-to-hand transaction," then reach into his waistband and retrieve something, and then engage in another hand-to-hand transaction, after which defendant walked away from the vehicle (*see Jones*, 90 NY2d at 837). The officer testified that, in his experience, it was significant that defendant reached into his waistband because that is a common place to conceal narcotics. In addition, the officer testified that the transactions took place at a known location for the sale of narcotics (*see Nichols*, 175 AD3d at 1118).

Inasmuch as the officer had probable cause to believe that defendant had committed a crime, his pat-down of defendant was permissible (*see People v Benjamin*, 51 NY2d 267, 270 [1980]; *People v Smith*, 134 AD3d 1453, 1454 [4th Dept 2015]; *People v Burnett*, 126 AD3d 1491, 1493 [4th Dept 2015]). The fact that the officer did not believe that he had probable cause to stop defendant until defendant committed a Vehicle and Traffic Law violation is of no moment. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis" (*Whren v United States*, 517 US 806, 813 [1996]; *see People v Robinson*, 97 NY2d 341, 349 [2001]). Rather, "the Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, *whatever* the subjective intent" (*Robinson*, 97 NY2d at 349 [internal quotation marks omitted]). Similarly, inasmuch as the officer had probable cause to stop defendant, we reject defendant's contention that his statements were the product of an illegal search (*see People v Gibbs*, 167 AD3d 1580, 1580 [4th Dept 2018], *lv denied* 33 NY3d 976 [2019]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

41

KA 19-01128

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE O. MAXON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (AXELLE LECOMTE-MATHEWSON 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 July 12, 2018. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree (three counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of three counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the second degree (§ 220.41 [1]), which crime he committed while awaiting sentencing following his plea in appeal No. 1. Defendant waived his right to appeal in appeal No. 2, but did not do so in appeal No. 1.

In appeal No. 1, defendant contends that his plea was not knowing, intelligent, and voluntary because the prosecutor and County Court suggested during his first appearance that he could be sentenced as a persistent felony offender based on his extensive criminal record, which included three prior felony convictions. Inasmuch as defendant's motion to withdraw his plea was not made on the ground that the plea was involuntarily entered in light of his incorrect belief that he faced a possible life sentence if convicted after trial, defendant's contention is not preserved for our review (*see People v Husted*, 215 AD3d 1269, 1271 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023]; *People v Gibson*, 140 AD3d 1786, 1787 [4th Dept 2016], *lv denied* 28 NY3d 1072 [2016]). In any event, we note that a

defendant's misapprehension of his or her sentencing exposure does not render a guilty plea involuntary as a matter of law (*see People v Davis*, 206 AD3d 1603, 1605 [4th Dept 2022]; *People v Murray*, 175 AD3d 1191, 1191 [1st Dept 2019], *lv denied* 34 NY3d 1018 [2019]). Instead, it is just one of several factors for a court to consider in determining whether a plea was voluntary (*see People v Garcia*, 92 NY2d 869, 870 [1998]).

Defendant further contends in appeal No. 1 that his plea was involuntary because it was coerced by defense counsel's alleged threat to withdraw from representing defendant if he did not plead guilty. Although preserved for our review, that contention lacks merit inasmuch as it is belied by the record (*see People v Gonzales*, 197 AD3d 880, 881 [4th Dept 2021], *lv denied* 38 NY3d 1071 [2022]; *People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). Indeed, during the plea colloquy, defendant stated that he was pleading guilty of his own free will and that no one had forced or threatened him into pleading guilty.

As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal in appeal No. 2 (*see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We nevertheless reject defendant's contention in each appeal that the sentence is unduly harsh or severe. We have reviewed defendant's remaining contentions in appeal Nos. 1 and 2 and conclude that none warrants modification or reversal of the judgment in either appeal.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

42

KA 19-01129

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE O. MAXON, ALSO KNOWN AS FLASH,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (AXELLE LECOMTE-MATHEWSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered July 12, 2018. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the second degree.

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

Same memorandum as in *People v Maxon* ([appeal No. 1] — AD3d — [Mar. 15, 2024] [4th Dept 2024]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

46

CA 23-00072

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

CARROLS RESTAURANT GROUP, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AMERICAN GUARANTEE AND LIABILITY
INSURANCE COMPANY, DEFENDANT-RESPONDENT.

DICELLO LEVITT LLP, NEW YORK CITY (GREG G. GUTZLER OF COUNSEL), AND THE CAREY LAW FIRM, GRAND ISLAND, FOR PLAINTIFF-APPELLANT.

MOUND OTTON WOLLAN & GREENGRASS LLP, NEW YORK CITY, WIGGIN AND DANA LLP (DAVID R. ROTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered November 17, 2022. The order granted the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the complaint to the extent that it seeks a declaration and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that plaintiff is not entitled to coverage from defendant for the subject loss,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff operates numerous Burger King and Popeyes restaurants throughout New York State and 22 other states and is insured under a commercial property insurance policy issued by defendant. After its restaurants were impacted by COVID-19 and related closure orders, plaintiff submitted a claim to defendant for its losses, and defendant disclaimed coverage. Plaintiff commenced this action, alleging that defendant had breached the terms of the insurance policy and seeking a declaration that the insurance policy issued by defendant provided coverage for the subject losses. Defendant moved pursuant to CPLR 3211 (a) (1) and (a) (7) to dismiss the complaint, and Supreme Court granted the motion. Plaintiff appeals.

"A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's]

claim[s]" (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092 [4th Dept 2014] [internal quotation marks omitted]). Here, defendant submitted the insurance policy as documentary proof under CPLR 3211 (a) (1) (*see Ralex Servs., Inc. v Southwest Mar. & Gen. Ins. Co.*, 155 AD3d 800, 801-802 [2d Dept 2017]).

The policy insured "against direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property." A covered cause of loss was defined as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." As recently explained by the Court of Appeals, "direct physical loss or damage requires a material alteration or a complete and persistent dispossession of insured property" (*Consolidated Rest. Operations, Inc. v Westport Ins. Corp.*, — NY3d —, —, 2024 NY Slip Op 00795, *2 [2024]). Here, plaintiff failed to allege either a material alteration or a complete and persistent dispossession of insured property, and thus the court properly determined that the policy did not cover plaintiff's claims. The court erred, however, in dismissing the complaint in its entirety and in failing to declare the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]; *D'Angelo v Philadelphia Indem. Ins. Co.*, 207 AD3d 1138, 1139-1140 [4th Dept 2022]). We therefore modify the order accordingly.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

55

CA 23-01188

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

IN THE MATTER OF IMAD SALEH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

245 ONTARIO EXPRESS, INC.,
RESPONDENT-APPELLANT,
ET AL., RESPONDENTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (TODD J. ALDINGER OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Erie County Court (Suzanne Maxwell Barnes, J.), entered April 5, 2023. The order affirmed a judgment of the Buffalo City Court issued on November 28, 2022.

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

Memorandum: In this summary holdover eviction proceeding, respondent appeals from an order that affirmed a judgment of Buffalo City Court granting petitioner landlord possession of a storefront that had been leased to a prime tenant and occupied by respondent pursuant to a sublease. We affirm.

"[T]ermination of the primary lease terminates a sub-lease" (*64 B Venture v American Realty Co.*, 179 AD2d 374, 376 [1st Dept 1992], *lv denied* 79 NY2d 757 [1992]; *see World of Food v New York World's Fair 1964-1965 Corp.*, 22 AD2d 278, 280 [1st Dept 1964]). Further, "termination of the prime lease will ordinarily prevent the exercise of a renewal option in a sublease" (*Cahill v COHI Towers Assoc.*, 160 AD2d 325, 325 [1st Dept 1990]; *see Leibowitz v Bickford's Lunch Sys.*, 241 NY 489, 496-497 [1926]; *see generally Minister, Elders & Deacons of Ref. Prot. Dutch Church of City of N.Y. v 198 Broadway*, 59 NY2d 170, 173 [1983]; *Tiger Crane Martial Arts v Franchise Stores Realty Corp.*, 235 AD2d 994, 995 [3d Dept 1997]).

Here, there is no dispute that the prime lease between petitioner and the prime tenant terminated without the prime tenant exercising his right to renewal. Thus, even assuming, arguendo, that the sublease was validly made in accordance with the terms of the prime

lease, we conclude that the sublease terminated with the prime lease. Contrary to respondent's contention, petitioner did not bind himself to the terms of the sublease by accepting rent from respondent (*see Leibowitz*, 241 NY at 498).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

57

TP 23-01548

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

IN THE MATTER OF THEODORE FEDOR, PETITIONER,

V MEMORANDUM AND ORDER

PRISCILLA LEDBETTER, CENTRAL OFFICE DIRECTOR OF TEMPORARY RELEASE PROGRAMS OF NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

KAREN MURTAGH, EXECUTIVE DIRECTOR, PRISONERS' LEGAL SERVICES OF NEW YORK, BUFFALO (ANDREW STECKER OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [Sanford A. Church, A.J.], entered July 25, 2023) to review a determination of respondent. The determination revoked petitioner's participation in the Temporary Work Release Program.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination to remove him from the work release program. Petitioner's contention that the temporary release committee failed to provide a statement of the evidence relied on (*see* 7 NYCRR 1904.2 [h] [7]) is not properly before us because he did not raise that claim in his petition (*see Matter of Kelly v Annucci*, 193 AD3d 1169, 1171 [3d Dept 2021]; *Matter of Burroughs v Colvin*, 170 AD3d 1643, 1643-1644 [4th Dept 2019]). Contrary to petitioner's further contention, the determination is supported by substantial evidence (*see Matter of Marciano v Goord*, 38 AD3d 217, 218 [1st Dept 2007]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

58

KA 21-01616

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered January 21, 2021. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and criminal possession of a weapon 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 a jury verdict, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and three counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We affirm.

Defendant contends that County Court erred in admitting in evidence surveillance video footage and recordings of phone and video calls made while defendant was incarcerated (recorded jail calls) inasmuch as that evidence lacked a proper foundation. We reject that contention. With respect to the surveillance footage, "[t]he decision to admit or exclude videotape evidence generally rests, to be sure, within a trial court's founded discretion" (*People v Patterson*, 93 NY2d 80, 84 [1999]). "Similar to a photograph, a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted" (*id.*). Here, although the evidentiary foundation established at the time the surveillance footage was entered into evidence was weak, any deficiency in that foundation was later remedied by the testimony of witnesses who confirmed the accuracy of the events depicted in the video (*see People v Cardoza*, 218 AD3d 1291, 1293 [4th Dept 2023], *lv denied* 40 NY3d 996 [2023]).

With respect to the recorded jail calls, we conclude that the People established a sufficient foundation for their admission in evidence (*see People v Harlow*, 195 AD3d 1505, 1508 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *see generally People v Ely*, 68 NY2d 520, 527-528 [1986]; *People v Sostre*, 172 AD3d 1623, 1625 [3d Dept 2019], *lv denied* 34 NY3d 938 [2019]). Defendant's identity on the recordings was established through the content of the recordings and the testimony of a police detective familiar with defendant's voice, and the testimony of individuals in charge of maintaining the jail's recording systems established that the recordings were " 'complete and accurate reproduction[s] of the conversation[s] and [had] not been altered' " (*Harlow*, 195 AD3d at 1508).

Even assuming, arguendo, that neither the surveillance footage nor the recorded jail calls were sufficiently authenticated and that the court thus erred in admitting them in evidence, we conclude that "the admission of such evidence was harmless as the evidence of . . . defendant's guilt was overwhelming, and there was no significant probability that the [alleged] error contributed to . . . defendant's conviction[ ]" (*People v Upson*, 186 AD3d 1270, 1271 [2d Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *see Cardoza*, 218 AD3d at 1293; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

We reject defendant's further contention that he was denied his right to confront one of the witnesses against him when the court received in evidence that witness's prior written statement. A defendant may not assert their constitutional right of confrontation to prevent the admission of a witness's out-of-court declarations when " 'it has been shown that the defendant procured the witness's unavailability through violence, threats or chicanery' " (*People v Smart*, 23 NY3d 213, 220 [2014]; *see People v Vernon*, 136 AD3d 1276, 1278 [4th Dept 2016], *lv denied* 27 NY3d 1076 [2016]).

At a *Sirois* hearing, the People introduced several recordings of phone calls made while defendant was incarcerated in which defendant first threatened the witness, who was his former girlfriend, and later entreated her not to testify and offered her a place to "lay low" until the trial was over. The People also introduced recordings in which defendant instructed a third party to text the witness and tell her not to cooperate and provided details on where the witness could stay and who would cover the witness's costs while she was hiding. We conclude that the court properly determined that the People established by the requisite clear and convincing evidence that the witness was unavailable to testify due to defendant's misconduct (*see People v Geraci*, 85 NY2d 359, 370 [1995]; *People v Bernazard*, 188 AD3d 1239, 1242 [2d Dept 2020], *lv denied* 36 NY3d 1095 [2021]; *People v Miller*, 61 AD3d 1429, 1429 [4th Dept 2009], *lv denied* 12 NY3d 927 [2009]).

Contrary to defendant's final contentions, we conclude that the conviction is supported by legally sufficient evidence with respect to each count (*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).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

60

KA 17-00735

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHARDEA BRADLEY, ALSO KNOWN AS ALBERTO HENRIQUEZ,
DEFENDANT-APPELLANT.

DAVID M. GIGLIO, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 23, 2017. The judgment convicted defendant upon a jury verdict of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting her upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that she was denied effective assistance of counsel based on defense counsel's failure to request a justification charge. We reject that contention. At the trial, defense counsel pursued a theory that defendant was innocent of the charged crime inasmuch as it was her codefendant who stabbed the victim. Under these circumstances, we conclude that "defense counsel's decision to advance the [innocence] defense 'was consistent with strategic decisions of a reasonably competent attorney' " (*People v Ortiz*, 167 AD3d 1562, 1563 [4th Dept 2018], *lv denied* 33 NY3d 979 [2019], quoting *People v Benevento*, 91 NY2d 708, 712 [1998]) inasmuch as the justification defense "would have been weak, at best, and . . . might have undermined a stronger defense" (*People v Richardson*, 174 AD3d 1535, 1536 [4th Dept 2019], *lv denied* 34 NY3d 983 [2019] [internal quotation marks omitted]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

67

CA 22-02003

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

CHARLOTTE MIHIGO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CYPRIEN C. MIHIGO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ALDERMAN AND ALDERMAN, PLLC, SYRACUSE (RICHARD B. ALDERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered December 13, 2022, in a divorce action. The judgment, inter alia, granted plaintiff a divorce.

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

Memorandum: On appeal from a judgment of divorce, defendant contends that plaintiff failed to meet her burden of establishing that the parties were married in Africa in 1994. We reject that contention. "[T]he well-settled marriage recognition rule 'recognizes as valid a marriage considered valid in the place where celebrated' " (*Lewis v New York State Dept. of Civ. Serv.*, 60 AD3d 216, 219 [3d Dept 2009], *affd* 13 NY3d 358 [2009]; *see Jayaram v Jayaram*, 205 AD3d 612, 612-613 [1st Dept 2022]; *Martinez v County of Monroe*, 50 AD3d 189, 191 [4th Dept 2008], *lv dismissed* 10 NY3d 856 [2008]). Here, the parties testified that they met in 1987 or 1988 in what is now known as the Democratic Republic of the Congo and began living together as husband and wife and had children together shortly thereafter. In August 1994, in preparing to travel to a refugee camp to seek asylum, they obtained a document to show that they were married. Supreme Court found that the parties were married in 1994, and we afford that determination deference inasmuch as the court was " 'in the best position to evaluate the character and credibility of the witnesses' " (*Wideman v Wideman*, 38 AD3d 1318, 1319 [4th Dept 2007]; *see Korpolinski v Korpolinski*, 195 AD3d 1427, 1427 [4th Dept 2021]). The parties' testimony showed that they were considered married in their culture in Africa (*see generally Matter of Mott v Duncan Petroleum Trans.*, 51 NY2d 289, 292-293 [1980]; *Matter of Mukuralinda v Kingombe*, 100 AD3d 1431, 1431-1432 [4th Dept 2012]).

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

68

CA 23-00006

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

CHARLOTTE MIHIGO, PLAINTIFF-RESPONDENT,

V ORDER

CYPRIEN C. MIHIGO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ALDERMAN AND ALDERMAN, PLLC, SYRACUSE (RICHARD B. ALDERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an amended order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered December 12, 2022, in a divorce action. The amended order, inter alia, directed defendant to pay maintenance to plaintiff.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

73

CA 22-01765

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

ROBERT FALLON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FIVE STAR MANAGEMENT SERVICES, LLC, NOW KNOWN AS JEMILEE, LLC, ET AL., DEFENDANTS, ASP UC SUPPORT LLC, NY URGENT CARE PRACTICE, P.C., NOW KNOWN AS WELLNOW URGENT CARE, P.C., AND NY PRIMARY CARE PRACTICE, P.C., DEFENDANTS-RESPONDENTS.

SEGAR & SCIORTINO, ROCHESTER (ERIN F. BOARDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Craig J. Doran, J.), entered May 25, 2022. The order granted the motion of defendants ASP UC Support LLC, NY Urgent Care Practice, P.C., now known as WellNow Urgent Care, P.C., and NY Primary Care Practice, P.C., for summary judgment and dismissed the complaint against those defendants.

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

Memorandum: Plaintiff commenced this action for injuries sustained during a spirometry test, which is used to measure a person's lung volume and air flow, performed at defendant NY Urgent Care Practice, P.C., now known as WellNow Urgent Care, P.C. During the administration of the test, plaintiff fainted, causing him to fall and injure, inter alia, his neck and jaw. Defendants-respondents (defendants) moved for summary judgment dismissing the complaint against them as untimely, maintaining that the action sounded in medical malpractice and was barred by the applicable statute of limitations (*see* CPLR 214-a). Supreme Court granted the motion. Plaintiff appeals, and we affirm.

Contrary to the contention of plaintiff, the court properly concluded that plaintiff's claim sounds in medical malpractice rather than ordinary negligence. The Court of Appeals has said that the "distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and 'no

rigid analytical line separates the two' " (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 787 [1996], quoting *Scott v Uljanov*, 74 NY2d 673, 674 [1989]). Thus, "a claim sounds in medical malpractice when the challenged conduct 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician' . . . By contrast, when 'the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the failure in fulfilling a different duty,' the claim sounds in negligence" (*id.* at 788). Stated another way, "[t]he distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of common everyday experience of the trier of the facts" (*Wulbrecht v Jehle*, 92 AD3d 1213, 1215 [4th Dept 2012] [internal quotation marks omitted]).

In support of the motion, defendants submitted plaintiff's complaint, which alleged that defendants were negligent in failing to, among other things, prevent plaintiff from falling during the administration of the spirometry test. Defendants further submitted plaintiff's deposition testimony, in which he stated that defendants' employee administered the test while plaintiff was standing and that it was after the employee directed plaintiff to repeat his breathing at a harder rate when plaintiff fainted. Defendants also submitted the affirmation of their expert, who opined that the allegations of negligence are directly and wholly linked to the administration of the spirometry test performed by defendants. Specifically, he concluded that decisions concerning the manner in which the test is performed, including whether to have the patient seated or standing, require a degree of medical skill not ordinarily possessed by lay persons. Thus, defendants met their initial burden of establishing that the allegedly negligent conduct "constituted an integral part of the process of rendering medical treatment" to plaintiff and therefore must be characterized as malpractice (*Scott*, 74 NY2d at 675; *cf. Weiner*, 88 NY2d at 787-788; *see also Smee v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966, 967 [4th Dept 1994]), and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Therefore, we conclude that the court properly determined that the action was subject to the medical malpractice statute of limitations and was untimely (*see generally* CPLR 214-a).

We have considered plaintiff's remaining contention and conclude that it lacks merit.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

74

CA 22-01691

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

IN THE MATTER OF BARBARA L. HENRY, DIANNE M. BROWN, DAVID J. TAYLOR AND CONNIE M. WHITTON, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF MANLIUS, TOWN OF MANLIUS CODES ENFORCEMENT OFFICER AND ABUNDANT SOLAR POWER, INC., RESPONDENTS-DEFENDANTS-RESPONDENTS.

DIRK J. OUDEMOOL, SYRACUSE, FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

HARRIS BEACH PLLC, SYRACUSE (JOSEPH V. FRATESCHI OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN BOARD OF TOWN OF MANLIUS, AND TOWN OF MANLIUS CODES ENFORCEMENT OFFICER.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT ABUNDANT SOLAR POWER, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered October 5, 2022, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment dismissed the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the provision dismissing those parts of the petition-complaint seeking declarations and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that petitioners-plaintiffs do not have a vested property right to review before the Town of Manlius Planning Board of an application for a special use permit and site plan of the solar energy system proposed by respondent-defendant Abundant Solar Power, Inc., and it is further
>
> ADJUDGED and DECLARED that Town Code § 155-27.2 is not unconstitutionally vague,

and as modified the judgment is affirmed without costs.

Memorandum: The Town of Manlius (Town) and respondent-defendant

Abundant Solar Power, Inc. (Abundant) entered into a lease agreement (lease) for Abundant to install a solar energy system on a closed landfill on Town property. At the time the lease was entered, Town Code former § 155-27.2 (former law), specifically former section 155-27.2 (D) (3) (a) (3), required Abundant to obtain a special use permit and site plan approval from the Town Planning Board (Planning Board). Abundant submitted the required application to the Planning Board, but it withdrew its application in February 2022. In March 2022, respondent-defendant Town Board of Town of Manlius (Town Board) repealed the former law and enacted a new Town Code § 155-27.2 (amended law). Pursuant to the amended section 155-27.2 (D) (4) (a) (3), medium and large solar energy systems were not subject to Planning Board review if the property on which the solar energy systems were proposed was owned by the Town.

Petitioners-plaintiffs (petitioners), residents of the Town, commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that the lease was null and void for violation of due process. Petitioners also sought to vacate the Town Board's enactment of the amended law and to vacate the building permit issued by respondent-defendant Town of Manlius Codes Enforcement Officer (CEO). Supreme Court granted the objections of respondents-defendants and dismissed the petition-complaint (complaint).

We note at the outset that petitioners have abandoned on appeal that part of the third cause of action seeking to set aside the CEO's issuance of a building permit as unauthorized and the fourth cause of action seeking a declaration that the amended law is unconstitutionally vague. We also note that the court erred in dismissing those parts of the complaint seeking declarations rather than declaring the rights of the parties, and we therefore modify the judgment accordingly (*see Restuccio v City of Oswego*, 114 AD3d 1191, 1191 [4th Dept 2014]; *Schlossin v Town of Marilla*, 48 AD3d 1118, 1119 [4th Dept 2008]; *see generally Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

We reject petitioners' contention that they had a vested right to special use permit and site plan review of the solar energy system before the Planning Board. "To establish a claim for violation of substantive due process, a party 'must establish a cognizable . . . vested property interest' . . . and 'that the governmental action was wholly without legal justification' " (*Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 59 [2011]; *see Jones v Town of Carroll*, 177 AD3d 1297, 1298 [4th Dept 2019]). Here, petitioners have not established any vested property interest (*see Matter of Santomero v Town of Bedford*, 204 AD3d 925, 927 [2d Dept 2022], *lv denied* 38 NY3d 914 [2022]; *Hilburg v New York State Dept. of Transp.*, 138 AD3d 1062, 1064 [2d Dept 2016]; *Schlossin*, 48 AD3d at 1119).

Petitioners' contention that the Town Board did not perform certain duties as required by the amended law is improperly raised for the first time on appeal (*see Matter of Zigenfus v Town of Cohocton Town Bd.*, 208 AD3d 1611, 1612 [4th Dept 2022]; *see generally Ciesinski*

v Town of Aurora, 202 AD2d 984, 985 [4th Dept 1994]). We have considered petitioners' remaining contentions and conclude that they are without merit.

Entered: March 15, 2024

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 22-00507

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEANDRE MARTIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered September 3, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree and reckless endangerment in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and reckless endangerment in the first degree (§ 120.25), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As the People correctly concede, 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]) and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Albanese*, 218 AD3d 1366, 1366-1367 [4th Dept 2023], *lv denied* 40 NY3d 995 [2023]). However, we conclude that the sentence is not unduly harsh or severe.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

81

KA 20-00764

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DHAN B. KHADKA, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered October 7, 2020. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated as a class D felony, and refusal to submit to a breath test.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of count 3 of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of driving while intoxicated as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and refusal to submit to a breath test (§ 1194 [1] [b]). As defendant contends and the People correctly concede, refusal to submit to a breath test mandated by Vehicle and Traffic Law § 1194 (1) (b) "is not a cognizable offense for which a person may be charged or convicted in a criminal court" (*People v Adams*, 201 AD3d 1311, 1312 [4th Dept 2022], *lv denied* 38 NY3d 1007 [2022]; *see People v Alim*, 204 AD3d 1418, 1419-1420 [4th Dept 2022], *lv denied* 38 NY3d 1068 [2022]; *People v Harris*, 201 AD3d 1327, 1327-1328 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022]; *People v Bembry*, 199 AD3d 1340, 1342 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]). Inasmuch as defendant was convicted by the jury of the nonexistent offense of refusal to submit to a breath test, we modify the judgment by reversing that part convicting him of count 3 of the indictment and dismissing that count (*see Alim*, 204 AD3d at 1419-1420; *Harris*, 201 AD3d at 1327-1328). Finally, we note that the certificate of conviction must be corrected to reflect that Sam L. Valleriani, J., presided at trial and sentencing (*see People v*

McKay, 197 AD3d 992, 993 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

82

CA 23-00721

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

MANUEL RIVERA-ORTIZ AND ANDRE PFANNER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WILLIAM COOK AND ANNEMARIE COOK,
DEFENDANTS-APPELLANTS.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOYLAN CODE LLP, ROCHESTER (MARK A. COSTELLO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered April 17, 2023. The order and judgment, among other things, granted plaintiffs' motion for partial summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion and vacating the second and third decretal paragraphs, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration that the parties' easement agreement (agreement) prohibits defendants from installing a fence between plaintiffs' property and certain trees that plaintiffs planted on the easement and an injunction requiring defendants to remove that part of a fence installed by defendants that blocked plaintiffs' view of those trees. Plaintiffs moved for partial summary judgment on their third cause of action, for injunctive relief, and defendants cross-moved for, inter alia, summary judgment dismissing the amended complaint. Defendants appeal from an order and judgment that granted the motion, denied the cross-motion, declared that the agreement included an easement granting plaintiffs an unobstructed view of the trees, and ordered defendants to remove the fence.

The record establishes that, a few years before the agreement was entered into, one of the plaintiffs planted trees close to the boundary line between the two contiguous parcels at issue. Plaintiffs subsequently learned that the trees had been planted on the neighboring property. After that discovery, which occurred around the time defendants purchased that property, the parties entered into the

agreement to resolve, inter alia, any lingering issues concerning the trees. The agreement generally provided that plaintiffs would be granted an easement over a portion of defendants' property to maintain the trees, and that defendants would refrain from removing any of the trees without plaintiffs' consent.

Defendants contend that Supreme Court erred in granting the motion and denying the cross-motion, inasmuch as the agreement unambiguously granted plaintiffs the right only to enter defendants' property for the purpose of maintaining the trees—it did not expressly grant plaintiffs an easement to view the trees or preclude defendants from erecting the fence. "To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the agreement is the only construction which can fairly be placed thereon" (*Jellinick v Naples & Assoc.*, 296 AD2d 75, 78-79 [4th Dept 2002] [internal quotation marks omitted]). As relevant here, "[w]hen the language of [an agreement] is ambiguous, its construction presents a question of fact [that] may not be resolved by the court on a motion for summary judgment" (*Cooling Tower Specialties, Inc. v Yaro Enters., Inc.*, 67 AD3d 1445, 1445 [4th Dept 2009] [internal quotation marks omitted]; *see generally Corter-Longwell v Juliano*, 200 AD3d 1578, 1584 [4th Dept 2021]).

In interpreting the agreement, we must "construe[ ] [it] according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law" (Real Property Law § 240 [3]; *see Mertowski v Werthman*, 45 AD3d 1312, 1313 [4th Dept 2007]; *see generally Herman v Roberts*, 119 NY 37, 42-43 [1890]). "The 'intent' at issue is the objective intent of the parties manifested by the language of the [agreement]; unless the [agreement] is ambiguous, evidence of unexpressed, subjective intentions of the parties is irrelevant" (*Modrzynski v Wolfer*, 234 AD2d 901, 902 [4th Dept 1996]). In turn, the "language of [an] easement is ambiguous" when it is "reasonably susceptible of more than one interpretation" (*Sundby v Kay*, 63 AD3d 1646, 1647 [4th Dept 2009] [internal quotation marks omitted]), at which point the court may "look into surrounding circumstances"—i.e., extrinsic evidence—to aid its interpretation (*Loch Sheldrake Assoc. v Evans*, 306 NY 297, 304 [1957]; *see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]).

Here, "[b]y having each sought summary judgment, both parties bore the burden of establishing that their construction of the [agreement] is the only construction which can fairly be placed thereon" (*Birdsong Estates Homeowners Assn., Inc. v D.P.S. Southwestern Corp.*, 101 AD3d 1735, 1736 [4th Dept 2012] [internal quotation marks omitted]; *see Jellinick*, 296 AD2d at 78-79). Neither party met that burden. Although "both plaintiff[s] and defendant[s] relied upon the purportedly plain and unambiguous provisions of the [agreement] to support their respective motions, the[ir] intricate effort[s] . . . to explain the meaning of [the agreement] demonstrate[ ] the lack of clarity and the ambiguity of the language thereof" (*Birdsong Estates Homeowners Assn.*, 101 AD3d at 1736 [internal quotation marks omitted]). Consequently, we conclude that the court properly denied the cross-motion, but erred in granting the

motion and in issuing a declaration and an injunction in plaintiffs' favor. We modify the order and judgment accordingly.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

84

CA 23-00700

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

JAMES LALIME AND JUDY LALIME,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

R.A.C. ENGINEERING P.C., ET AL., DEFENDANTS,
AND TOWN OF CLARENCE, DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO, GERBER CIANO KELLY BRADY LLP (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (THOMAS D. LYONS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered April 3, 2023. The order denied the motion of defendant Town of Clarence to dismiss the complaint and all cross-claims against it and granted the cross-motion of plaintiffs for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross-motion is denied, the motion is granted and the complaint and all cross-claims against defendant Town of Clarence are dismissed.

Memorandum: On September 18, 2020, plaintiffs' house collapsed. Plaintiffs served an untimely notice of claim on defendant Town of Clarence (Town), followed by an amended summons and a complaint. The Town moved to dismiss the complaint and all cross-claims against it based on plaintiffs' failure to serve a timely notice of claim and, by notice of cross-motion filed on September 6, 2022, plaintiffs sought, inter alia, leave to serve a late notice of claim. The Town now appeals from an order denying the motion and granting the cross-motion. We reverse.

It is well settled that an application for the extension of time within which to serve a notice of claim "may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled" (*Pierson v City of New York*, 56 NY2d 950, 954 [1982]; *see Bennett v City of Buffalo Parks & Recreation*, 192 AD3d 1684, 1685 [4th Dept 2021]). Where that time expires before the application for an extension is made, "the court lack[s] the power to authorize late filing of the notice [of claim]" (*Pierson*, 56 NY2d at 956).

Here, we conclude that plaintiffs' earlier service of a notice of claim is a nullity inasmuch as, even accounting for the toll provided by the COVID-19 executive orders (*see* Executive Order [A. Cuomo] Nos. 202.28 [9 NYCRR 8.202.28], 202.72 [9 NYCRR 8.202.72]), "the notice of claim was served more than 90 days after the accident but before leave to serve a late notice of claim was granted" (*Bennett*, 192 AD3d at 1685 [internal quotation marks omitted]; *see Wall v Erie County*, 26 AD3d 753, 753 [4th Dept 2006]). Thus, because plaintiffs' cross-motion "was made after the expiration of the maximum period permitted for seeking such relief, i.e., one year and 90 days," Supreme Court should have denied the cross-motion, granted the motion, and dismissed the complaint and cross-claims against the Town (*Bennett*, 192 AD3d at 1685 [internal quotation marks omitted]; *see* General Municipal Law §§ 50-e [5]; 50-i [1]; *Pierson*, 56 NY2d at 954).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

86

CA 22-01751

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

MICHAEL ROSE, AS ADMINISTRATOR OF THE ESTATE OF JESSIE ROSE, DECEASED, AND INDIVIDUALLY AS FATHER OF JESSIE ROSE, AND KRISTINE ROSE, INDIVIDUALLY AS MOTHER OF JESSIE ROSE, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ANTHONY ELLIS AND CITY OF UTICA, DEFENDANTS-RESPONDENTS.

WOODRUFF LEE CARROLL P.C., SYRACUSE (WOODRUFF LEE CARROLL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered September 28, 2022. The order granted defendants' motion for summary judgment and dismissed the amended complaint.

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

Memorandum: In this action arising from the death of plaintiffs' decedent during an incident in which defendant Anthony Ellis, a police officer employed by defendant City of Utica, responded to a public park where decedent had been observed firing a sawed-off shotgun, plaintiffs appeal from an order that, inter alia, granted defendants' motion for summary judgment dismissing the amended complaint. Even assuming, arguendo, that plaintiffs are not collaterally estopped from litigating the viability of their assault and battery causes of action by virtue of prior determinations in the federal action arising from the same incident (*see Rose v City of Utica*, 2018 WL 2041621, *5-12, 2018 US Dist LEXIS 220803, *12-35 [ND NY, Apr. 19, 2018, No. 6:14-CV-01256 (BKS/TWD)], *affd* 777 Fed Appx 575 [2d Cir 2019], *cert denied* — US —, 140 S Ct 1119 [2020]), we conclude that Supreme Court properly granted the motion insofar as it sought summary judgment dismissing those causes of action because defendants met their initial burden of establishing their entitlement to judgment as a matter of law and plaintiffs failed to raise a triable issue of fact (*see Brown v City of New York*, 192 AD3d 963, 966-967 [2d Dept 2021], *lv denied* 38 NY3d 902 [2022]). We reject plaintiffs' remaining contentions and

otherwise affirm for reasons stated in the decision at Supreme Court.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

88

CA 23-00408

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

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

V MEMORANDUM AND ORDER

TYREE A., RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (William F. Ramseier, J.), entered February 27, 2023, in a proceeding pursuant to Mental Hygiene Law article 10. The order denied the motion of respondent to dismiss the petition.

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

Memorandum: In this proceeding pursuant to Mental Hygiene Law article 10, respondent appeals from an order denying his motion to dismiss the petition seeking his civil management. According to respondent, he was not afforded the benefit of certain time credits that, if properly credited to him, would have resulted in his release prior to August 8, 2022, the day the article 10 petition was filed. Respondent contends that because he was not lawfully detained at the time, he was not a detained sex offender within the meaning of Mental Hygiene Law § 10.03 (g) (1) and was not subject to the State's jurisdiction. We reject that contention. Even assuming, arguendo, that respondent's imprisonment was unlawful at the time the article 10 proceeding was commenced, we conclude that Supreme Court correctly denied his motion to dismiss, because " '[t]he legality of [a prisoner's] custody is irrelevant' " to whether the prisoner is properly considered a detained sex offender within the meaning of the statute (*Matter of State of New York v Matter*, 78 AD3d 1694, 1695 [4th Dept 2010], quoting *People ex rel. Joseph II. v Superintendent of Southport Correctional Facility*, 15 NY3d 126, 134 [2010], *rearg denied* 15 NY3d 847 [2010]; *see Matter of State of New York v Abdul A.*, 123

AD3d 1047, 1047-1048 [2d Dept 2014], *lv denied* 25 NY3d 904 [2015]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

91

KA 19-00961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMOL M. JACKSON, DEFENDANT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered May 14, 2018. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, manslaughter in the first degree, robbery in the first degree, robbery in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant was convicted, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [3]), manslaughter in the first degree (§ 125.20 [1]), robbery in the first degree (§ 160.15 [4]), robbery in the second degree (§ 160.10 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Contrary to defendant's contention, Supreme Court properly denied his repeated severance motions, inasmuch as defendant failed to demonstrate the requisite good cause for a discretionary severance (*see* CPL 200.40 [1]; *People v Mahboubian*, 74 NY2d 174, 183 [1989]; *cf. People v McGuire*, 148 AD3d 1578, 1579 [4th Dept 2017]). Where counts are properly joined pursuant to CPL 200.40 (1), a defendant may nevertheless seek severance for " 'good cause shown' " (*Mahboubian*, 74 NY2d at 183). "Good cause . . . includes, but is not limited to, a finding that a defendant 'will be unduly prejudiced by a joint trial' " (*id.*, quoting CPL 200.40 [1]). "Upon such a finding of prejudice, the court may order counts to be tried separately, grant a severance of defendants or provide whatever other relief justice requires" (CPL 200.40 [1]). Where, as here, "the same evidence is used to prove the charges against each defendant, a joint trial is preferred and severance will . . . be granted [only] for the most cogent reasons" (*People v Dickson*, 21 AD3d 646, 647 [3d Dept 2005]; *see* CPL 200.40 [1]; *People v Bornholdt*, 33 NY2d 75, 87 [1973], *cert denied* 416 US 905 [1974]). We conclude that the court did not abuse

its discretion in denying defendant's motions inasmuch as " 'there was no irreconcilable conflict between the defenses presented nor was there a significant danger that any alleged conflict led the jury to infer any defendant's guilt . . . [, and] no defendant took an aggressive adversarial stance against another' " (*People v Isaac*, 195 AD3d 1410, 1411 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]; *see People v De Los Angeles*, 270 AD2d 196, 197-198 [1st Dept 2000], *lv denied* 95 NY2d 889 [2000]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

93

KA 23-00479

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN P. MANCUSO, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, PLLC, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered February 1, 2023. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third 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]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, the integrity of the grand jury proceeding was not impaired by the prosecutor's failure to instruct the grand jurors on the defense of temporary innocent possession of a weapon. "[T]here is no requirement that the [g]rand [j]ury must be charged with every potential defense suggested [in] evidence," but, rather, the People are required to charge "only those defenses that the evidence will reasonably support" (*People v Moses*, 197 AD3d 951, 952 [4th Dept 2021], *lv denied* 37 NY3d 1097 [2021], *reconsideration denied* 37 NY3d 1163 [2022] [internal quotation marks omitted]; *see People v Angona*, 119 AD3d 1406, 1407 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015]). Here, we conclude that an instruction regarding the defense of temporary and innocent possession of a weapon was not warranted inasmuch as there was insufficient evidence before the grand jury to support such a defense (*see Moses*, 197 AD3d at 952;

cf. People v Graham, 148 AD3d 1517, 1518-1519 [4th Dept 2017]). Defendant's further contention that the prosecutor failed to provide the grand jury with certain exculpatory evidence is not preserved for our review inasmuch as defendant failed to move to dismiss the indictment on that ground (*see generally People v Griggs*, 117 AD3d 1523, 1523 [4th Dept 2014], *affd* 27 NY3d 602 [2016], *rearg denied* 28 NY3d 957 [2016]), 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 reject defendant's contention that he was subjected to custodial interrogation by police investigators who did not provide *Miranda* warnings when defendant was questioned in the bathroom of his residence and that County Court therefore erred in refusing to suppress the statements made by defendant at that time. It is well settled that "both the elements of police 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Huffman*, 41 NY2d 29, 33 [1976]; *see People v Anthony*, 85 AD3d 1634, 1635 [4th Dept 2011], *lv denied* 17 NY3d 813 [2011]). "In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had [that person] been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012]; *see People v Thomas*, 166 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019]). Under the circumstances presented here, we conclude that "a reasonable person, innocent of any crime, would not have believed that [they were] in police custody but, rather, would have believed that [they were] being interviewed as a witness [to a fatal event]" (*People v Debo*, 45 AD3d 1349, 1350 [4th Dept 2007], *lv denied* 10 NY3d 809 [2008]). Specifically, the evidence establishes, inter alia, that defendant insisted on remaining in the bathroom when officers spoke with defendant. The recording from the police officer's body camera belies defendant's contention that he was "corralled" in the room by the officer. While the police officers testified that defendant was not free to leave, a police officer's subjective belief "has no bearing on the question whether a suspect was in custody at a particular time . . . [and] the subjective intent of the officer . . . is irrelevant where, as here, there is no evidence that such subjective intent was communicated to the defendant" (*Thomas*, 166 AD3d at 1500 [internal quotation marks omitted]). Thus, we conclude that "the evidence at the [suppression] hearing establishes that defendant was not in custody when he made the statements, and thus *Miranda* warnings were not required" (*People v Bell-Scott*, 162 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]).

Contrary to the further contention of defendant, we conclude that the court did not err in refusing to suppress the statements that he made to the police at the police station. The record of the suppression hearing supports the court's determination that there was a sufficiently pronounced break between the custodial questioning of defendant by police in the living room of defendant's residence in

violation of his *Miranda* rights and his subsequent questioning by police at the police station (*see People v Paulman*, 5 NY3d 122, 130-132 [2005]; *People v Blair*, 121 AD3d 1570, 1571 [4th Dept 2014]).

We further reject defendant's contention that all of his statements to the police should have been suppressed because, given his intoxication from drugs coupled with his impaired mental state, he was incapable of making voluntary statements. The record of the suppression hearing, including the recording from the police officer's body camera, establishes that defendant was not so impaired by drugs and his cognitive ability was not so impaired to such a degree that he was incapable of making voluntary statements (*see People v Carbonaro*, 134 AD3d 1543, 1548 [4th Dept 2015], *lv denied* 27 NY3d 994 [2016], *reconsideration denied* 27 NY3d 1149 [2016]).

We further reject defendant's contention that Penal Law § 265.03 is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). The decision in *Bruen* "had no impact on the constitutionality of New York State's criminal possession of a weapon statutes" (*People v Joyce*, 219 AD3d 627, 628 [2d Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *see People v Cabrera*, — NY3d —, —, 2023 NY Slip Op 05968, *7 [2023]; *People v Williams*, 78 Misc 3d 1205[A], 2023 NY Slip Op 50158[U], *2-4 [Sup Ct, Erie County 2023]).

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

Entered: March 15, 2024

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 20-00918

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJMIER M. MACK, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Alex R. Renzi, J.), rendered February 5, 2020. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed as a matter of discretion in the interest of justice, the plea is vacated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant contends that his plea was not knowing, voluntary and intelligent because it was coerced, his waiver of the right to appeal is invalid and the police lacked probable cause to arrest him.

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his contention regarding his arrest, we conclude that probable cause existed for defendant's arrest. During the suppression hearing, police officers testified, among other things, that defendant and his codefendant were placed, by means of their ankle monitors, at the locations of burglarized homes. The officers also testified that as part of their investigation they obtained surveillance footage that showed defendant in a pawnshop with property matching items that had been stolen (*see generally People v Muhammad*, 204 AD3d 1402, 1403 [4th Dept 2022], *lv denied* 38 NY3d 1073 [2022]; *People v Young*, 152 AD3d 981, 982-983 [3d Dept 2017], *lv denied* 30 NY3d 955 [2017]).

Defendant's challenge to the voluntariness of his plea would survive even a valid waiver of the right to appeal (*see People v Barzee*, 204 AD3d 1422, 1422 [4th Dept 2022], *lv denied* 38 NY3d 1132

[2022]), and we agree with defendant that his plea was involuntary inasmuch as it was coerced. During the appearance wherein defendant accepted a connected plea offer with his codefendant, Supreme Court informed defendant "there's no way in God's earth that if you're convicted of this crime you're going to get towards the minimum with me." The court also erroneously informed defendant on two occasions that he risked "up to thirty years" in prison by not taking the plea.

Under the circumstances, we agree with defendant that the court's statements did "not amount to a description of the range of the potential sentences but, rather, they constitute[d] impermissible coercion, 'rendering the plea involuntary and requiring its vacatur' " (*People v Flinn*, 60 AD3d 1304, 1305 [4th Dept 2009]; *see People v Rogers*, 114 AD3d 707, 707 [2d Dept 2014], *lv denied* 23 NY3d 1067 [2014]; *People v Wilson*, 245 AD2d 161, 163 [1st Dept 1997], *lv denied* 91 NY2d 946 [1998]). The court's coercive statements were "all the more serious" in light of its erroneous statement that defendant was facing serving 30 years in prison (*People v Sung Min*, 249 AD2d 130, 132 [1st Dept 1998]). Even if the court after trial imposed consecutive sentences for each of the class C felonies with which defendant was charged, by statute, his sentence would "be deemed to be twenty years" (Penal Law § 70.30 [1] [e] [i]). We conclude that the court's statements signaled that the court intended to treat defendant "very differently as far as the sentence is concerned if he exercised his right to a trial" (*Flinn*, 60 AD3d at 1305 [internal quotation marks omitted]; *see Sung Min*, 249 AD2d at 132).

We also note that defendant's plea was a connected plea, which meant that his codefendant would not get the benefit of his plea deal if defendant did not accept his offer. "The inclusion of a third-party benefit in a plea bargain is simply one factor for a . . . court to weigh in making the overall determination whether the plea is voluntarily entered" (*People v Fiumefreddo*, 82 NY2d 536, 545 [1993] [internal quotation marks omitted]), and connected pleas "present concerns requiring special care" (*People v Santos*, 244 AD2d 897, 897 [4th Dept 1997]). Special care to ensure that defendant's plea was voluntary was not exercised here, especially in light of defendant's repeated assertion that, as a result of the connected plea, he had "no choice," which adds further support to the conclusion that defendant's plea was involuntary.

Thus, upon reviewing the totality of the circumstances, we conclude that the record establishes that defendant's plea was coerced. Although defendant failed to preserve his challenge to the voluntariness of his plea, we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), and we reverse the judgment, vacate the plea, and remit the matter to Supreme Court for further proceedings on the indictment before a different justice.

All concur except BANNISTER and GREENWOOD, JJ., who dissent and vote to affirm in the following memorandum: Because we conclude that defendant's contention that his guilty plea was not knowingly, voluntarily and intelligently made is unpreserved and that, under the

circumstances of this case, we should not exercise our interest of justice discretion to review that unpreserved contention, we respectfully dissent and would affirm the judgment.

Here, defendant contends that the plea colloquy was inadequate in several respects. He did not, however, move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Terwilliger*, 182 AD3d 1044, 1045 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]; *People v Jimenez*, 177 AD3d 1326, 1326 [4th Dept 2019], *lv denied* 34 NY3d 1078 [2019]). Further, the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply. In these circumstances, preservation is required (*see* CPL 470.05 [2]; *Lopez*, 71 NY2d at 665).

Under the circumstances of this case, we would decline to exercise our power to review defendant's contention in the interest of justice (*see* CPL 470.15 [3] [c]). Here, defendant received the same very favorable plea as his codefendant, in the face of strong evidence of his guilt of the various crimes charged in the indictment.

Entered: March 15, 2024

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 20-01193

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LONNIE TOWNSEND, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 2, 2020. The judgment convicted defendant upon a guilty plea of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting defendant upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the conviction is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Defendant failed to raise a constitutional challenge before the trial court, however, and therefore any such contention is unpreserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]). Contrary to defendant's contention, his "challenge to the constitutionality of [his conviction under the] statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, — NY3d —, —, 2023 NY Slip Op 05968, *2-7 [2023]). We decline to exercise our power to review defendant's constitutional challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends that Supreme Court erred in refusing to suppress the physical evidence found in his vehicle because the police lacked probable cause to search the vehicle. We reject that contention. The record establishes, and defendant does not dispute,

that the police were entitled to stop his vehicle based on an observed violation of the Vehicle and Traffic Law (*see People v Ricks*, 145 AD3d 1610, 1610-1611 [4th Dept 2016], *lv denied* 29 NY3d 1000 [2017]; *see generally People v Robinson*, 97 NY2d 341, 349 [2001]; *People v Binion*, 100 AD3d 1514, 1515 [4th Dept 2012], *lv denied* 21 NY3d 911 [2013]).

Furthermore, we conclude that, after stopping the vehicle, the police had probable cause to search it. At the time that the stop was conducted in 2019, it was "well established that [t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, [was] sufficient to constitute probable cause" to search a vehicle (*People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014] [internal quotation marks omitted]). A police officer testified at the suppression hearing that he was familiar with the smell of marihuana based on his "on-the-job experience," and that he detected that odor emanating from the vehicle as he approached it (*see People v Wright*, 158 AD3d 1125, 1126-1127 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]; *People v Mack*, 114 AD3d 1282, 1282 [4th Dept 2014], *lv denied* 22 NY3d 1200 [2014]; *Cuffie*, 109 AD3d at 1201). We discern no basis to disturb the court's credibility assessments, which are entitled to great deference, because "[n]othing about the [challenged] testimony was unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self contradictory" (*People v Walker*, 128 AD3d 1499, 1500 [4th Dept 2015], *lv denied* 26 NY3d 936 [2015] [internal quotation marks omitted]; *see generally People v Prochilo*, 41 NY2d 759, 761 [1977]; *People v Bush*, 107 AD3d 1581, 1582 [4th Dept 2013], *lv denied* 22 NY3d 954 [2013]).

Although the recently-enacted Penal Law § 222.05 (3) states that in "any criminal proceeding," including suppression hearings, no finding of probable cause shall be based solely on evidence of the odor of cannabis, that statute does not apply retroactively (*see People v Pastrana*, — NY3d —, —, 2023 NY Slip Op 05966, *2-3 [2023]; *People v Vaughn*, 203 AD3d 1729, 1730 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]), and a pending direct appeal does not "constitute a 'criminal proceeding' to which [that] statute applies" (*People v Kuforiji*, 209 AD3d 499, 500 [1st Dept 2022], *lv denied* 39 NY3d 986 [2022]; *see People v Fabien*, 206 AD3d 436, 437 [1st Dept 2022], *lv denied* 39 NY3d 985 [2022]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

117

KA 17-00196

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESMOND J. HART, ALSO KNOWN AS JAZZ,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered January 13, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), arising from defendant's fatal shooting of the victim outside of a restaurant. We affirm.

Defendant's contention that the grand jury proceeding was defective pursuant to CPL 210.35 (5) lacks merit because defendant failed to meet his burden of establishing " 'the existence of defects impairing the integrity of the . . . proceeding and giving rise to a possibility of prejudice' " (*People v Davis*, 68 AD3d 1653, 1655 [4th Dept 2009], *lv denied* 14 NY3d 839 [2010]; *see People v Black*, 220 AD2d 604, 605 [2d Dept 1995], *lv denied* 87 NY2d 898 [1995]; *cf. People v Falcon*, 204 AD2d 181, 181-182 [1st Dept 1994], *lv denied* 84 NY2d 825 [1994]).

Defendant further contends that Supreme Court erred in determining that he voluntarily waived his *Miranda* rights prior to making certain statements to the police and thus erred in refusing to suppress those statements. We reject that contention.

"[A]bsent a 'full and effective warning of [*Miranda*] rights' and a knowing, intelligent and voluntary waiver, statements made by a

suspect during custodial interrogation must be suppressed" (*People v Dunbar*, 24 NY3d 304, 314 [2014], *cert denied* 575 US 1005 [2015], quoting *Miranda v Arizona*, 384 US 436, 445 [1966]). "[A]n explicit verbal waiver is not required; an implicit waiver may suffice and may be inferred from the circumstances" (*People v Smith*, 217 AD2d 221, 234 [4th Dept 1995], *lv denied* 87 NY2d 977 [1996]; *see People v Davis*, 55 NY2d 731, 733 [1981]; *People v Rodriguez-Rivera*, 203 AD3d 1624, 1626 [4th Dept 2022], *lv denied* 39 NY3d 942 [2022]).

Here, the evidence presented at the suppression hearing, which included the testimony of one of the investigators who interrogated defendant and a video recording of that interrogation, established that the investigators informed defendant that he was under arrest in connection with the investigation of a murder that had occurred a few weeks earlier at a particular location and advised him of his *Miranda* rights, which defendant stated he understood, and that defendant subsequently agreed to speak with the investigators after they indicated, in response to defendant's inquiries, that they could not discuss additional details until defendant agreed to talk with them. We conclude that the court properly determined that the People established an implicit waiver inasmuch as the record demonstrates that defendant understood his *Miranda* rights and, "promptly after having been administered those rights[,] willingly proceed[ed] to . . . answer questions during interrogation" (*People v Sirno*, 76 NY2d 967, 968 [1990]; *see Rodriguez-Rivera*, 203 AD3d at 1626-1627; *People v Goncalves*, 288 AD2d 883, 884 [4th Dept 2001], *lv denied* 97 NY2d 729 [2002]). Defendant further asserts, however, that the investigators engaged in police deception by representing that they could not reveal more information regarding the extent of the investigation and defendant's suspected involvement in the murder until defendant agreed to speak with them, which rendered his waiver involuntary. We conclude that defendant's assertion lacks merit inasmuch as " '[t]here is . . . no requirement that a suspect be made aware in advance of all possible subjects of questioning' before receiving and waiving *Miranda* rights" (*People v Cass*, 43 AD3d 1272, 1273 [4th Dept 2007], *lv denied* 9 NY3d 1032 [2008]; *see People v Hall*, 152 AD2d 948, 949 [4th Dept 1989], *lv denied* 74 NY2d 847 [1989]; *People v Seaman*, 130 AD2d 875, 877 [3d Dept 1987], *lv denied* 70 NY2d 717 [1987]).

Next, contrary to defendant's contention, we conclude that "[t]he admission of incriminating, nonprivileged phone calls that defendant chose to make while [in pretrial detention], after receiving multiple forms of notice that his calls may be monitored and recorded, did not violate . . . his due process right to participate in the preparation of his own defense" (*People v Cisse*, 149 AD3d 435, 436 [1st Dept 2017], *affd on other grounds* 32 NY3d 1198 [2019], *cert denied* — US —, 140 S Ct 83 [2019]; *see People v Quinn*, 210 AD3d 1284, 1285-1287 [3d Dept 2022], *lv denied* 39 NY3d 1079 [2023]; *People v Utley*, 170 AD3d 757, 758 [2d Dept 2019], *lv denied* 33 NY3d 1074 [2019]).

Relatedly, defendant contends that the court erred in admitting in evidence certain statements that he made during the recorded phone calls because those statements were irrelevant or, in the alternative,

the probative value thereof was substantially outweighed by the danger of unfair prejudice. Initially, we conclude that the challenged statements, which related to defendant's prosecution for the murder in this case, do not constitute *Molineux* evidence, and we note that the fact " '[t]hat the People classified it as *Molineux* evidence, and the trial court considered it on that basis, does not prevent us from concluding it was not,' because the parties' arguments . . . regarding the probative value of the [evidence] and its prejudicial effect 'would remain the same' " (*People v Frumusa*, 29 NY3d 364, 370 [2017], *rearg denied* 29 NY3d 1110 [2017]).

Here, defendant failed to preserve for our review his challenge to the admissibility of his statements that he could enlist the services of a lawyer to "find little loopholes" and that he might have to "cop out" given the proof against him inasmuch as he did not object to the admission of those statements on the specific grounds he now raises on appeal (*see* CPL 470.05 [2]; *People v Reibel*, 181 AD3d 1268, 1271 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020], *reconsideration denied* 35 NY3d 1096 [2020]). We decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *cf. People v Roberts*, 203 AD3d 1465, 1468 [3d Dept 2022]). Defendant also failed to preserve for our review his assertion that he was deprived of a fair trial by the admission in evidence of his references in the recorded phone calls to needing a "good lawyer." The record establishes that the court gave a prompt curative instruction to the jury at trial when the recording was played, which it reiterated during its final charge to the jury. Following those instructions, defense counsel "neither objected further nor requested a mistrial, and thus, [u]nder these circumstances, the curative instructions must be deemed to have corrected the error to the . . . satisfaction" of defendant (*People v Elian*, 129 AD3d 1635, 1636 [4th Dept 2015], *lv denied* 26 NY3d 1087 [2015] [internal quotation marks omitted]; *see People v Heide*, 84 NY2d 943, 944 [1994]; *People v Lane*, 106 AD3d 1478, 1480-1481 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]; *People v Mendez*, 104 AD3d 1145, 1145 [4th Dept 2013], *lv denied* 21 NY3d 945 [2013]). We decline to exercise our power to review defendant's assertion as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Elian*, 129 AD3d at 1636; *Lane*, 106 AD3d at 1481). Contrary to defendant's further assertion, the remaining challenged statements on the recorded phone calls were admissible inasmuch as those statements were "relevant to his consciousness of guilt" (*People v McIntosh*, 158 AD3d 1289, 1291 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see People v Jefferson*, 125 AD3d 1463, 1463 [4th Dept 2015], *lv denied* 25 NY3d 990 [2015]), and their probative value was not "substantially outweighed by the danger that [the evidence would] unfairly prejudice the other side or mislead the jury" (*People v Scarola*, 71 NY2d 769, 777 [1988]; *see People v Brown*, 204 AD3d 1390, 1391 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]; *McIntosh*, 158 AD3d at 1291).

Defendant contends that the verdict with respect to murder in the second degree is against the weight of the evidence because the People failed to prove beyond a reasonable doubt that his use of deadly

physical force was not justified. We reject that contention. Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), including the charge on the defense of justification, we conclude that "the jury 'did not fail to give the evidence the weight it should be accorded in rejecting defendant's justification defense' and thus that the verdict is not against the weight of the evidence in that respect" (*People v Barill*, 120 AD3d 951, 951-952 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014], *reconsideration denied* 25 NY3d 949 [2015], *cert denied* 577 US 865 [2015]; *see People v Simmons*, 148 AD3d 1660, 1662 [4th Dept 2017], *lv denied* 29 NY3d 1094 [2017]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 15, 2024

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 22-01989

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

IN THE MATTER OF COURTNEY FOWLER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LANNY JONES, RESPONDENT-APPELLANT.

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

CAMBARERI & BRENNECK, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Kristina Karle, J.), entered October 4, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody of the subject children and suspended respondent's visitation with the 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, respondent father appeals from an order that, inter alia, awarded petitioner mother sole custody of the parties' two children and suspended the father's visitation with the children.

The presumption that visitation with a noncustodial parent is in the best interests of a child, even when the parent seeking visitation is incarcerated, may be rebutted "through demonstration by a preponderance of the evidence" (*Matter of Granger v Misercola*, 21 NY3d 86, 92 [2013] [emphasis omitted]; *see Matter of Grayson v Lopez*, 178 AD3d 1427, 1428 [4th Dept 2019]). "[T]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record" (*Matter of Mountzouros v Mountzouros*, 191 AD3d 1388, 1389 [4th Dept 2021], *lv denied* 37 NY3d 902 [2021]).

We reject the father's contention that Family Court's determination, that suspension of the father's visitation with the subject children while he is incarcerated was in the children's best

interests, lacks a sound and substantial basis in the record.

A parent's failure to exercise visitation for a prolonged period of time is a relevant factor when determining whether visitation is warranted (*see Matter of Brown v Terwilliger*, 108 AD3d 1047, 1048 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013]) and here the record establishes that the father made no meaningful effort to nurture a relationship with the children: he failed to exercise visitation, when he was allowed to do so, and did not take the opportunity to write letters or cards to the children during these proceedings. The court also properly took into consideration that the father was convicted of, inter alia, criminal contempt in the first degree (Penal Law § 215.51) for violating an order of protection issued in favor of the mother and the children, further demonstrating "no remorse or understanding that his actions were harmful to the children" (*Grayson*, 178 AD3d at 1428).

We conclude that there is no basis to disturb the court's determination suspending the father's visitation with the children.

Entered: March 15, 2024

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 22-01684

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

IN THE MATTER OF CHRISTINE TAGGART,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LINCOLN DUNCAN SISK, RESPONDENT-APPELLANT.

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

CHRISTINE TAGGART, PETITIONER-RESPONDENT PRO SE.

ARLENE BRADSHAW, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered October 4, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and physical custody of 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 6, respondent father appeals from an order that, inter alia, awarded petitioner mother sole legal and physical custody of the subject children. We affirm.

On appeal, the father contends that Family Court abused its discretion in denying his request for an adjournment on the day of trial on the mother's modification petition. We 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 Dixon v Crow*, 192 AD3d 1467, 1467 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021] [internal quotation marks omitted]; *see Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1413 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]). Here, the father failed to demonstrate that the need for an adjournment to prepare for a trial on a petition that had been pending for two years was not due to his refusal to cooperate with his assigned counsel without good cause (*see generally Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1361 [4th Dept 2021]; *Matter of Anthony J.A. [Jason A.A.]*, 180 AD3d 1376, 1378 [4th Dept 2020], *lv denied* 35 NY3d 902 [2020]; *Matter of*

Petkovsek v Snyder, 251 AD2d 1088, 1088-1089 [4th Dept 1998]).

Entered: March 15, 2024

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 22-01750

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

EUGENE MUSIAL AND LORRAINE MUSIAL,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID C. DONOHUE, ESQ., ET AL., DEFENDANTS,
RUSSELL BUTTON, ESQ., AND THE BUTTON LAW
FIRM, PLLC, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFFS-APPELLANTS.

CONNORS, LLP, BUFFALO (MICHAEL J. ROACH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered July 20, 2022. The order granted the motion of defendants Russell Button, Esq., and The Button Law Firm, PLLC, to dismiss the complaint against them.

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

Memorandum: Plaintiffs, who reside in New York, commenced this breach of contract and legal malpractice action against Texas attorney Russell Button, Esq., and his law firm, the Button Law Firm, PLLC (collectively, Button defendants), as well as New York attorneys David C. Donohue, Esq., Barry J. Donohue, Esq., and John F. Donohue, Esq., and their law firm, Donohue Law Offices (collectively, Donohue defendants). Plaintiffs allege that defendants failed to provide them with adequate legal representation with respect to claims arising from a motor vehicle accident that occurred in Texas. In appeal No. 1, plaintiffs appeal from an order that granted the Button defendants' motion to dismiss the complaint against them for lack of personal jurisdiction. In appeal No. 2, plaintiffs appeal from an order that denied their motion seeking, inter alia, to strike the note of issue or obtain post-note of issue discovery.

With respect to appeal No. 1, we reject plaintiffs' contention that the Button defendants are subject to long-arm jurisdiction in New York. Under CPLR 302 (a) (1), " 'a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state' " (*People v Frisco Mktg. of NY LLC*, 93 AD3d 1352, 1353 [4th Dept 2012]).

"Jurisdiction can attach on the basis of one transaction, even if the defendant never enters the state, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Glazer v Socata, S.A.S.*, 170 AD3d 1685, 1686 [4th Dept 2019], *lv denied* 33 NY3d 911 [2019], quoting *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [internal quotation marks omitted]). "Purposeful" activities are "those by which a defendant, through volitional acts, avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws" (*id.*, quoting *Fischbarg*, 9 NY3d at 380 [internal quotation marks omitted]; *see generally Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 [2007]). "As the party seeking to assert personal jurisdiction, the plaintiff bears the burden of proof on [that] issue" (*Frisco Mktg. of NY LLC*, 93 AD3d at 1353 [internal quotation marks omitted]).

Here, plaintiffs failed to show that the Button defendants purposefully availed themselves of the privilege of conducting activities in New York so as to subject them to long-arm jurisdiction pursuant to CPLR 302 (a) (1), inasmuch as the Button defendants "never entered New York, [were] solicited . . . to perform services outside of New York, . . . performed outside of New York such services as were performed, and [are] alleged [only] to have neglected to perform other services outside of New York" (*Mayes v Leipziger*, 674 F2d 178, 185 [2d Cir 1982]; *see Bloomgarden v Lanza*, 143 AD3d 850, 852 [2d Dept 2016]), and the documentary evidence belies the conclusory allegations of plaintiffs' counsel that the Button defendants actively solicited referrals in New York (*cf*. *Fischbarg*, 9 NY3d at 377; *see generally Eberhardt v G&J Contr., Inc*., 188 AD3d 1653, 1654 [4th Dept 2020]; *Peters v Peters*, 101 AD3d 403, 403-404 [1st Dept 2012]). Even accepting as true the allegations set forth in the complaint and in the opposition to the motion to dismiss, and according plaintiffs the benefit of every favorable inference (*see Bloomgarden*, 143 AD3d at 851), we conclude that, although plaintiffs signed the Button defendants' retainer agreement in New York and were in New York while on a telephone conference call with defendant Russell Button, who was in Texas at the time, this occurred during the course of the Button defendants' performance of legal services in Texas and because plaintiffs were New York domiciliaries, not because the Button defendants were purposefully engaging in any business activities in New York (*see id.* at 852; *cf*. *State of New York v Vayu, Inc.*, 39 NY3d 330, 332-335 [2023]).

Plaintiffs also failed to make a prima facie showing of long-arm jurisdiction over the Button defendants pursuant to CPLR 302 (a) (3), inasmuch as plaintiffs' alleged injuries did not occur within New York but, rather, in Texas, where the Button defendants' alleged legal malpractice occurred (*see Bloomgarden*, 143 AD3d at 852; *see generally Zeidan v Scott's Dev. Co.*, 173 AD3d 1639, 1640 [4th Dept 2019]).

With respect to appeal No. 2, it is well settled that "[t]he right to appeal from an intermediate order terminates with the entry of a final judgment" (*McCann v Gordon*, 204 AD3d 1449, 1449 [4th Dept 2022] [internal quotation marks omitted]; *see generally Matter of Aho*,

39 NY2d 241, 248 [1976]). Because the record of this case in the New York State Courts Electronic Filing System establishes that a final order dismissing the complaint was entered on October 13, 2023, of which we take judicial notice (*see McCann*, 204 AD3d at 1449), plaintiffs' appeal from the intermediate order on their discovery motion (appeal No. 2) must be dismissed (*see McDonough v Transit Rd. Apts., LLC*, 164 AD3d 1603, 1603 [4th Dept 2018]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

123

CA 23-01179

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

EUGENE MUSIAL AND LORRAINE MUSIAL,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID C. DONOHUE, ESQ., BARRY J. DONOHUE, ESQ.,
JOHN F. DONOHUE, ESQ., DONOHUE LAW OFFICES,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered June 6, 2023. The order denied the motion of plaintiffs seeking, inter alia, to strike the note of issue.

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

Same memorandum as in *Musial v Donohue* ([appeal No. 1]) – AD3d – [Mar. 15, 2024] [4th Dept 2024]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

124

CAF 22-00793

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

IN THE MATTER OF ADRIAN L. AND AIDEN S.

ONEIDA COUNTY DEPARTMENT OF FAMILY AND COMMUNITY SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

KEETOYIA B. AND JASON L., RESPONDENTS-APPELLANTS.

TRACY L. PUGLIESE, CLINTON, FOR RESPONDENT-APPELLANT KEETOYIA B.

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

DEANA D. GATTARI, UTICA, FOR PETITIONER-RESPONDENT.

CHRISTINE S. KIESEL, SAUQUOIT, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered June 29, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had 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, respondents each appeal from an order that, inter alia, determined that they neglected the subject children. As a preliminary matter, we exercise our discretion to treat respondents' notices of appeal from the order as valid notices of appeal from the subsequently entered order of disposition (*see* CPLR 5520 [c]; *Matter of Gina R. [Christina R.]*, 211 AD3d 1483, 1483 [4th Dept 2022]; *Matter of Ariana F.F. [Robert E.F.]*, 202 AD3d 1440, 1441 [4th Dept 2022]).

We reject respondents' contention that Family Court erred in finding that they neglected the children. We conclude that petitioner established by a preponderance of the evidence that the children were in imminent danger of emotional impairment based upon the alleged repeated incidents of domestic violence between respondents (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Afton C. [James C.]*, 17 NY3d 1, 8-9 [2011]).

We further reject respondent Jason L.'s contentions that the court erred in various evidentiary rulings. Jason L.'s contention that the Utica Police Department records were not properly certified is unpreserved for our review. Jason L. additionally contends that

the court erred in considering those records because they contained inadmissible hearsay. We reject that contention, inasmuch as, with respect to the police records, "[t]here is no indication that the court considered, credited, or relied upon inadmissible hearsay in reaching its determination" (*Matter of Milo C. [Daniella C.]*, 214 AD3d 1350, 1351 [4th Dept 2023], *lv denied* 40 NY3d 901 [2023] [internal quotation marks omitted]).

Jason L. further contends that the court erred in considering the maternal grandmother's testimony regarding statements made by the older subject child and the mother, because those statements constituted inadmissible hearsay. We reject that contention. The older child's out-of-court statements relating to allegations of neglect were sufficiently corroborated by other evidence tending to support their reliability (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Crystal S. [Patrick P.]*, 193 AD3d 1353, 1354 [4th Dept 2021]). With respect to the mother's out-of-court statements, we conclude that any error "is harmless because the result reached herein would have been the same even had such [statements] been excluded" (*Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]). We also reject Jason L.'s contention with respect to hearsay testimony of a supervisor employed by petitioner, because that testimony was admitted conditionally, the court later noted explicitly that it "may not consider [the supervisor's] testimony" in reaching its decision, and there is no indication that the court relied upon that hearsay (*see Milo C.*, 214 AD3d at 1351).

We have reviewed respondents' remaining contentions in both appeals and conclude that they lack merit.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

136

KA 23-00864

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER W. CAMPBELL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THOMAS L. PELYCH, HORNELL, 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 December 20, 2022. 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.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

137

KA 22-02020

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE BYRD, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM 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 (Thomas J. Miller, J.), rendered May 14, 2019. The judgment convicted defendant upon his plea of guilty of burglary 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 burglary in the first degree (Penal Law § 140.30 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, we nevertheless conclude that none of defendant's contentions on appeal requires reversal or modification (*see generally People v Paul*, 139 AD3d 1383, 1383 [4th Dept 2016], *lv denied* 28 NY3d 973 [2016]; *People v Shubert,* 83 AD3d 1577, 1577 [4th Dept 2011]). Defendant's contention that his plea of guilty was invalid because the Judge who presided over his plea proceeding recused himself prior to sentencing is unpreserved for appellate review and, in any event, without merit (*see generally People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]). "Where, as here, a judge voluntarily recuses [themselves] to avoid the appearance of impropriety, 'judicial proceedings had prior to the recusal . . . remain valid, absent a showing of actual bias or actual impropriety' " (*People v Joseph*, 167 AD3d 776, 777 [2d Dept 2018]; *see generally Ulrich v Estate of Zdunkiewicz*, 8 AD3d 1014, 1014 [4th Dept 2004]). Defendant did not make such a showing here.

Defendant further contends that his guilty plea was not knowing, voluntary, and intelligent because certain portions of Supreme Court's inquiry of defendant occurred after his factual admissions to the elements of the crime. That contention is not preserved for our review inasmuch as defendant did not move to withdraw his guilty plea or to vacate the judgment of conviction on that ground (*see generally*

People v Scales, 118 AD3d 1500, 1500 [4th Dept 2014], *lv denied* 23 NY3d 1067 [2014]), and the narrow exception to the preservation rule does not apply here (*see generally People v Lopez*, 71 NY2d 662, 666 [1988]).

Contrary to defendant's contention, we conclude that County Court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea. Defendant's assertions that he did not understand the proceedings are belied by the statements he made during the plea colloquy (*see People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

Defendant's contention that defense counsel was ineffective does not survive his guilty plea because defendant has not "demonstrate[d] that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney[']s] allegedly poor performance" (*People v Jackson*, 202 AD3d 1447, 1449 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022] [internal quotation marks omitted]; *see People v Coleman*, 178 AD3d 1377, 1378 [4th Dept 2019], *lv denied* 35 NY3d 1026 [2020]). Defendant failed to show a reasonable probability that, but for defense counsel's alleged errors, defendant would not have pleaded guilty and would have insisted on going to trial (*see Coleman*, 178 AD3d at 1378; *People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]).

Contrary to defendant's contention, we conclude that his sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and, as noted, we conclude that none warrants reversal or modification of the judgment.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

140

KA 22-02007

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TED L. ABRAHAM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered April 12, 2022. The judgment convicted defendant upon a guilty plea of driving while ability impaired by drugs.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while ability impaired by drugs (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [c] [ii]). Defendant contends that reversal of the judgment and vacatur of the plea are required because, before he pleaded guilty, County Court failed to inform him that a fine could also be imposed along with a term of imprisonment if he violated the conditions of his interim probation (*see generally* § 1193 [1] [c] [ii]; *cf. generally People v Cyganik*, 154 AD3d 1336, 1337-1338 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). We agree.

"It is well settled that, in order for a plea to be knowingly, voluntarily and intelligently entered, a defendant must be advised of the direct consequences of that plea" (*People v Jones*, 118 AD3d 1360, 1361 [4th Dept 2014]; *see generally People v Hill*, 9 NY3d 189, 191 [2007], *cert denied* 553 US 1048 [2008]). "The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine" (*People v Harnett*, 16 NY3d 200, 205 [2011]), and the failure to advise a defendant at the time of the guilty plea of all of the potential direct consequence of that plea "requires that

[the] plea be vacated" (*People v Tung Nguyen*, 191 AD3d 1329, 1330-1331 [4th Dept 2021] [internal quotation marks omitted]). Here, the court advised defendant that, upon a violation of interim probation, he could be sentenced "to anything allowable by law which . . . is up to two and a third to seven years in the department of corrections," but failed to advise him of any other potential direct consequences of the plea, including a fine (*see* Vehicle and Traffic Law § 1193 [1] [c] [ii]). We note that defendant's challenge to the voluntariness of his plea is not encompassed in an appeal waiver (*see People v Thomas*, 34 NY3d 545, 558 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), and that preservation of defendant's contention was not required under the circumstances of this case inasmuch as "defendant did not have sufficient knowledge of the terms of the plea at the plea allocution and, when later advised, did not have sufficient opportunity to move to withdraw [his] plea" (*People v Turner*, 24 NY3d 254, 259 [2014]).

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

141

KA 23-00865

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER W. CAMPBELL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THOMAS L. PELYCH, HORNELL, 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 December 20, 2022. 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.

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

142

KA 23-00836

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARK A. BLANDFORD, DEFENDANT-APPELLANT.

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 (Jennifer M. Noto, J.), rendered January 19, 2023. The judgment convicted defendant, upon a guilty plea, of failure to report a change of address as a sex offender.

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

144

CAF 23-01110

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

IN THE MATTER OF ALBINA H. AND ISAIAH H.

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

ORDER

XENIA H., RESPONDENT, AND
JOHN H., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (ERIN WELCH FAIR OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered June 21, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject children.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

145

CAF 22-00950

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

IN THE MATTER OF DORIKA S., JIBU M., SALAMA M., AND MUNEZERO L.

---------- MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

LEOPOLD G., RESPONDENT-APPELLANT.

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

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

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

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILDREN.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered May 18, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused one of the subject children and derivatively abused the other three 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 appeals from an order that adjudged that he abused the eldest child of his girlfriend and derivatively abused her three youngest children, one of whom was his.

We agree with respondent that the findings of abuse and derivative abuse are properly before us despite the fact that he entered into a contract for services in lieu of a dispositional hearing inasmuch as he contested the findings of abuse and derivative abuse at the fact-finding hearing (*see Matter of Zoe L. [Melissa L.]*, 122 AD3d 1445, 1446 [4th Dept 2014], *lv denied* 24 NY3d 918 [2015]; *see also Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1676-1677 [4th Dept 2021]).

Contrary to respondent’s contention, Family Court’s finding that he sexually abused the eldest of the subject children is supported by

the requisite preponderance of the evidence (*see Matter of James L.H. [Lisa H.]*, 182 AD3d 990, 991 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]; *see generally* Family Ct Act § 1046 [b] [i]). "A child's out-of-court statements may form the basis for a finding of [abuse] as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability" (*James L.H.*, 182 AD3d at 991 [internal quotation marks omitted]; *see* § 1046 [a] [vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987], *rearg denied* 71 NY2d 890 [1988]). "Courts have considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse . . . , and [t]he Legislature has expressed a clear intent that a relatively low degree of corroborative evidence is sufficient in abuse proceedings" (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011] [internal quotation marks omitted]).

Here, the out-of-court statements of the eldest of the subject children were sufficiently corroborated by the testimony of "caseworker[s] trained in forensic interviewing techniques" (*Matter of Skyler D. [Joseph D.]*, 185 AD3d 1515, 1516 [4th Dept 2020]), the child's " 'age-inappropriate knowledge of sexual matters' " and language (*id.*), a medical report indicating vaginal penetration of the child (*see Matter of David C. [Lawrence C.]*, 162 AD3d 1648, 1649 [4th Dept 2018]), and a caseworker's discovery of a container of lotion as and where described by the child in her out-of-court statements that detailed its use in her sexual abuse. "[C]orroborative evidence as to the identity of an abuser is not required" (*Matter of Amelia V.M.B. [Davidson B.]*, 107 AD3d 980, 981 [2d Dept 2013]; *see also Matter of Nichole L.*, 213 AD2d 750, 751 [3d Dept 1995], *lv denied* 86 NY2d 701 [1995]). Moreover, the child gave multiple, consistent descriptions of respondent's abuse and, " '[a]lthough repetition of an accusation by a child does not corroborate the child's prior account of [abuse] . . . , the consistency of the child['s] out-of-court statements describing [the] sexual conduct enhances the reliability of those out-of-court statements' " (*Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1411 [4th Dept 2017]). Additionally, the court was entitled to draw " 'the strongest inference' " against respondent that the opposing evidence permits based upon his failure to testify (*Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1855 [4th Dept 2010]).

We further conclude that the findings of derivative abuse with respect to the three other subject children are supported by a preponderance of the evidence inasmuch as they were present in the home or, on at least one occasion, in the same room as respondent during the times that he sexually abused their eldest sibling (*see Skyler D.*, 185 AD3d at 1517; *Matter of A.R.*, 309 AD2d 1153, 1154 [4th Dept 2003]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

146

OP 23-01825

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

IN THE MATTER OF WILLIE SHIPMON, PETITIONER,

V MEMORANDUM AND ORDER

HON. THOMAS E. MORAN, SUPREME COURT JUSTICE, AND MONROE COUNTY DISTRICT ATTORNEY'S OFFICE, RESPONDENTS.

LINDSEY M. PIEPER, ROCHESTER, FOR PETITIONER.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT MONROE COUNTY DISTRICT ATTORNEY'S OFFICE.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit respondents from retrying petitioner on Indictment No. 71434-22.

It is hereby ORDERED that said petition is unanimously granted without costs and judgment is granted in favor of petitioner as follows:

> "It is ADJUDGED that respondents are prohibited from retrying petitioner on Indictment No. 71434-22."

Memorandum: Petitioner commenced this original CPLR article 78 proceeding in this Court seeking a writ of prohibition barring his retrial on the ground of double jeopardy. We agree with petitioner that the petition should be granted.

Petitioner was charged, together with a codefendant, with two counts of criminal possession of a weapon and one count of murder in the second degree. A joint jury trial commenced before Supreme Court (Moran, J.) in September 2023. In the middle of the second day of jury deliberations, after the alternate jurors had been dismissed, the court received a note from the jury foreperson asking: "If we have a decision on five counts but not on one of them, what would our course of action be?" The court informed the jurors that it was too early to "contemplate a partial verdict" and instructed them to continue deliberating. After the exchange of additional notes, the foreperson informed the court that one juror had refused to continue deliberating further and wanted to "get back" to the case after the weekend.

The court released the jury and, over the weekend, received two

messages directly from jury members. The first message alleged that a juror—later identified as juror number five—had conducted independent research into the definition of second-degree murder and had engaged in discussions about the case outside the presence of the full jury. In the second message, juror number five requested to speak to the Judge.

When court reconvened, the court and the parties questioned juror number five, who denied conducting independent research or discussing the case outside the presence of the full jury. However, he did allege that there had been "tension in the jury room" caused by, inter alia, jurors making comments having racial connotations. He further stated that, although he felt pressured by the other jurors, he believed that a resolution was still possible. The court then undertook a separate inquiry with each juror, asking them whether they were aware of any juror researching the definition of murder in the second degree, discussing the case outside the presence of the full jury, or making racial comments. Three of the jurors said that juror number five had told them that he looked up the definition of murder in the second degree and that juror number five had tried to engage in deliberations outside the presence of the full jury. Several jurors also stated that there had been some racial tension during deliberations and identified juror number five as the "only [B]lack man" in the deliberation room. Notably, none of the jurors stated that juror number five had shared his findings regarding the definition of murder in the second degree with them, and the jurors' descriptions of "discussions" outside the presence of the full panel suggested that such incidents were brief and not substantive. The court did not permit any questioning from petitioner's counsel as to whether a partial verdict had been reached and, if so, whether the racial tensions began before or after that point.

At the close of the inquiry, the Judge expressed frustration that his admonishments to the jury had been violated and asked the parties whether they were moving for a mistrial. Petitioner's codefendant promptly made such a motion, but petitioner did not and requested instead that deliberations continue with 11 jurors. Noting that such a request required approval of the trial judge, the court declared a mistrial. Petitioner then requested that the jury be polled to determine whether they had reached a partial verdict. The court denied that request and scheduled a retrial.

Initially, respondent Monroe County District Attorney's Office correctly acknowledges that double jeopardy is a ground for obtaining the remedy of a writ of prohibition. "[W]hen a defendant is about to be prosecuted in violation of [their] constitutional right against double jeopardy, . . . the harm that [they] would suffer—prosecution for a crime for which [they] cannot constitutionally be tried—is so great and the ordinary appellate process so inadequate to redress that harm, that prohibition will lie to raise the claim" (*Matter of Rush v Mordue*, 68 NY2d 348, 354 [1986]; *see People v Michael*, 48 NY2d 1, 7 [1979]). Further, there is no dispute that jeopardy had attached at the time the court declared a mistrial (*see* CPL 40.20 [1]; 40.30 [1] [b]; *People v Ferguson*, 67 NY2d 383, 387-388 [1986]).

"[T]he Double Jeopardy Clause protects criminal defendants from multiple prosecutions for the same offense" (*Matter of Gorghan v DeAngelis*, 7 NY3d 470, 473 [2006]). "[W]hen a mistrial is granted over the defendant's objection or without the defendant's consent, double jeopardy will, as a general rule, bar retrial" (*Matter of Davis v Brown*, 87 NY2d 626, 630 [1996]). "However, the right to have one's case decided by the first empaneled jury is not absolute, and a mistrial granted as the product of manifest necessity will not bar a retrial" (*id.*; *see Hall v Potoker*, 49 NY2d 501, 505 [1980]; *Michael*, 48 NY2d at 9; *see also* CPL 280.10 [3]). A court "must exercise sound discretion to assure that, taking all relevant circumstances into account, there was manifest necessity for the declaration of a mistrial without defendant's consent" (*Matter of Enright v Siedlecki*, 59 NY2d 195, 200 [1983]; *see Michael*, 48 NY2d at 9).

Although deference is accorded to a trial court's decision to declare a mistrial, the court's discretion is not without limits (*see Enright*, 59 NY2d at 200). The People bear the "heavy" burden of establishing that the mistrial was manifestly necessary (*Arizona v Washington*, 434 US 497, 505 [1978]; *see Matter of Capellan v Stone*, 49 AD3d 121, 126 [1st Dept 2008], *lv denied* 10 NY3d 716 [2008]). "[E]ven if the reasons for granting a mistrial are deemed actual and substantial, the trial court must explore appropriate alternatives and provide a sufficient basis in the record for resorting to this 'drastic measure' " (*People v Smith*, 176 AD3d 1114, 1116 [2d Dept 2019], *lv denied* 34 NY3d 1163 [2020]; *see Hall*, 49 NY2d at 505; *see also Matter of McNair v McNamara*, 206 AD3d 1689, 1691 [4th Dept 2022]).

Here, the People have not met their burden of demonstrating that the declaration of a mistrial was manifestly necessary. Assuming, arguendo, that juror number five was grossly unqualified to continue serving, we conclude that the court abused its discretion in declaring a mistrial without considering other alternatives. Petitioner expressed his desire to waive trial by a jury of 12 individuals and proceed with the remaining 11 jurors, an option that has been endorsed by the Court of Appeals "if circumstances arise that warrant such a request" (*People v Gajadhar*, 9 NY3d 438, 447 [2007]). Although the court has discretion to deny a request to proceed with 11 jurors—as the court did here—that discretion is limited (*see id.*). The record here is devoid of evidence that petitioner's request was not tendered in good faith, that the request was " 'a stratagem to procure an otherwise impermissible procedural advantage' " (*id.*), or that deliberation with 11 jurors could not "produce a fair verdict" (*Arizona*, 434 US at 509). Under the circumstances presented, as urged by defense counsel, "it would have been appropriate to poll the remainder of the jurors to ascertain whether they could render an impartial verdict" (*Smith*, 176 AD3d at 1116; *see Matter of Morris v Livote*, 105 AD3d 43, 48 [1st Dept 2013]; *see also Matter of Rubenfeld v Appelman*, 230 AD2d 911, 912 [2d Dept 1996]).

Moreover, "it was an abuse of discretion to have declared a mistrial on all of the counts in the indictment without inquiring

whether a decision had been reached on any of the charges" (*Matter of Robles v Bamberger*, 219 AD2d 243, 247 [1st Dept 1996], *lv denied* 88 NY2d 809 [1996], *appeal dismissed* 88 NY2d 962 [1996]). Although there was not "overwhelming evidence" that a partial verdict had been reached (*id.*), the jury's note asking for guidance on next steps "[i]f we have a decision on five counts but not on one of them" presented more than a mere inference that the jury may have reached a partial verdict, and the subsequent communications with the jury did not indicate otherwise (*cf. Matter of Rivera v Firetog*, 11 NY3d 501, 508 [2008]). Under these circumstances, the court was required to make an inquiry "as to whether a verdict had been reached on any of the counts . . . before declaring a mistrial over the petitioner's objection" (*Robles*, 219 AD2d at 247; *see generally Matter of Oliver v Justices of N.Y. Supreme Ct. of N.Y. County*, 36 NY2d 53, 58 [1974]).

On this record, "[n]either physical impossibility to proceed nor manifest necessity to declare a mistrial as to the entire indictment has been demonstrated" (*Robles*, 219 AD2d at 248) because the court failed "to obtain enough information" whether a mistrial was actually necessary as to all counts (*Ferguson*, 67 NY2d at 388). Thus, a retrial is precluded (*see Smith*, 176 AD3d at 1116-1117; *Robles*, 219 AD2d at 247-248; *see generally McNair*, 206 AD3d at 1691).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

149

CA 22-01991

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

MATTHEW J. HAMMILL AND YOUMIE J. HAMMILL,
PLAINTIFFS-APPELLANTS,

V ORDER

JEROME A. LAZORE AND LISA LAZORE,
DEFENDANTS-RESPONDENTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (MATTHEW W. O'NEIL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH SOVIK KENDRICK & SUGNET P.C., SYRACUSE (JOHN P. COGHLAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered December 9, 2022. The judgment, among other things, denied the request of plaintiffs for a permanent injunction.

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

153

CA 22-01895

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

TIMOTHY JONES, PLAINTIFF-APPELLANT,

V ORDER

CITY OF BUFFALO, JAMES COMERFORD, JR.,
COMMISSIONER OF PERMIT & INSPECTION SERVICES
AND HANNAH DEMOLITION, INC.,
DEFENDANTS-RESPONDENTS.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFF-APPELLANT.

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF BUFFALO, AND JAMES COMERFORD, JR., COMMISSIONER OF PERMIT & INSPECTION SERVICES.

PAUL M. MICHALEK, JR., WEST SENECA, FOR DEFENDANT-RESPONDENT HANNAH DEMOLITION, INC.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 31, 2022. The order granted the motions of defendants for summary judgment and dismissed the complaint.

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

171

CA 23-00893

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

ABBY RESTANI AND THOMAS RESTANI,
PLAINTIFFS-RESPONDENTS,

V ORDER

UNIVERSAL PROPERTIES OF NEW YORK, LLC,
ST. MARY'S RECTORY AND ST. ANNE MOTHER OF
MARY FOOD PANTRY, DEFENDANTS-APPELLANTS.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FINKELSTEIN & PARTNERS, LLP, NEWBURGH (GEORGE A. KOHL, II, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Scott J. DelConte, J.), entered May 10, 2023. The order denied defendants' motion for summary judgment.

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

174

CA 23-00717

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

DENNISON W. WRIGHT AND SONIA LAGARES-WRIGHT,
PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF ROCHESTER, ET AL., DEFENDANTS,
COUNTY OF MONROE, COUNTY OF MONROE PUBLIC SAFETY
DEPARTMENT, MONROE COUNTY OFFICE OF PROBATION
AND COMMUNITY CORRECTIONS AND MONROE COUNTY
911 EMERGENCY COMMUNICATIONS DEPARTMENT,
DEFENDANTS-APPELLANTS.

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

LAW FIRM OF ALEX DELL, PLLC, ALBANY (SAMANTHA M. HOLBROOK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered April 7, 2023. The order, inter alia, denied the motion by defendants County of Monroe, County of Monroe Public Safety Department, Monroe County Office of Probation and Community Corrections and Monroe County 911 Emergency Communications Department to dismiss plaintiffs' complaint against them.

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

176

CA 23-01368

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

RICARDO V. HAMMOND, JR., PLAINTIFF-RESPONDENT,

V ORDER

FLUVANNA ENTERPRISES, LLC, DEFENDANT-RESPONDENT,
AND PAINTING UNLIMITED OF JAMESTOWN, INC.,
DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, ROCHESTER (KEVIN J. FEDERATION OF COUNSEL), FOR DEFENDANT-APPELLANT.

FESSENDEN LAUMER & DEANGELO, PLLC, JAMESTOWN (MARY B. SCHILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICES OF JOHN WALLACE, HARTFORD, CONNECTICUT (JORDYN M. PHILLIPS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Stephen W. Cass, A.J.), entered August 8, 2023. The order denied in part the motion of defendant Painting Unlimited of Jamestown, Inc., for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 21, 2023,

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

188

CAF 22-01143

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

IN THE MATTER OF NOAH C., ROMEO C., JADEN C., AND JACOB C.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

SHARON ALLEN, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

ANDREW G. MORABITO, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

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

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

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

SHARON ALLEN, KEUKA PARK, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

ANDREW G. MORABITO, EAST ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Ontario County (Jacqueline E. Sisson, J.), entered July 12, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondents' parental rights with respect to the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the disposition with respect to the three oldest children, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the

following memorandum: In this proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent parents and the four subject children appeal from an order that, inter alia, revoked prior suspended judgments entered upon respondents' admissions to permanently neglecting the children, terminated respondents' parental rights, and directed that the children be freed for adoption. We conclude that there is a sound and substantial basis in the record to support Family Court's determination that petitioner established by a preponderance of the evidence that respondents violated numerous terms of the suspended judgments and that, given the facts and circumstances at the time of the hearing, it was in the children's best interests to terminate respondents' parental rights (*see Matter of Dominic T.M. [Cassie M.]*, 169 AD3d 1469, 1470 [4th Dept 2019], *lv denied* 33 NY3d 902 [2019]; *Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1664 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019]).

Nevertheless, the three oldest children, along with the father, assert that new facts and allegations warrant remittal for a new dispositional hearing to determine the best interests of those children. We may "consider . . . new facts and allegations 'to the extent [that] they indicate that the record before us is no longer sufficient' to determine whether termination of . . . parental rights is in [a child's] best interests" (*Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1595 [4th Dept 2012], *lv dismissed* 21 NY3d 975 [2013], quoting *Matter of Michael B.*, 80 NY2d 299, 318 [1992]; *see Matter of Darlenea T. [Wanda A.]*, 122 AD3d 1416, 1417 [4th Dept 2014]; *Matter of Malik S. [Jana M.]*, 101 AD3d 1776, 1777-1778 [4th Dept 2012]; *Matter of Shad S. [Amy C.Y.]*, 67 AD3d 1359, 1360 [4th Dept 2009]). Here, the court's best interests determination was based, in part, on the fact that the oldest child had been successfully placed with a kinship guardian, and that the second oldest child, the third oldest child, and the youngest child had long lived with foster parents who were willing to adopt them. The attorneys for the oldest child, the second oldest child, and the third oldest child now report that, in the intervening 20 months since the entry of the order on appeal, among other things, the oldest child's kinship guardianship has been terminated, the second oldest child's adoptive placement has been disrupted inasmuch as he repeatedly absconded from the foster parents' home and his paternal grandmother has been awarded custody of him, and there is a pending custody petition by the paternal grandmother for the third oldest child, who will turn 14 years old later this year and remains steadfast in his opposition to being adopted (*see Malik S.*, 101 AD3d at 1777; *see also Darlenea T.*, 122 AD3d at 1417; *Gena S.*, 101 AD3d at 1595; *Shad S.*, 67 AD3d at 1360). Although other new facts and allegations asserted by petitioner suggest that termination of respondents' parental rights might remain in the best interests of the oldest child, the second oldest child, and the third oldest child, we conclude that the record before us is no longer sufficient to determine whether termination of respondents' parental rights is in the best interests of those children (*see Darlenea T.*, 122 AD3d at 1417; *Gena S.*, 101 AD3d at 1595; *Malik S.*, 101 AD3d at 1777-1778; *Shad S.*, 67 AD3d at 1360; *see generally Michael B.*, 80 NY2d at 318). We therefore modify the order by vacating the disposition with respect to the three oldest children and remit the matter to Family Court for a

new dispositional hearing to determine the best interests of those children. We note that there are no new facts or allegations with respect to the circumstances of the youngest child, and that "the conflict between the result with respect to [the youngest child] and the results with respect to [the three oldest children] is of no moment inasmuch as termination has been upheld with respect to younger siblings in similar circumstances" (*Gena S.*, 101 AD3d at 1595).

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

191

CA 23-00320

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

PB-67 DOE, PLAINTIFF-RESPONDENT,

V ORDER

LINDA BAUMANN, AS EXECUTOR OF THE ESTATE
OF WENDY E. DIMET, DECEASED, ET AL., DEFENDANTS,
AND NIAGARA FALLS CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

SHAUB AHMUTY CITRIN & SPRATT LLP, LAKE SUCCESS (NICHOLAS TAM OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS & PAOLICELLI, LLP, NEW YORK CITY (YITZCHAK M. FOGEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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

Appeal from an order of the Supreme Court, Niagara County (Mark J. Grisanti, A.J.), entered January 20, 2023. The order, insofar as appealed from, denied in part the motion of defendant Niagara Falls City School District to dismiss the complaint against it.

Now, upon reading and filing the stipulation to withdraw the appeal signed by the attorneys for the parties on January 16, 2024, and the accompanying letter signed by the attorney for defendant-appellant on February 2, 2024,

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

192

CA 23-01191

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

ORISKA CORPORATION GENERAL CONTRACTING,
ET AL., PLAINTIFFS,

V ORDER

NICHOLAS KORDAS, INDIVIDUALLY AND ON BEHALF OF
KORDAS & MARINIS, LLP, ET AL., DEFENDANTS.

MERKOURIOS ANGELIADES IRREVOCABLE TRUST, LIBERTY
MERKOURIOS, AS TRUSTEE OF THE MERKOURIOS ANGELIADES
IRREVOCABLE TRUST, M.A. ANGELIADES, INC., LIBERTY
MERKOURIOUS, AS CHIEF EXECUTIVE OFFICER OF M.A.
ANGELIADES, INC., AND MERKOURIOUS ANGELIADES,
INDIVIDUALLY, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

JAMES M. KERNAN, ET AL., THIRD-PARTY DEFENDANTS,
AND FRANK POLICELLI, THIRD-PARTY DEFENDANT-RESPONDENT.

ROSENBERG CALICA & BIRNEY LLP, GARDEN CITY (JUDAH SERFATY OF COUNSEL),
FOR THIRD-PARTY PLAINTIFFS-APPELLANTS.

ZACHARY C. OREN, UTICA, FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered March 24, 2023. The order, among other things, granted the motion of third-party defendant Frank Policelli to dismiss the third-party complaint against him.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 6, 2024,

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

193

CA 23-00451

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

IN THE MATTER OF MATTHEW KAVANAUGH,
JAMES KAVANAUGH AND HELEN KAVANAUGH, FOR THE
JUDICIAL DISSOLUTION OF CONSUMERS BEVERAGES,
INC. PURSUANT TO BCL § 1104-A,
PETITIONERS-APPELLANTS,

V ORDER

CONSUMERS BEVERAGES, INC., ET AL., RESPONDENTS,
CORNELIUS KAVANAUGH, ALSO KNOWN AS NEIL KAVANAUGH,
RESPONDENT-RESPONDENT,
AND MARY ELLEN KAVANAUGH, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

GROSS SHUMAN P.C., BUFFALO (KEVIN R. LELONEK OF COUNSEL), FOR PETITIONERS-APPELLANTS.

GARVEY & GARVEY, BUFFALO (DENNIS J. GARVEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

CONNORS LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR RESPONDENT-RESPONDENT.

BARCLAY DAMON, LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR RESPONDENT CONSUMERS BEVERAGES, INC.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 21, 2023. The order granted the motion of respondent Cornelius Kavanaugh, also known as Neil Kavanaugh, to dismiss the petition and cross-petitions.

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

194

CA 23-01367

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

IN THE MATTER OF MATTHEW KAVANAUGH,
JAMES KAVANAUGH AND HELEN KAVANAUGH, FOR THE
JUDICIAL DISSOLUTION OF CONSUMERS BEVERAGES,
INC. PURSUANT TO BCL § 1104-a,
PETITIONERS-APPELLANTS,

V ORDER

CONSUMERS BEVERAGES, INC., ET AL., RESPONDENTS,
AND CORNELIUS KAVANAUGH, ALSO KNOWN AS NEIL KAVANAUGH,
RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

GROSS SHUMAN P.C., BUFFALO (KEVIN R. LELONEK OF COUNSEL), FOR PETITIONERS-APPELLANTS.

CONNORS LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR RESPONDENT-RESPONDENT.

BARCLAY DAMON, LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR RESPONDENT CONSUMERS BEVERAGES, INC.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 28, 2023. The order denied the motion of petitioners seeking leave to renew.

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

217

CAF 22-01997

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

IN THE MATTER OF PATIENCE E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

VICTORIA E., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

ANAISS RIJO LELONEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROXANNA Q. HERREID OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 17, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In appeal Nos. 1 through 3, respondent mother appeals from orders terminating her parental rights to the subject children pursuant to Social Services Law § 384-b on the ground of permanent neglect. We now affirm in all three appeals.

In all three appeals, we conclude that petitioner met its burden of establishing by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the mother's relationship with the children (*see* Social Services Law § 384-b [7] [a]; *Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 142-143 [1984]). Although Family Court failed to comply with CPLR 4213 (b) when it neglected to make specific findings of fact with respect to the fulfillment of petitioner's statutory obligation (*see Matter of Paulette B.*, 270 AD2d 949, 949 [4th Dept 2000]; *Matter of Kelly G.*, 244 AD2d 709, 709-710 [3d Dept 1997]), the record is sufficiently developed to enable us to make the necessary findings (*see Matter of Howard R.*, 258 AD2d 893, 893 [4th Dept 1999]).

Contrary to the mother's further contention in these appeals, the evidence at the hearing establishes that, despite those diligent

efforts, the mother 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 Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]; *see Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]; *Matter of Faith K. [Jamie K.]*, 203 AD3d 1568, 1569 [4th Dept 2022]; *see generally* Social Services Law § 384-b [7] [c]). Here, the mother was discharged from mental health counseling, anger management classes, and substance abuse treatment for failure to attend (*see Matter of Brady J.C. [Justin P.C.]*, 154 AD3d 1325, 1326 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]), thereby demonstrating that she failed to "take meaningful steps to correct the conditions that led to the child[ren]'s removal" (*Matter of Ayden D. [John D.]*, 202 AD3d 1455, 1456 [4th Dept 2022] [internal quotation marks omitted]), and "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" (*Giovanni K.*, 62 AD3d at 1243; *see Matter of Soraya S. [Kathryne T.]*, 158 AD3d 1305, 1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]).

Finally, we reject the mother's contention that a suspended judgment was warranted and conclude that it was in the children's best interests to terminate the mother's parental rights. "A suspended judgment is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1663 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019] [internal quotation marks omitted]; *see* Family Ct Act § 633; *Matter of Michael B.*, 80 NY2d 299, 310-311 [1992]) and "may be warranted where the parent has made sufficient progress in addressing the issues that led to the child[ren]'s removal from custody" (*Matter of Brandon I.J. [Daisy D.]*, 198 AD3d 1310, 1311 [4th Dept 2021], *lv denied* 38 NY3d 901 [2022]).

Here, the mother's progress in completing her parenting classes, which was only one of several required services, "was made after the [termination of parental rights] petition[s were] filed, and she failed to complete th[at] requirement [or any of her other required services] during [the time between when] the petition was filed and the hearing was concluded" (*Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010]). Thus, we conclude that any progress "made by [the mother] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the [children's] unsettled familial status" (*id.* [internal quotation marks omitted]). Our conclusion is further supported by the foster parents' desire to adopt the children, which adoption would provide them with a "sense of stability" (*Matter of Tumario B. [Valerie L.],* 83 AD3d 1412, 1412 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011] [internal quotation marks omitted]), and the fact that the children spent a significant portion of their lives in the foster parents' care and established a bond with them that they lacked with the mother (*see Matter of Ty'Keith R.*, 45 AD3d 1397, 1397 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]). We therefore conclude that the

court properly determined that a suspended judgment was unwarranted (*see Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1669 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]; *Brandon I.J.*, 198 AD3d at 1311; *Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1520-1521 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

218

CAF 22-01998

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

IN THE MATTER OF BROOKLYN E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

VICTORIA E., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

ANAISS RIJO LELONEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROXANNA Q. HERREID OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 17, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Same memorandum as in *Matter of Patience E. (Victoria E.)* ([appeal No. 1] — AD3d — [Mar. 15, 2024] [4th Dept 2024]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

219

CAF 22-01999

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

IN THE MATTER OF DAVID E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

VICTORIA E., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

ANAISS RIJO LELONEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROXANNA Q. HERREID OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 17, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Same memorandum as in *Matter of Patience E. (Victoria E.)* ([appeal No. 1] — AD3d — [Mar. 15, 2024] [4th Dept 2024]).

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

221

CA 22-01343

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

SHERRY WITHIAM-LEITCH, AS EXECUTOR
OF THE ESTATE OF FRANK M. LEITCH, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

DR. LYNDA M. SORENSON, DR. JULIET L.
CROSSLAND-SORENSON, D.C., AND FLEMING SORENSON,
DEFENDANTS-APPELLANTS.

VIOLA CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered April 8, 2022. The order denied the motion of defendants for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 24, 2024,

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

231

TP 23-01626

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

IN THE MATTER OF THE ESTATE OF
CLANCY STARKS AND WATERFRONT OPERATIONS
ASSOCIATES, LLC, DOING BUSINESS AS
ELLICOTT CENTER FOR NURSING AND REHABILITATION,
PETITIONERS,

V ORDER

NEW YORK STATE DEPARTMENT OF HEALTH
AND JAMES V. MCDONALD, IN HIS OFFICIAL CAPACITY
AS ACTING COMMISSIONER OF NEW YORK
STATE DEPARTMENT OF HEALTH, RESPONDENTS.

COWART DIZZIA LLP, NEW YORK CITY (JENNIFER NEARY OF COUNSEL), FOR PETITIONERS.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Mark J. Grisanti, A.J.], entered September 19, 2023) to review a determination of respondents. The determination denied a request for review of the denial of an application for Medicaid benefits submitted on behalf of Clancy Starks.

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

243

CA 22-01923

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

ESPERANZA MANSION GROUP LLC, TODD ALEXANDER ENTERPRISES, INC., TODD ALEXANDER AND MARY OLIVO, PLAINTIFFS-APPELLANTS,

V ORDER

LAWRENCE MEHLENBACHER, ELIZABETH MEHLENBACHER, CATHERINE MAJANE, ESPERANZA MANSION & INN LLC, AND ESPERANZA MANSION ESTATES LLC, DEFENDANTS-RESPONDENTS.

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

HARRIS BEACH PLLC, PITTSFORD (KELLY S. FOSS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Yates County (J. Scott Odorisi, J.), entered November 3, 2022. The order, inter alia, granted in part the motion of defendants for sanctions.

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

262

CA 23-00602

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

IN THE MATTER OF EMMETT LANIER,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered March 8, 2023, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: March 15, 2024

Ann Dillon Flynn
Clerk of the Court