



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

DECISIONS FILED

JUNE 5, 2026

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED JUNE 5, 2026

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_____	121	KA 23 01953	PEOPLE V STEVEN REMINGTON
_____	131	CA 25 00186	HERITAGE CHRISTIAN SERVICES, INC. V TOWN OF WEBSTER BOARD OF ASSESSMENT REVIEW
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

198/25

CA 24-00467

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

BETH NEARY, PLAINTIFF-RESPONDENT,

V

ORDER

ST. MARY'S SQUARE CONDOMINIUM ASSOCIATION,
ET AL., DEFENDANT.

ST. MARY'S SQUARE CONDOMINIUM ASSOCIATION,
THIRD-PARTY PLAINTIFF-RESPONDENT,

V

REGAN LAWNCARE AND LANDSCAPING, INC.,
THIRD-PARTY DEFENDANT-APPELLANT.

GOMEZ LAW, LLC, BUFFALO (RAFAEL O. GOMEZ OF COUNSEL), FOR THIRD-PARTY
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (KRIS E. LAWRENCE OF COUNSEL), FOR
THIRD-PARTY PLAINTIFF-RESPONDENT.

STEVE BOYD, P.C., BUFFALO (LEAH A. COSTANZO OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kelly A. Vacco, J.), entered February 6, 2024. The order denied the motion of third-party defendant for summary judgment dismissing the third-party complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 21 and 23, 2025, and June 23, 2025,

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

All concur except KEANE, J., who is not participating.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-01207

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GERMAINE DIXON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 24, 2023. 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 a 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 invalid. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Rivera*, 225 AD3d 1286, 1286 [4th Dept 2024], *lv denied* 41 NY3d 1004 [2024]; *People v Fernandez*, 218 AD3d 1257, 1257-1258 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]) and thus does not preclude our review of the remainder of his challenges on appeal (*see People v Coffee* [appeal No. 1], 236 AD3d 1467, 1467 [4th Dept 2025], *lv denied* 43 NY3d 1007 [2025]; *People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we nevertheless affirm. Defendant contends that Supreme Court erred in refusing to suppress his statements to the police because they were the product of coercion and he had invoked his right to counsel. We reject that contention (*see People v Jenkins*, 159 AD3d 1419, 1420 [4th Dept 2018], *lv denied* 31 NY3d 1118 [2018], *reconsideration denied* 32 NY3d 1005 [2018]; *see also People v Hymes*, 174 AD3d 1295, 1297 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]; *People v Jones*, 188 AD3d 1682, 1682 [4th Dept 2020], *lv denied* 36 NY3d 1057 [2021]; *People v Jackson*, 105 AD3d 866, 868-869 [2d Dept 2013], *lv denied* 21 NY3d 1016 [2013]). Additionally, defendant failed to preserve his contention that the statements to the police should have been suppressed on the ground that he invoked his right to remain silent (*see People v Sullivan*, 239 AD3d 1371, 1372 [4th Dept 2025]).

Finally, we reject defendant's contention that the bargained-for sentence of incarceration is unduly harsh and severe.

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

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KA 23-01953

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN REMINGTON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered November 7, 2022. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the first degree (Penal Law former § 130.35 [2]) and assault in the second degree (§ 120.05 [6]).

Defendant contends that he was denied a fair trial by prosecutorial misconduct, but we note that he failed to object to any of the comments he now raises on appeal, and thus his contention is not preserved for our review (see *People v Smith*, 150 AD3d 1664, 1666 [4th Dept 2017], lv denied 30 NY3d 953 [2017]). In any event, defendant's contention is without merit (see *People v Thanthima*, — AD3d —, —, 2026 NY Slip Op 02503, *1 [4th Dept 2026]). We further conclude that defense counsel was not ineffective for failing to object to the prosecutor's statements (see *People v Farrington*, 171 AD3d 1538, 1540 [4th Dept 2019], lv denied 34 NY3d 930 [2019]).

Defendant further contends that defense counsel was ineffective for eliciting certain harmful testimony from the victim. We reject that contention. Defendant's theory of the case was that the victim fabricated the rape to avoid consequences of her probation violation and defense counsel's questions were consistent with defendant's strategy at trial. On appeal, defendant has failed to establish the absence of any strategic or other legitimate explanation for defense counsel's cross-examination of the victim (see generally *People v Caban*, 5 NY3d 143, 152 [2005]) and therefore failed to demonstrate that the cross-examination deprived him of meaningful representation

(*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). We further conclude that defendant's remaining allegations of ineffective assistance of counsel lack merit (*see generally People v Paul*, 171 AD3d 1555, 1557 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019], *reconsideration denied* 34 NY3d 983 [2019]).

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

Defendant failed to preserve for our review his contention that, in sentencing him, County Court punished him for exercising his right to a trial (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Mohamed*, 224 AD3d 1271, 1271-1272 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]). Finally, defendant's sentence is not unduly harsh or severe.

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

131

CA 25-00186

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

IN THE MATTER OF HERITAGE CHRISTIAN
SERVICES, INC., PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF WEBSTER BOARD OF ASSESSMENT REVIEW,
ASSESSOR OF TOWN OF WEBSTER, TOWN OF WEBSTER,
RESPONDENTS,
AND WEBSTER CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

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

JACOBSON LAW FIRM, P.C., PITTSFORD (ROBERT L. JACOBSON OF COUNSEL),
FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered August 6, 2024, in a proceeding pursuant to CPLR article 78 and RPTL article 7. The order and judgment, inter alia, granted in part the cross-motion of petitioner for summary judgment.

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

Memorandum: In this hybrid CPLR article 78 and RPTL article 7 proceeding, respondent Webster Central School District (school district) appeals from an order and judgment that, inter alia, determined that petitioner's real property is subject to a real property tax exemption pursuant to RPTL 420-a for tax years 2017 through 2023. We affirm.

Contrary to the school district's contention, petitioner, a property owner seeking an exemption from real property taxes pursuant to RPTL 420-a, met its burden of establishing that the subject property is used exclusively in furtherance of its charitable purpose (see RPTL 420-a [1] [a]; *Matter of Merry-Go-Round Playhouse, Inc. v Assessor of City of Auburn*, 24 NY3d 362, 367-368 [2014]; *Matter of Salvation Army v Town of Ellicott Bd. of Assessment Review*, 100 AD2d 361, 362 [4th Dept 1984]; see also *Matter of Adult Home at Erie Sta., Inc. v Assessor & Bd. of Assessment Review of City of Middletown*, 10 NY3d 205, 216 [2008]; *Matter of Association of Bar of City of N.Y. v Lewisohn*, 34 NY2d 143, 153 [1974]). With respect to petitioner's

cross-motion for summary judgment seeking an order requiring the exemption, we conclude that the affidavit of petitioner's president and chief executive officer relied upon her firsthand knowledge in detailing several aspects of petitioner's operations and thus had probative value (see *Gherghinoiu v ATCO Props. & Mgt., Inc.*, 32 AD3d 314, 315 [1st Dept 2006], *lv denied* 7 NY3d 716 [2006]; cf. *Anderson v Livonia, Avon & Lakeville R.R. Corp.*, 300 AD2d 1134, 1134-1135 [4th Dept 2002]). We further conclude that, in opposition to petitioner's showing, the school district failed to raise a material issue of fact (see generally *Merry-Go-Round Playhouse, Inc.*, 24 NY3d at 369).

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

171

CA 25-00429

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

IN THE MATTER OF MARIO ZANGHI, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DANIEL MARTUSCELLO, III, 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 (RACHEL RAIMONDI OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County
(Donald G. O'Geen, A.J.), entered February 25, 2025, in a proceeding
pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his
CPLR article 78 petition seeking to annul the determination of the
Parole Board that denied his request for release to parole
supervision. Following that denial and during the pendency of this
appeal, petitioner reappeared before the Parole Board in September
2025, and was subsequently denied parole. Consequently, this appeal
must be dismissed as moot (*see Matter of Lopez v Annucci*, 229 AD3d
1124, 1125 [4th Dept 2024]; *Matter of Hill v Annucci*, 149 AD3d 1540,
1541 [4th Dept 2017]). Contrary to petitioner's contention, the
exception to the mootness doctrine does not apply (*see Matter of
Lopez-Contreras v Annucci*, 221 AD3d 1580, 1580 [4th Dept 2023]; *see
generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715
[1980]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

172

KA 25-00132

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

IN THE MATTER OF A CONFIDENTIAL INVESTIGATION
CONCERNING MISCONDUCT, NON-FEASANCE OR NEGLECT
BY A PUBLIC OFFICIAL.

FELICIA PITTS DAVIS, APPELLANT,

MEMORANDUM AND ORDER

THE ONONDAGA COUNTY DISTRICT ATTORNEY'S OFFICE,
RESPONDENT.

ROBERT F. JULIAN, P.C., UTICA (ROBERT F. JULIAN OF COUNSEL), FOR
APPELLANT.

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

Appeal from an order of the Onondaga County Court (Matthew J. Doran, J.), rendered December 23, 2024. The order, among other things, accepted a Grand Jury Report and ordered the report sealed pending the determination of an appeal from the order.

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

Memorandum: The grand jury of Onondaga County submitted to County Court a report pursuant to CPL 190.85 (1) (a) recommending the removal of appellant, a City Court Judge, from the bench based upon her misconduct or non-feasance in public office. The court accepted the report and ordered it sealed pending the determination of this appeal pursuant to CPL 190.90. Appellant appeals, and we affirm.

Appellant contends that the court should have rejected the report because the New York Commission on Judicial Conduct (CJC) has exclusive jurisdiction to review and make determinations regarding the conduct of members of the judiciary. We reject that contention. The statutory framework provided by the CPL permits a grand jury to issue a report to the court "[c]oncerning misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action" (CPL 190.85 [1] [a]). "Judges fall within the broad definition of public servant" (*People v Garson*, 6 NY3d 604, 613 [2006]).

We also reject appellant's further contention that the report should remain sealed after this Court's determination because

proceedings of the CJC are confidential. We note that "this Court is not bound by an erroneous concession of counsel or the parties with respect to a legal principle and such concession does not . . . relieve us from the performance of our judicial function and does not require us to adopt the proposal urged upon us" (*Genesee County Fish & Game Protective Assn., Inc. v Sullivan*, 239 AD3d 1245, 1247-1248 [4th Dept 2025] [internal quotation marks omitted]). The provisions of the Judiciary Law related to the confidentiality of CJC proceedings apply only to matters before the CJC not to matters, such as these, that are before the court (see *Matter of New York State Commn. on Jud. Conduct v Doe*, 96 AD2d 638, 639 [3d Dept 1983], *affd* 61 NY2d 56 [1984]; *Matter of Nicholson v State Commn. on Jud. Conduct*, 50 NY2d 597, 612-613 [1980]). If, as here, the order accepting a report is appealed, the report and the order must be sealed by the court and may not be filed as a public record until the determination of the appeal (see CPL 190.85 [3]). We conclude that, in light of our affirmance of the order accepting the report, the order and report must be made public.

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

200

KA 24-01289

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MOUNIR L. HOWARD, DEFENDANT-APPELLANT.

JOHN ROWLEY, SPENCER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered April 25, 2024. The judgment convicted defendant upon a jury verdict of attempted assault in the first degree, assault in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). We affirm.

We reject defendant's contention that County Court denied him the right to represent himself. A defendant in a criminal case may proceed pro se if "(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*People v McIntyre*, 36 NY2d 10, 17 [1974]; see *People v Lewis*, 44 NY3d 350, 358 [2025]; *People v Williams*, 203 AD3d 1571, 1571-1572 [4th Dept 2022], lv denied 38 NY3d 1075 [2022]).

Here, defendant retained counsel to represent him, but defense counsel moved for leave to withdraw from representing defendant a month prior to trial. After both defendant and defense counsel agreed in court that the relationship between them was "totally broken down," the court granted the motion. The court then addressed with defendant proceeding forward and noted that there was an allegation from the public defender's office that defendant wanted to represent himself. Defendant responded "Absolutely." In response to questioning from the court, defendant indicated that he had no legal training and then abruptly stated "[c]onversation is done." Nevertheless, the court

continued speaking with defendant and advised him that it did not believe that he was capable of representing himself and that it would be a "foolish decision" to do so. Defendant responded "Okay, that's fine" and "All right" and indicated that he would look for new counsel, but did not want anyone from the public defender's office. Defendant agreed with the court's proposal to have him return to court every week to report on any progress made and to assign him an attorney if defendant did not retain counsel in one month. After one week, defendant indicated that he was reviewing a list and was getting close to a decision. After another week, defendant returned to court and, following a discussion at the bench, the court placed on the record that defendant would be represented by attorneys from the public defender's office. Defendant made no objection and never again raised the issue of proceeding pro se.

Under these circumstances, we conclude that defendant withdrew or abandoned his request to proceed pro se (see *People v Battle*, 200 AD3d 1712, 1715 [4th Dept 2021], lv denied 38 NY3d 1132 [2022]; *People v Jordan*, 157 AD3d 413, 414 [1st Dept 2018], lv denied 31 NY3d 984 [2018]). Counsel was assigned to him just two weeks after he initially remarked that he wanted to proceed pro se, and defendant was "seemingly satisfied" with that appointment (*People v Gillian*, 8 NY3d 85, 88 [2006]).

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

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

201

KA 23-01285

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES JONES, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (TABITHA R. SALONEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 15, 2023. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of manslaughter in the first degree (Penal Law § 125.20 [1]). As a condition of his plea, defendant waived his right to a Penal Law § 60.12 hearing to determine his eligibility for an alternative sentence under the Domestic Violence Survivors Justice Act. Inasmuch as "section 60.12 hearings are not waivable as a condition of a plea agreement" (*People v N.H.*, — NY3d —, 2026 NY Slip Op 02437, *1 [2026]), we agree with defendant that this matter must be remitted for further proceedings, including a Penal Law § 60.12 hearing should defendant request one (*see id.* at *7). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for further proceedings.

Defendant's remaining contentions are academic in light of our determination.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

208

CA 25-00676

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

BROADWAY WAREHOUSE CO., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BUFFALO BARN BOARD, LLC, DEFENDANT-RESPONDENT.

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

JUSTIN S. WHITE, WILLIAMSVILLE, FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 17, 2025. The order and judgment, among other things, modified a Referee's report by reducing the amount of attorney's fees awarded to plaintiff.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, damages in the form of attorney's fees it expended to secure a judgment in a prior action for unpaid rent due under a commercial lease. The complaint asserts causes of action for breach of contract and fraudulent transfer of assets. Plaintiff moved for partial summary judgment on liability, and Supreme Court granted plaintiff's motion in part with respect to the breach of contract cause of action and appointed a referee to determine the amount of damages, i.e., attorney's fees, to which plaintiff is entitled.

Following an evidentiary hearing, the Referee issued a report recommending that plaintiff be awarded \$135,009.89 in legal fees. Although that is almost twice the amount of damages that plaintiff obtained in the initial action for unpaid rent, plaintiff had requested \$293,067.82 in fees plus prejudgment interest of \$187,078.26, for a total \$480,146.08. The Referee denied plaintiff's request for prejudgment interest. After the parties objected to different portions of the Referee's report, the court entered an order and judgment in which it reduced the award to \$88,487.58, which represents legal fees incurred by plaintiff from the time of the commencement of the initial action in 2010 through December 5, 2017, when defendant's principal satisfied the judgment for unpaid rent plus interest. Plaintiff now appeals, contending that the court erred in determining that it was not entitled under the lease to recover attorney's fees incurred after December 5, 2017, when defendant's

principal paid the rent due under the lease plus interest. We affirm.

While plaintiff was properly granted an award of attorney's fees for legal work undertaken to obtain the judgment in the prior action for unpaid rent owed by defendant, we reject plaintiff's contention that it is entitled to attorney's fees for legal work undertaken to collect the attorney's fees to which it was entitled under the lease. That is to say, plaintiff is not entitled to "fees on fees." An award of "fees on fees" is allowed only if pursuant to "a specific contractual provision or statute" (*Matter of Aron Law, PLLC v New York City Fire Dept.*, 239 AD3d 972, 973 [2d Dept 2025], *lv dismissed* 44 NY3d 1020 [2025]; see *Batsidis v Wallack Mgt. Co., Inc.*, 126 AD3d 551, 553 [1st Dept 2015]). "In the absence of unmistakably clear intent regarding the recovery of fees on fees, a right to recover those fees should not be implied" (*Pace v Robertson*, 235 AD3d 989, 992 [2d Dept 2025] [internal quotation marks omitted]; see 546-552 W. 146th St. LLC v Arfa, 99 AD3d 117, 122 [1st Dept 2012]). Here, the standard form attorney's fees provision in the parties' lease does not authorize plaintiff to collect attorney's fees expended to collect attorney's fees due under the lease upon a breach by the tenant.

Finally, plaintiff contends that the court should have granted it prejudgment interest on the award of attorney's fees pursuant to CPLR 5001. Because plaintiff did not object to that portion of the Referee's report that denied its request for prejudgment interest, plaintiff waived its contention (see generally *Matter of Thomas v Murphy*, 2 AD3d 1404, 1404 [4th Dept 2003]; *Sroka v Sroka*, 255 AD2d 897, 898 [4th Dept 1998]; *Passaro v Henry*, 251 AD2d 390, 390 [2d Dept 1998]).

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

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CA 24-01928

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

SCOTT A. DELISLE, PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

FBBT/US PROPERTIES, LLC, DEFENDANT-RESPONDENT,
CSL PLASMA INC., AND BARKER CONTRACTING, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

HURWITZ FINE P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS-APPELLANTS.

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

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered October 31, 2024. The order, inter alia, denied the motion of plaintiff for partial summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action.

It is hereby ORDERED that the order so appealed from is modified on the law by granting plaintiff's motion for summary judgment on liability under Labor Law § 240 (1), and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained while performing construction work on premises owned by defendant FBBT/US Properties, LLC (FBBT) and leased to defendant CSL Plasma Inc. (CSL). FBBT and CSL hired defendant Barker Contracting, Inc. (Barker) as general contractor for the construction project, and Barker subcontracted a portion of the project to plaintiff's employer. Plaintiff alleged that an A-frame ladder on which he had been standing shifted, causing him to lose his balance and then injure his arm as he grabbed the ladder to steady himself before he fell to the ground. Plaintiff further alleged that the ladder, which was one of several provided by his employer, had been modified by a CSL employee who duct-taped tube socks over the four feet of the ladder to prevent the ladder from scuffing newly-installed tile floors. Plaintiff moved for partial summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action, and CSL and Barker (collectively, CSL

defendants) cross-moved for summary judgment dismissing the complaint and all cross-claims against them. Plaintiff appeals and the CSL defendants cross-appeal from an order that, inter alia, denied plaintiff's motion and denied that part of the CSL defendants' cross-motion with respect to the Labor Law § 240 (1) cause of action.

Plaintiff contends on his appeal that Supreme Court erred in denying his motion. We agree, and we therefore modify the order accordingly. To establish a prima facie case of liability under Labor Law § 240 (1), a plaintiff must " 'show that the statute was violated and that the violation proximately caused [the] injury' " (*Miller v Spall Dev. Corp.*, 45 AD3d 1297, 1297 [4th Dept 2007], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). "Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain[s] steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Montalvo v J. Petrocelli Constr. Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [internal quotation marks omitted]; see also *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015]). "[T]he fact that the ladder failed and [that the] plaintiff fell to the ground demonstrates that it was not so placed . . . as to give proper protection to [the plaintiff]" (*Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1578 [4th Dept 2016] [internal quotation marks omitted]; see *Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582 [4th Dept 2011]). "Evidence that the ladder was structurally sound and not defective is not relevant on the issue of whether it was properly placed" (*Kirbis*, 90 AD3d at 1582 [internal quotation marks omitted]).

Here, plaintiff met his initial burden on the motion by submitting his deposition testimony wherein he testified that a CSL employee named John covered the ladder's feet with socks, that John instructed plaintiff to use the modified ladder, and that the socks caused the ladder to slide and plaintiff to fall. Plaintiff's un rebutted testimony established that "the statute was violated and that the violation proximately caused his injury" (*Cahill*, 4 NY3d at 39).

We further agree with plaintiff that, in opposition, the CSL defendants failed to raise a triable issue of fact whether plaintiff was the sole proximate cause of the accident (see generally *Weitzel v State of New York*, 160 AD3d 1394, 1394-1395 [4th Dept 2018]). The elements of a sole proximate cause defense are that the "plaintiff (1) had adequate safety devices available, (2) knew both that the safety devices were available and that [the plaintiff was] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had [the plaintiff] not made that choice" (*Verdugo v Fox Bldg. Group, Inc.*, 218 AD3d 1179, 1180 [4th Dept 2023] [internal quotation marks omitted]; see *Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]).

Here, the CSL defendants established that there was an available safety device—i.e., other, unmodified ladders—and that plaintiff knew that those ladders were available and that he was expected to use

them. We conclude, however, that, in opposition to plaintiff's showing that a CSL employee instructed him to use a modified ladder to protect the newly installed tile floor, the CSL defendants failed to raise a triable issue of fact whether plaintiff "chose for no good reason" to use the modified ladder (see *Guaman-Sanango v 57 E. 72nd Corp.*, 227 AD3d 677-679 [2d Dept 2024]; see also *Finocchi v Live Nation Inc.*, 204 AD3d 1432, 1433-1434 [4th Dept 2022]). Regardless of whether the CSL employee was plaintiff's actual supervisor, plaintiff "was under no obligation to demand safer methods" for performing his work (*Finocchi*, 204 AD3d at 1434). The CSL defendants' assertion that evidence of the alleged instructions from the CSL employee constituted inadmissible hearsay was raised for the first time on appeal and thus is not properly before us (see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

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

All concur except LINDLEY, J.P., and GREENWOOD, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent inasmuch as we agree with Supreme Court that triable issues of fact preclude summary judgment to plaintiff on the Labor Law § 240 (1) cause of action.

Plaintiff was injured while working on a construction project on property owned by defendant FBBT/US Properties, LLC and leased to defendant CSL Plasma Inc. (CSL). Defendant Barker Contracting, Inc. (Barker) was the general contractor on the construction site. As relevant here, plaintiff moved for partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) cause of action, and CSL and Barker cross-moved for summary judgment dismissing the complaint and all cross-claims against them. The court, inter alia, denied plaintiff's motion and denied that part of the cross-motion of CSL and Barker seeking summary judgment dismissing the Labor Law § 240 (1) cause of action. Plaintiff now appeals, and CSL and Barker cross-appeal.

Plaintiff testified at his deposition that his employer provided six- and eight-foot A-frame stepladders for use on the project. The ladder he normally used had "[g]ood feet" and was "[g]reat." He used that six-foot ladder the morning of the accident without issue, placing a piece of underlayment beneath the ladder to protect the newly-installed tile floor from being damaged. When plaintiff returned from his lunch break, however, the ladder was being used by someone named "John," who had a red beard and who introduced himself as an employee of CSL. Plaintiff testified that John had modified the ladder by taping tube socks on the feet to protect the floor. Plaintiff testified that John "[m]ore [or] less" instructed him to use the modified stepladder. Plaintiff testified that he was injured while using the modified stepladder when the ladder slid forward, causing him to lose his balance and grab the ladder in an attempt to steady himself, at which point he felt pain in his left arm and fell off the ladder.

Plaintiff's fall was unwitnessed, and neither the project manager for the property nor the director of engineering services for CSL knew of a CSL employee named John who had a red beard. There was also deposition testimony that the only CSL employee assigned to the relevant project would have been the CSL project manager and that no one was aware of socks being placed on ladder feet. The project superintendent, who was at the project site every day, testified that if he had seen socks placed on a ladder's feet, he would have corrected it immediately.

Also before the court were several documents prepared by plaintiff shortly after his fall. In his workers' compensation claim form, plaintiff wrote that the accident occurred when he "[s]lipped while ascending ladder, lost balance, and regained balance . . . only after hearing noise in left shoulder." In another note created in connection with the workers' compensation claim, plaintiff stated that the accident occurred "while [he] was ascending a company ladder [when he] lost [his] footing and balance and while attempting to regain balance, [his] body shifted to the left, [he] heard a crunch and felt a snapping in [his] left shoulder, immediately followed by a sharp pain and numbness in [his] hand, arm, shoulder and neck." A similar account was given by plaintiff to his employer, which was used to fill out the employer's workers' compensation form.

In order to establish his entitlement to judgment on liability under Labor Law § 240 (1) as a matter of law, plaintiff was required "to show that the statute was violated and that the violation proximately caused his injury" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). A defendant has no liability under Labor Law § 240 (1) when the plaintiff (1) "had adequate safety devices available," (2) "knew both that" the safety devices "were available and that [the plaintiff was] expected to use them," (3) "chose for no good reason not to do so," and (4) would not have been injured had the plaintiff "not made that choice" (*id.* at 40). Although in some instances a plaintiff may be entitled to summary judgment on the issue of liability even when the accident is unwitnessed, where there is a triable issue of fact relating to the prima facie case or to plaintiff's credibility, the motion should be denied (see *Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). In our view, plaintiff failed to eliminate issues of fact or, alternatively, defendants raised a triable issue of fact.

Viewing the evidence in the light most favorable to defendants, as the nonmoving parties on plaintiff's motion (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), we conclude that "there is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]; see *Krause v Industry Matrix, LLC*, 227 AD3d 1560, 1561 [4th Dept 2024]; *Bonczar v American Multi-Cinema, Inc.*, 158 AD3d 1114, 1115 [4th Dept 2018]). Plaintiff's description of the accident in his deposition testimony differed from the description he gave shortly after the accident when he applied for workers' compensation benefits. In seeking workers'

compensation benefits, plaintiff stated that he "slipped" and lost his balance, not that the ladder itself slid. There are also issues of fact whether there were socks placed on the feet of the ladder and, even if there were, whether plaintiff was instructed to use that ladder as modified or whether he could have used a different ladder. In that regard, plaintiff's and the majority's reliance on *Finocchi v Live Nation Inc.* (204 AD3d 1432, 1433 [4th Dept 2022]) is misplaced inasmuch as that case involved a verdict after a nonjury trial, not a motion for summary judgment.

In response to a contention regarding hearsay, plaintiff states in his reply brief that it does not matter that the CSL employee named John is unknown and unavailable for cross-examination because "plaintiff can testify [to the encounter with the CSL employee] and . . . defendants can cross-examine [plaintiff] regarding it" (emphasis added). That is precisely why summary judgment in favor of plaintiff is inappropriate here. It is for a jury to determine, after the examination and cross-examination of the witnesses, whether the accident occurred as testified to by plaintiff at his deposition and whether plaintiff was given any purported instruction to use a modified ladder.

In sum, it is well settled that "[a]n 'accident alone' is insufficient to establish a violation of Labor Law § 240 (1) or causation" (*Cutaia v Board of Mgrs. of the 160/170 Varick St. Condominium*, 38 NY3d 1037, 1038 [2022]). On this record, we conclude that issues of fact preclude an award of summary judgment in favor of plaintiff on the Labor Law § 240 (1) cause of action (see *id.* at 1038-1039; *Valente v Lend Lease [US] Constr. LMB, Inc.*, 29 NY3d 1104, 1105 [2017]; *Cahill*, 4 NY3d at 40). Inasmuch as we conclude that the remaining contentions of CSL and Barker are without merit, we would affirm the order.

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

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KA 25-00336

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DOUGLAS E. EGGERS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (AXELLE LECOMTE MATHEWSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an amended order of the Ontario County Court (Frederick G. Reed, A.J.), dated April 25, 2025. The amended order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

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

As a preliminary matter, we note that the original order in this appeal was superseded by an amended order and the proper appeal is from the amended order (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]). Although defendant, by his notice of appeal, has taken an appeal from the original order, we conclude that the appeal must be deemed taken from the amended order inasmuch as the appeal is timely, no prejudice has resulted, and the amended order has been furnished to us (*see CPLR 5512 [a]; see generally Tapp Partners, LLC v Wall Sections Inc.*, 244 AD3d 1727, 1728 [4th Dept 2025]).

We reject defendant's contention that County Court treated defendant's presumptive override as mandatory. It is well established "that the application of the override for a prior felony sex crime is presumptive, not mandatory or automatic" (*People v Edmonds*, 133 AD3d 1332, 1333 [4th Dept 2015], *lv denied* 26 NY3d 918 [2016]). Here, however, the court did not treat defendant's presumptive level three classification as mandatory, inasmuch as the court indicated that the presumptive override "[was] an override that I'm going to follow on this case" (*cf. People v Douglas*, 199 AD3d 1330, 1331 [4th Dept 2021]).

We agree with defendant that the court failed to comply with Correction Law § 168-n (3), which requires the court making a risk level determination pursuant to SORA to set forth the findings of fact and conclusions of law on which it based its determination (*see People v Flax*, 71 AD3d 1451, 1451-1452 [4th Dept 2010]). We conclude, however, that the record in this case "is sufficient to enable us to make our own findings of fact and conclusions of law" (*People v Young*, 108 AD3d 1232, 1233 [4th Dept 2013], *lv denied* 22 NY3d 853 [2013], *rearg denied* 22 NY3d 1036 [2013]).

We reject defendant's contention that the court should have granted his request for a downward departure to a level two risk. "Under SORA, a court must follow three analytical steps to determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score" (*People v Gillotti*, 23 NY3d 841, 861 [2014]). "At the first step, the court must decide whether the aggravating or mitigating circumstances alleged by a party seeking a departure are, as a matter of law, of a kind or to a degree not adequately taken into account by the guidelines" (*id.*). "At the second step, the court must decide whether the party requesting the departure has adduced sufficient evidence to meet its burden of proof in establishing that the alleged aggravating or mitigating circumstances actually exist in the case at hand" (*id.*). "If the party applying for a departure surmounts the first two steps, the law permits a departure, but the court still has discretion to refuse to depart or to grant a departure" (*id.*). "Thus, at the third step, the court must exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure to avoid an over- or under-assessment of the defendant's dangerousness and risk of sexual recidivism" (*id.*).

Even assuming, *arguendo*, that defendant satisfied his burden with respect to "the first two steps of the three-step analysis required in evaluating a request for a downward departure" (*People v Cornwell*, 213 AD3d 1239, 1240 [4th Dept 2023], *lv denied* 39 NY3d 916 [2023]), we conclude on this record, after applying the third step of weighing the aggravating and mitigating factors, that the totality of the circumstances demonstrates that "defendant's presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism" (*People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]).

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

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

MATTER OF JOSEPH B. GERARDI, A SUSPENDED ATTORNEY, RESPONDENT.
GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT, PETITIONER. -

- Order of disbarment entered. Per Curiam Opinion: Respondent was admitted to the practice of law by this Court on January 15, 1987. His business address on file with the Office of Court Administration is located in Fayetteville. In October 2018, the Grievance Committee advised this Court that, in July 2018, respondent was convicted, upon a jury verdict in the United States District Court for the Southern District of New York, of three felony counts: wire fraud in violation of 18 USC § 1343; conspiracy to commit wire fraud in violation of 18 USC § 1349; and knowingly making a materially false statement to a federal official in violation of 18 USC § 1001 (a) (2). The conviction was based on a superseding indictment alleging that respondent, as co-owner and general counsel of a Syracuse-based real estate development company, conspired with several others to engage in bid-rigging to obtain development contracts related to the Buffalo Billion initiative. It was alleged that the scheme involved, inter alia, conspiring with a government representative to draft requests for proposals that afforded an unfair advantage to respondent's company. It was further alleged that, in 2016, respondent made materially false statements to federal officials during a proffer session related to the government's investigation of the bid-rigging scheme.

By order entered November 9, 2018, this Court determined that respondent had been convicted of a "serious crime," suspended him from the practice of law on an interim basis, and directed him to show cause why a final order of discipline should not be entered, pursuant to Judiciary Law § 90 (4). Respondent's counsel thereafter advised this Court that, on December 6, 2018, the District Court sentenced respondent to incarceration for a period of 30 months, followed by a two-year period of supervised release, and directed him to pay a fine in the amount of \$500,000.

Respondent thereafter requested numerous adjournments of the return date of this Court's show cause order, while he and his co-defendants sought appellate review of their convictions. After certain proceedings before the United States Court of Appeals for the Second Circuit, the United States Supreme Court vacated respondent's judgment of conviction based on challenges to the wire fraud theories proffered by the government at trial (see *Aiello v United States*, - US -, -, 143 S Ct 2491, 2491 [2023]). On remand, the Second Circuit affirmed respondent's conviction for violating 18 USC § 1001 (a) (2) (see *United States*

v Aiello, 118 F4th 291, 307 [2d Cir 2024], *cert denied sub nom. Ciminelli v United States*, – US –, 145 S Ct 2814 [2025]).

Respondent states that, after the government announced its intention to retry the wire fraud counts, he resolved those charges in December 2025 by entering a plea of guilty to one count of conspiracy to commit wire fraud in violation of 18 USC § 1349, a federal felony. The parties have advised this Court that respondent's guilty plea to the wire fraud conspiracy charge in 2025 concerns the same conduct that formed the basis of the wire fraud conspiracy alleged in the superseding indictment. In December 2025, the District Court resentenced respondent to time served and directed him to pay a fine in the amount of \$500,000.

In determining an appropriate sanction, we have considered respondent's submissions in mitigation, including his expression of remorse and numerous written statements of support from family members, colleagues, and members of his community attesting to his good character. However, we conclude that the relevant aggravating factors far outweigh the relevant mitigating factors. Respondent stands convicted of two federal felonies, both of which are serious crimes under Judiciary Law § 90 (4) (d). Moreover, the record indicates that respondent used his legal skills, at least in part, to rig bids and secure taxpayer-funded construction projects for his company totaling approximately \$105 million. Respondent thereafter sought to conceal the misconduct by misleading federal officials during their investigation of the matter. Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be disbarred, effective nunc pro tunc to November 9, 2018. PRESENT: CURRAN, J.P., BANNISTER, MONTOUR, AND HANNAH, JJ. (Filed June 5, 2026.)

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

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CA 24-01643

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

IN THE MATTER OF THE ESTATE OF ARCHIE J. MIELTY,
ALSO KNOWN AS ARCHIE JOHANNES MIELTY, DECEASED.

MEMORANDUM AND ORDER

JOHN E. MIELTY, PETITIONER-RESPONDENT;

JAMES V. MIELTY, OBJECTANT-APPELLANT.
(APPEAL NO. 1.)

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R. CANNON OF COUNSEL), FOR
OBJECTANT-APPELLANT.

CROSSMORE & TIFFANY, ITHACA (EDWARD Y. CROSSMORE OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Seneca County
(Barry L. Porsch, S.), entered September 6, 2024, in a proceeding to
probate a will. The order denied the motion of objectant for summary
judgment, granted the cross-motion of petitioner for summary judgment,
dismissed the objections, and admitted to probate the last will and
testament of decedent.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by vacating the determination to
dismiss the objection of undue influence, reinstating that objection,
and vacating the ordering paragraph admitting the last will and
testament of Archie J. Mielty, dated June 30, 2021, to probate and, as
modified, the order is affirmed without costs.

Memorandum: In June 2021, less than two months before his death,
Archie J. Mielty (decedent) changed his 2010 will and amended the
Archie J. Mielty Revocable Trust (Trust), dated October 12, 2010, to
leave all of his assets to one of his sons, petitioner-respondent John
E. Mielty (petitioner). Prior versions of the will left the assets
equally to petitioner and decedent's other son, objectant-petitioner
James V. Mielty (objectant). Petitioner filed a petition to probate
the 2021 will, and he amended the petition twice: to add himself as a
distributee and to include the Trust as a residuary beneficiary of the
will. Objectant filed objections to the amended petition, contending
that decedent lacked testamentary capacity when he executed the
documents, that the will was the product of undue influence, and that
the will was not duly executed. Objectant also commenced a proceeding
pursuant to Surrogate's Court Procedure Act § 2102 challenging the
amendment to the Trust.

Following discovery, objectant moved in both appeals for summary judgment: in appeal No. 1 on his objections to the probate of the will and in appeal No. 2 on his petition challenging the amendment of the Trust. Petitioner cross-moved in both appeals for "partial summary judgment." In an order with respect to the Estate of Archie J. Mielty, Surrogate's Court denied objectant's motion, granted the cross-motion, and admitted the 2021 will to probate. In a separate order with respect to the Trust, the Surrogate denied objectant's motion, granted the cross-motion, and determined that the Trust was lawfully amended. In appeal No. 1, objectant appeals from the order with respect to the Estate. In appeal No. 2, objectant appeals from the order with respect to the Trust. We agree with objectant in appeal No. 1 that the Surrogate erred in dismissing his objection regarding undue influence and in appeal No. 2 that it erred in dismissing that part of his petition alleging undue influence, and we therefore modify the orders accordingly.

Contrary to objectant's contention in appeal No. 1, the Surrogate properly determined as a matter of law that the 2021 will was duly executed in accordance with EPTL 3-2.1. It is well settled that the execution of a will requires relatively strict observance of specific statutory formalities: "the testator must sign the document at the end; the testator must sign or acknowledge the signature in the presence of the attesting witnesses; the testator must declare to each of the attesting witnesses that the instrument is [the testator's] will; and there must be two attesting witnesses who shall, within 30 days, attest the testator's signature and, at the request of the testator, sign their names and affix their residence addresses" (*Matter of Lewis*, 114 AD3d 203, 211 [4th Dept 2014], *mod* 25 NY3d 456 [2015]; *see* EPTL 3-2.1 [a]; *Matter of Fraccaro*, 161 AD3d 1275, 1276 [3d Dept 2018], *lv denied* 32 NY3d 911 [2018]).

"The burden of proving the validity of a purported will lies with its proponent, who must do so by a preponderance of the evidence" (*Fraccaro*, 161 AD3d at 1276; *see Matter of Walker*, 124 AD3d 970, 972 [3d Dept 2015]; *Matter of Falk*, 47 AD3d 21, 26 [1st Dept 2007], *lv denied* 10 NY3d 702 [2008]), but "[a] will is presumed to have been properly executed where, as here, the execution was supervised by the attorney who drafted the will" (*Matter of Pilon*, 9 AD3d 771, 772 [3d Dept 2004]; *see Matter of Rodriguez*, 239 AD3d 1270, 1271 [4th Dept 2025]; *see also Matter of Halpern*, 76 AD3d 429, 431-432 [1st Dept 2010], *affd* 16 NY3d 777 [2011]). Moreover, a presumption of due execution also arises where, as here, "the will was accompanied by a self-executing affidavit of the attesting witnesses . . . In order to rebut this presumption, there must be *positive proof* that the formal requirements of execution were not met" (*Pilon*, 9 AD3d at 772 [emphasis added]; *see Matter of Korn*, 25 AD3d 379, 379 [1st Dept 2006]). Here, there was no positive proof to rebut the presumption of validity.

Contrary to objectant's contention, the mere fact that one of the attesting witnesses could not recall all of the circumstances of the execution of the will does not create an inherent inconsistency and,

under the circumstances of this case, does not rebut the presumption of validity. "Where an attesting witness has forgotten the occurrence . . . and at least 1 other attesting witness has been examined the will may be admitted to probate upon the testimony of the other witness . . . and such other facts as would be sufficient to prove the will" (SCPA 1405 [3]; see *Matter of Collins*, 60 NY2d 466, 469-471 [1983]; *Matter of Ziele*, 242 AD2d 576, 577 [2d Dept 1997]). Thus, the Surrogate did not improperly credit one attesting witness over the other.

Contrary to objectant's further contention in both appeals, the Surrogate did not err in determining as a matter of law that decedent executed the documents with the requisite testamentary capacity. Initially, objectant contends that the Surrogate erred in refusing to consider a chaplain's notes contained in decedent's hospital records, which stated that decedent had told the chaplain that he avoided serving in the Vietnam War because he was deployed at that time to Finland, when, in fact, he had served in the Korean War and was discharged from the military long before the Vietnam War. According to objectant, those notes evince a lack of capacity. We reject that contention. The notes constitute hearsay and were not properly certified as business records under CPLR 4518 (a). "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (*West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950 [4th Dept 2002]; see *Unifund CCR Partners v Youngman*, 89 AD3d 1377, 1378 [4th Dept 2011], *lv denied* 19 NY3d 803 [2012]). No such foundation was laid by objectant. First, there is no evidence that the chaplain was under a business duty to make such notes (see CPLR 4518 [a]; *Matter of Joseph M.W. [Blake]*, 188 AD3d 1563, 1567 [4th Dept 2020]; see generally *Iwasykiw v Starks*, 179 AD3d 1485, 1487 [4th Dept 2020]; *KG2, LLC v Weller*, 105 AD3d 1414, 1415-1416 [4th Dept 2013]). Further, there is no evidence to " 'indicate that they were made . . . pursuant to an established procedure for the routine, habitual, systematic making of records that would qualify them as trustworthy accounts,' or that they 'were the records regularly relied on in the business' " (*Deutsche Bank Natl. Trust Co. v Dennis*, 181 AD3d 864, 869 [2d Dept 2020], quoting *People v Kennedy*, 68 NY2d 569, 580 [1986]). We have reviewed objectant's remaining contention regarding hearsay exceptions and conclude that it lacks merit. In any event, the notes specifically stated that decedent "was lucid, organized in thought and in a good mood" and thus provide no basis to question decedent's testamentary capacity.

Objectant likewise contends in both appeals that a brief conversation between decedent and petitioner approximately two weeks after the documents were executed establishes that decedent lacked testamentary capacity when he signed the documents. That contention lacks merit. In the conversation, which took place one night when decedent was in the hospital, decedent told petitioner that he had flown with Charles Lindbergh. We conclude that the one questionable statement two weeks after the documents were executed does not raise an issue of fact regarding defendant's testamentary capacity on the

relevant day. "[T]he appropriate inquiry is whether . . . decedent was lucid and rational at the time the will [and the trust amendment were] made" (*Matter of Alibrandi*, 104 AD3d 1175, 1176 [4th Dept 2013] [internal quotation marks omitted]; see *Matter of Buck*, 225 AD3d 1186, 1188 [4th Dept 2024]).

We reject objectant's contention that the Surrogate engaged in improper fact-finding. The Surrogate weighed all of the evidence relevant to decedent's condition at the time the will and the trust amendment were made and did not err in according minimal weight to ancillary anecdotes about events that happened at other times when he was in the hospital.

With respect to capacity, objectant further contends in both appeals that, inasmuch as decedent's attorneys did not know the value of decedent's assets or discuss them with him during the execution of the documents, decedent lacked capacity to execute the documents especially because, he contends, decedent was misled about the value of those assets. That contention is belied by the record. On the morning of June 30, 2021, i.e., the day of execution of the documents, decedent conversed with his attorney by telephone and discussed how he wanted certain real estate in Florida, which was not deeded to the trust, to go to petitioner and that he, therefore, had to change his will. Moreover, six months earlier, decedent had signed loan documents outlining all of his assets, including all of his real estate holdings and their values as well as his liabilities.

We nevertheless agree with objectant in both appeals that the Surrogate erred in dismissing his objection and claim related to undue influence. It is well established that issues of testamentary capacity are separate and distinct from issues of undue influence. The issue of undue influence thus involves a distinct inquiry from that of capacity, and a "decedent's testamentary capacity at the time the [will or trust] was executed does not affect" an independent determination that a beneficiary exercised undue influence over the decedent (*Matter of Wang*, 179 AD3d 418, 419 [1st Dept 2020]; see *Matter of Johnson*, 6 AD3d 859, 860-861 [3d Dept 2004]; *Matter of Donovan*, 47 AD2d 923, 924 [2d Dept 1975]).

Although petitioner cross-moved in both appeals for only "partial summary judgment," and petitioner's attorney conceded in both appeals that "the issue of undue influence in this case cannot be determined on summary judgment [because] [d]isputed material facts and questions of credibility must await a trial to be resolved," the Surrogate nevertheless dismissed all of objectant's objections and challenges to the amendment of the Trust, including those related to undue influence. Even assuming, arguendo, that the general relief clauses in petitioner's papers enabled the Surrogate to dismiss the undue influence objection and challenge because they were "not too dramatically unlike that which is actually sought" and objectant was not prejudiced (*Tirado v Miller*, 75 AD3d 153, 158 [2d Dept 2010]; cf. *Burke v Arcadis G&M of N.Y. Architectural & Eng'g Servs., P.C.*, 149 AD3d 1514, 1517 [4th Dept 2017]; *McGuire v McGuire*, 29 AD3d 963, 965

[2d Dept 2006]), we conclude that the Surrogate erred in ignoring the concession by petitioner's attorney (see generally *Mashreqbank PCS v Ahmed Hamad Al Gosaibi & Bros. Co.*, 101 AD3d 1, 17 [1st Dept 2012] [Andrias, J., dissenting], revd 23 NY3d 129 [2014]).

In any event, on the merits, we conclude in both appeals that petitioner's own proof establishes that there are triable issues of fact regarding the existence of a confidential relationship and undue influence (see *Matter of Rozof*, 219 AD3d 1428, 1430 [2d Dept 2023]; see generally *Matter of Nealon*, 104 AD3d 1088, 1089 [3d Dept 2013], *affd* 22 NY3d 1045 [2014]; *Matter of Dibble*, 243 AD3d 993, 995 [3d Dept 2025]).

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

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CA 24-01644

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

IN THE MATTER OF THE ARCHIE J. MIELTY REVOCABLE
TRUST DATED OCTOBER 12, 2010, AND ITS AMENDMENT
DATED JUNE 30, 2021.

JAMES V. MIELTY, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

JOHN E. MIELTY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R. CANNON OF COUNSEL), FOR
PETITIONER-APPELLANT.

CROSSMORE & TIFFANY, ITHACA (EDWARD Y. CROSSMORE OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Seneca County
(Barry L. Porsch, S.), entered September 6, 2024, in a proceeding
pursuant to Surrogate's Court Procedure Act § 2102. The order denied
the motion of petitioner for summary judgment, granted the cross-
motion of respondent for summary judgment and determined that the
subject trust was lawfully amended.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by vacating the determination to
dismiss that part of the petition alleging undue influence,
reinstating the petition to that extent, and vacating the third
ordering paragraph and, as modified, the order is affirmed without
costs. Same memorandum as in *Matter of Mielty* ([appeal No. 1] – AD3d
– [June 5, 2026] [4th Dept 2026]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

252

KA 24-01364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WESLEY A. COLE, JR., DEFENDANT-APPELLANT.

ADAM AMIRAULT, BUFFALO, FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (RICHARD SULLIVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Yates County (Jason L. Cook, J.), rendered April 2, 2024. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal contempt in the first degree (§ 215.51 [b] [ii]). We affirm.

Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Romanchik*, 242 AD3d 1624, 1625-1626 [4th Dept 2025]; *People v Cummings*, 240 AD3d 1207, 1207 [4th Dept 2025], lv denied 44 NY3d 1051 [2025]; *People v Hoose*, 236 AD3d 1294, 1295-1296 [4th Dept 2025], lv denied 44 NY3d 993 [2025]; see generally *People v Thomas*, 34 NY3d 545, 559-564 [2019], cert denied 589 US 1302 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]). Supreme Court "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439 [4th Dept 2010], lv denied 15 NY3d 920 [2010], quoting *Lopez*, 6 NY3d at 256; see *Romanchik*, 242 AD3d at 1625). The court also confirmed defendant's understanding that the waiver was "not an absolute bar to the taking of a first-tier direct appeal" (*Thomas*, 34 NY3d at 558; see *Romanchik*, 242 AD3d at 1625). Indeed, as defendant correctly concedes, the court "followed the model colloquy nearly verbatim" (*People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024], lv denied 42 NY3d 1079 [2025]; see NY

Model Colloquies, Waiver of Right to Appeal; *see also Romanchik*, 242 AD3d at 1625; *Hoose*, 236 AD3d at 1295). Defendant also executed a written waiver, and the record establishes that the court ascertained that defendant, "before signing the written waiver form, had reviewed the contents thereof with [his] attorney and understood the appellate rights [he] was giving up as a result of the waiver" (*People v Correia*, 240 AD3d 1440, 1441-1442 [4th Dept 2025], *lv denied* 44 NY3d 992 [2025]; *see People v Edmonds*, 229 AD3d 1275, 1277 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]).

Defendant nonetheless asserts that he did not knowingly and intelligently waive his right to appeal because the court was required, and failed, to provide a more detailed explanation to ensure that he understood the distinction between a severity of sentence claim, which is waivable, and a legality of sentence claim, which is nonwaivable. We conclude that defendant's assertion lacks merit. " '[A] trial court need not engage in any particular litany' or catechism in satisfying itself that a defendant has entered a knowing, intelligent and voluntary appeal waiver"; rather, "a trial court 'must make certain that a defendant's understanding' of the waiver, along with the other 'terms and conditions of a plea agreement is evident on the face of the record' " (*People v Bradshaw*, 18 NY3d 257, 265 [2011], quoting *Lopez*, 6 NY3d at 256). Here, in eliciting defendant's understanding during the oral colloquy, which, as noted above, generally followed the model colloquy, the court appropriately explained and distinguished a waivable severity of sentence claim and a nonwaivable legality of sentence claim inasmuch as it clarified that defendant was giving up the right to appellate review of a claim that "the sentence imposed was harsh or excessive," which would thereby normally render the sentence final, and thereafter contrasted the typical finality of the sentence in that regard with a claim that the sentence was illegal, which could still be reviewed on appeal (*see People v Wilson*, 217 AD3d 1561, 1562 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023]; *cf. People v Risco*, 165 AD3d 703, 704 [2d Dept 2018], *lv denied* 32 NY3d 1114 [2018]). Contrary to defendant's further assertion, the record establishes that he received consideration in exchange for the waiver inasmuch as the plea agreement, which included the waiver among its negotiated terms, resulted in defendant pleading guilty to two counts of the indictment in full satisfaction of all charges therein, and defendant received a sentencing promise (*see People v Campbell*, 244 AD3d 1826, 1828-1829 [4th Dept 2025]; *People v Allen*, 174 AD3d 1456, 1456 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]; *cf. People v Gramza*, 140 AD3d 1643, 1643-1644 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]).

In sum, we conclude that the court's "oral colloquy, specifically its inquiry of [defendant] and resulting assurances that he had ample opportunity to discuss with counsel the meaning of the waiver and appellate rights he was surrendering," together with the written waiver, "was sufficient to support a knowing and voluntary waiver under the totality of the circumstances" (*Thomas*, 34 NY3d at 564; *see Cummings*, 240 AD3d at 1207; *People v Jones*, 239 AD3d 1475, 1476 [4th Dept 2025]). That valid waiver forecloses appellate review of

defendant's challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *People v Seaberg*, 74 NY2d 1, 9-10 [1989]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-00101

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL VIOLA, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ 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 (Gordon J. Cuffy, A.J.), rendered October 3, 2022. The judgment convicted defendant, upon a jury verdict, of menacing of a police officer or peace officer (three counts), criminal possession of a weapon in the third degree (two counts) and menacing in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment that convicted him, upon a jury verdict, of three counts of menacing a police officer or peace officer (Penal Law § 120.18), two counts of criminal possession of a weapon in the third degree (§ 265.02 [1]), and one count of menacing in the second degree (§ 120.14 [1]).

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

Defendant raises several contentions regarding his various CPL 30.30 motions; however, as defendant notes, County Court did not rule on those motions, and the court's failure to rule on defendant's CPL 30.30 motions cannot be deemed a denial thereof (*see People v Baker*, 229 AD3d 1324, 1328 [4th Dept 2024]; *People v Session*, 206 AD3d 1678, 1682 [4th Dept 2022]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]). We therefore hold the case, reserve decision, and

remit the matter to County Court for a determination on the motions
(*see generally Baker*, 229 AD3d at 1328; *Session*, 206 AD3d at 1682).

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

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CAF 24-01514

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

IN THE MATTER OF BETH LOCKHART, ESQ., ATTORNEY
FOR THE CHILD, PETITIONER-RESPONDENT,

V

OPINION AND ORDER

MELISSA MONICA, RESPONDENT-APPELLANT.

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

BETH A. LOCKHART, NORTH SYRACUSE, ATTORNEY FOR THE CHILD,
PETITIONER-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered July 2, 2024, in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from the subject child.

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

Opinion by GREENWOOD, J.:

At issue on this appeal is whether an attorney for the child may file a family offense petition pursuant to Family Court Act article 8 on behalf of a child against a nonparent. We conclude that an attorney for the child has that authority and therefore affirm.

I.

In a separate Family Court Act article 6 proceeding, petitioner Attorney for the Child (AFC) was assigned to represent the subject child in November 2022 after the child's father filed a modification petition for custody against the child's mother. The parties stipulated to the matter being determined by a Court Attorney Referee, who issued a temporary order of custody that, inter alia, ordered that "neither party shall seek or allow an immediate family member to seek police inquiry or intervention absent a true life-threatening emergency (i.e., no wellness checks)." Respondent grandmother was not a party to the custody proceeding. At an appearance before the Referee in February 2023, after the parties represented that the grandmother was the "bad actor" regarding repeated calls to the police, the Referee essentially invited the AFC to file a family offense petition alleging harassment against the grandmother, which the AFC did that day on behalf of the child against the grandmother.

The Referee subsequently recused herself, and Family Court referred the matter to a different Referee.

The grandmother moved to dismiss the petition, arguing that the AFC, as a nonparent, lacked standing to file a family offense petition on behalf of the child. The court denied the motion. At the trial on the petition, the evidence established that the grandmother made multiple calls to the police requesting welfare checks on the child and also made multiple child abuse referrals. The father testified that the child was scared and frightened when questioned by the police, including one incident where the father had to wake the child up to speak with the police.

The court adopted the Referee's recommendation that the grandmother committed the family offense of harassment in the second degree as set forth in Penal Law § 240.26 (3) and issued an order of protection against the grandmother in favor of the child. The grandmother appeals.

II.

The grandmother first contends that the order should be vacated and the petition dismissed because the court did not have jurisdiction over her, and the AFC lacked authority to bring this proceeding.

Initially, the grandmother's contention that the court lacked jurisdiction to impose conditions upon her because she was a nonparent, non-guardian who was not a party to the custody proceeding, is without merit. Pursuant to Family Court Act § 812 (1), Family Court has concurrent jurisdiction with criminal courts "over any proceeding concerning acts which would constitute . . . harassment in the second degree . . . between spouses or former spouses, or between parent and child or between members of the same family or household." Members of the same family or household means "persons related by consanguinity or affinity" (§ 812 [1] [a]). Thus, as the biological maternal grandparent of the child, the grandmother and the child are members of the same family, and thus the court had jurisdiction to issue an order of protection against the grandmother upon its finding that she committed the offense of harassment in the second degree.

With respect to the grandmother's contention that the AFC did not have the authority to file a petition against the grandmother, a family offense petition may be brought by:

"(a) Any person in the relation to the respondent of spouse, or former spouse, parent, child, or member of the same family or household;

(b) A duly authorized agency, association, society, or institution;

(c) A peace officer, acting pursuant to [their] special duties, or a police officer; [or]

(d) A person on the court's own motion" (Family Ct

Act § 822).

Although the court did not rely upon subdivision (d) in denying the grandmother's motion to dismiss, we note that it may have been unaware of the first Referee's statements to the AFC where the Referee essentially invited the AFC to file the petition on behalf of the child against the grandmother.

Regardless, the child is a person "in the relation to the [grandmother] of . . . member of the same family" (Family Ct Act § 822 [a]; see § 812 [1] [a]). Parents may commence family offense proceedings on behalf of their children (see *Matter of Samantha I. v Luis J.*, 122 AD3d 1090, 1091 [3d Dept 2014]; *Matter of Berg v Mantia*, 77 AD3d 827, 827 [2d Dept 2010]; *Matter of Harris v Magee*, 77 AD3d 944, 945 [2d Dept 2010]), and we conclude that an AFC may also file a petition on behalf of the child pursuant to subdivision (a) of section 822.

Family Court may, and in some instances must, appoint an AFC to represent a minor child's interests (see Family Ct Act §§ 241, 249 [a]). Whether an appointment is required by statute or at the court's discretion, as here, the appointment of counsel to represent a child "is often indispensable to a practical realization of due process of law" (§ 241). The legislature has recognized that children "often require the assistance of counsel to help protect their interests and to help them express their wishes to the court" (*id.*). Once the appointment is made, the court "cannot thereafter relegate the [AFC] to a meaningless role" (*Matter of Figueroa v Lopez*, 48 AD3d 906, 907 [3d Dept 2008]), and "children's attorneys are expected to participate fully in proceedings in which they are appointed" (*Matter of Barbara T. v Acquinetta M.*, 164 AD3d 1, 8 [1st Dept 2018]). The AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]; see *Matter of Sloma v Saya*, 210 AD3d 1494, 1494 [4th Dept 2022]; *Matter of Payne v Montano*, 166 AD3d 1342, 1343 [3d Dept 2018]).

There are numerous cases where AFCs have filed petitions in Family Court seeking to modify a custody or visitation order (see e.g. *Matter of Richard CC. v Lacey DD.*, 243 AD3d 1186, 1187 [3d Dept 2025]; *Matter of William V. v Christine W.*, 206 AD3d 1478, 1478-1479 [3d Dept 2022]; *Matter of Nina M.T. v DeSabato*, 198 AD3d 791, 792 [2d Dept 2021]; *Matter of Merkle v Henry*, 133 AD3d 1266, 1267 [4th Dept 2015]; *Matter of Rebecca B.*, 227 AD2d 315, 315 [1st Dept 1996]), even though there is no explicit statutory authority allowing them to do so. An AFC was also found to have standing to file objections to an order of a support magistrate even though the Family Court Act does not specify that objections may be filed by the child's attorney (see *Barbara T.*, 164 AD3d at 7-8). We see no reason why an AFC cannot also file a petition on behalf of the child alleging a family offense. By allowing the AFC to file a family offense petition, we are furthering the AFC's duty to protect the child's interests (see Family Ct Act § 241), i.e., to prevent the further harassment of the child by the grandmother, which was raised and discussed in the child custody proceeding.

Although the authority of an AFC to file a family offense petition on behalf of a child has not been addressed directly by a court, the Third Department addressed it in passing in *Matter of Pamela N. v Neil N.* (93 AD3d 1107 [3d Dept 2012]). In that case, the mother had commenced a family offense proceeding against the father, which was dismissed, and the mother appealed (*id.* at 1108). The Court rejected the father's contention that Family Court had no basis to appoint an AFC to represent the children in the proceeding (*id.* at 1110). The Court noted that, "as the children could have originated a family offense proceeding against him . . . , his claim that they or *their attorney* 'lack standing' to seek to reinstate the mother's family offense petition on this appeal is meritless" (*id.* [emphasis added]).

In sum, we conclude that the court properly denied the grandmother's motion to dismiss the petition based on the AFC's lack of standing.

III.

The grandmother next contends that the AFC failed to prove by a preponderance of the evidence that the grandmother committed a family offense. We reject that contention. The AFC met her burden of establishing by a preponderance of the evidence that the grandmother committed the family offense of harassment in the second degree by making multiple calls to the police and contacting child welfare agencies concerning the child for no good reason (*see Matter of Beck v Butler*, 87 AD3d 1410, 1411 [4th Dept 2011], *lv denied* 18 NY3d 801 [2011]; *see also Matter of Keith M. v Tiffany S.S.*, 177 AD3d 508, 508-509 [1st Dept 2019]; *Matter of Doris M. v Yarenis P.*, 161 AD3d 502, 502-503 [1st Dept 2018]). The evidence established that the grandmother's "course of conduct or repeated[] . . . acts . . . alarm[ed] or seriously annoy[ed] [the child] and . . . serve[d] no legitimate purpose" (Penal Law § 240.26 [3]). Despite the grandmother's assertions that she was motivated by her concern for the child's safety, we conclude that the court had a reasonable basis to infer from the circumstances her "intent to harass, annoy[,] or alarm [the child]" (§ 240.26; *see Matter of Carney v Carney*, 231 AD3d 1535, 1536 [4th Dept 2024]; *Matter of Inez A. v David A.*, 222 AD3d 547, 547 [1st Dept 2023]; *Matter of Bianca L.C. v Alan H.D.*, 219 AD3d 1213, 1214 [1st Dept 2023]).

Contrary to the grandmother's further contention, the stay-away order of protection was warranted to end the family disruption (*see* Family Ct Act § 812 [2] [b]), was necessary to deter the grandmother from causing further unnecessary police visits (*see generally* § 842 [a]), and was in the best interests of the child (*see Matter of Harrington v Harrington*, 63 AD3d 1618, 1619 [4th Dept 2009], *lv denied* 13 NY3d 705 [2009]).

IV.

We have examined the grandmother's remaining contentions and conclude that they do not warrant modification or reversal of the order.

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

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CA 25-00520

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

IN THE MATTER OF MICHAEL L. MCROBBIE,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DANIEL MARTUSCELLO, III, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County
(Donald G. O'Geen, A.J.), entered March 3, 2025, 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.

Memorandum: Petitioner appeals from a judgment dismissing his
CPLR article 78 petition seeking to annul the determination of the
Board of Parole (Board) revoking his release to parole supervision.
We affirm.

Petitioner contends that Supreme Court improperly considered the
Board's determination and the Board of Parole Appeals Unit's findings
and decision, and that he was denied a statutory right under Executive
Law § 259-i (4-a) (a) to appeal to County Court in lieu of an
administrative appeal. Petitioner failed to preserve those
contentions for our review inasmuch as he did not raise them in his
administrative appeal or in the petition (see *Matter of Shrubsall v*
Annucci, 230 AD3d 1556, 1556 [4th Dept 2024]; *Krupa v Stanford*, 145
AD3d 1656, 1656 [4th Dept 2016]). We have no discretionary authority
to review petitioner's unpreserved contentions in this CPLR article 78
proceeding (see *Matter of Khan v New York State Dept. of Health*, 96
NY2d 879, 880 [2001]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

262

CAF 25-00392

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

IN THE MATTER OF KAROLINE L. DIEDRICHS-WHEELER,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CHRISTOPHER G. MCAVOY, RESPONDENT-RESPONDENT.

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

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

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered February 14, 2025, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that summarily dismissed her petition, which sought to modify an existing consent order of custody and visitation between the mother and respondent father by, primarily, changing the mother's visitation from supervised to unsupervised. We affirm.

We reject the mother's contention that Family Court erred in granting the father's motion to dismiss the modification petition without a hearing. It is well established that "[a] hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order" (*Carney v Carney*, 151 AD3d 1912, 1912 [4th Dept 2017], *lv dismissed* 30 NY3d 1012 [2017] [internal quotation marks omitted]). Here, even "upon giving the petition a liberal construction, accepting the facts alleged therein as true, and according the [mother] the benefit of every favorable inference" (*Matter of Kelley v Fifield*, 159 AD3d 1612, 1613 [4th Dept 2018]), we conclude that the mother failed to adequately set forth "factual allegations of a change in circumstances warranting modification to ensure the best interests of the child" (*Matter of Bastoni v Bastoni*, 244 AD3d 1830, 1830 [4th Dept 2025] [internal quotation marks omitted]). Contrary to the mother's assertions, "the mere passage of time and the child getting older do not constitute [sufficient] changes in circumstances" (*Matter of Ford v Baldi*, 123 AD3d 1399, 1400 [3d Dept 2014]), and she "otherwise failed to make a sufficient

evidentiary showing of a change in circumstances to require a hearing" (Carney, 151 AD3d at 1913 [internal quotation marks omitted]). Notwithstanding the letter from the mother's visitation supervisor submitted with the petition reporting that the supervised visits that the mother managed to attend were successful, the record establishes that the mother alleged only that she had resumed exercising supervised visitation for six months following a three-year absence and that, at oral argument on the motion, the mother conceded that she had once again ceased exercising supervised visitation in the months immediately preceding the petition (see *Matter of Alan U. v Mandy V.*, 155 AD3d 1359, 1360 [3d Dept 2017]).

Contrary to the mother's further contention, we conclude that the court did not abuse its discretion in implicitly denying her cross-motion for leave to amend the modification petition (see *Matter of Harry P. v Cindy W.*, 48 AD3d 1100, 1100 [4th Dept 2008]).

Finally, to the extent that the mother contends that the Attorney for the Child (AFC) failed to adequately convey the child's position or that the court, despite the AFC's representations that she had spoken with the child and had met with the child on various prior occasions, should have adjourned the proceeding to facilitate another in-person meeting between the AFC and the child, those issues are raised for the first time on appeal and are thus not preserved for our review (see *Matter of Mountzouros v Mountzouros*, 191 AD3d 1388, 1390-1391 [4th Dept 2021], *lv denied* 37 NY3d 902 [2021]; *Matter of Brown v Wolfgram*, 109 AD3d 1144, 1145 [4th Dept 2013]).

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

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CA 24-01732

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

LOUIS SHATTUCK, INDIVIDUALLY AND AS ASSIGNEE OF
CORY LISINSKI, DOING BUSINESS AS CNL CONSTRUCTION
AND MAINTENANCE, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

DRYDEN MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

BARCLAY DAMON LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT.

SCOTT R. ORNDOFF, BUFFALO, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered September 18, 2024. The order, among other things, granted in part plaintiff's motion for summary judgment and granted in part defendant's cross-motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion seeking summary judgment against defendant with respect to damages up to the policy limit and denying that part of defendant's cross-motion seeking to dismiss the first through fourth causes of action to the extent they allege bad faith and reinstating those causes of action in their entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiff was injured while performing construction work using the tools and equipment of Cory Lisinski, doing business as CNL Construction and Maintenance (Lisinski). Lisinski was insured by defendant, Dryden Mutual Insurance Company. Lisinski notified defendant of the accident but defendant disclaimed coverage based on, inter alia, lack of coverage for liability under the Workers' Compensation Law. Plaintiff commenced a personal injury action naming Lisinski as a defendant and, following a damages inquest, obtained a default judgment in the amount of \$2,841,782. Lisinski assigned to plaintiff any and all rights, claims, and interests that Lisinski had against defendant arising from the personal injury action.

Plaintiff then brought a direct action against defendant, suing individually and as assignee of Lisinski, as an injured person/judgment creditor pursuant to Insurance Law § 3420 (a) (2) and

(b) (1). Plaintiff moved for summary judgment on the complaint, seeking, inter alia, a finding of liability under section 3420 (a) (2) for damages up to the policy limit. Defendant cross-moved for summary judgment dismissing the complaint. Supreme Court concluded that defendant was liable under section 3420 (a) (2) but directed a new damages inquest in the interest of justice to allow the participation of defendant's counsel. The court further dismissed plaintiff's bad faith claims. The court thus partially granted plaintiff's motion, partially granted defendant's cross-motion, and otherwise denied the cross-motion. Defendant appeals, as limited by its brief, from the order to the extent that it denied the cross-motion in part, and plaintiff cross-appeals from the order to the extent that it directed a new damages inquest and granted the cross-motion in part.

Defendant contends in its appeal that the court should have granted its cross-motion to dismiss the complaint in its entirety because Lisinski failed to forward to defendant the papers concerning the underlying default proceeding. We reject defendant's contention. An insurer's "duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks omitted]). "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (*id.*; see also *National Union Fire Ins. Co. of Pittsburgh, Pa. v City of Oswego*, 295 AD2d 905, 905-906 [4th Dept 2002]). Here, the complaint in the underlying personal injury action alleged that plaintiff was an employee of Lisinski but also included the alternative allegation that plaintiff was an independent contractor. Thus, defendant was required at least to provide Lisinski with a defense (see *Automobile Ins. Co. of Hartford*, 7 NY3d at 137). Instead, defendant disclaimed coverage on the ground, inter alia, that plaintiff was an employee and therefore a policy exclusion precluded coverage inasmuch as plaintiff would be covered by a workers' compensation claim.

Defendant's disclaimer constituted a repudiation by defendant inasmuch as "[a]n anticipatory breach of contract by a promisor is a repudiation of [its] contractual duty before the time fixed in the contract for . . . performance has arrived" (*Audthan LLC v Nick & Duke, LLC*, 42 NY3d 292, 303 [2024] [internal quotation marks omitted]; see also *Norcon Power Partners, L.P. v Niagara Mohawk Power Corp.*, 92 NY2d 458, 462-463 [1998]). Repudiation requires "some express and absolute refusal to perform . . . that is positive and unequivocal" (*Audthan LLC*, 42 NY3d at 303 [internal quotation marks omitted]) and it "may result in numerous ways; among others, from the sending of a letter denying all liability and refusing to pay the loss" (*Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 217 [1984]). Here, in light of defendant's repudiation, Lisinski was excused "from further performance on his part of the conditions of the [insurance policy]," including forwarding to defendant the suit papers regarding the default proceeding (*Bornas v Standard Acc. Ins. Co. of Detroit, Mich.*, 5 AD2d 96, 102 [4th Dept 1958] [internal quotation

marks omitted]; see *Auerbach v Otsego Mut. Fire Ins. Co.*, 36 AD3d 840, 842 [2d Dept 2007]). The court thus did not err when it refused to grant the cross-motion in its entirety.

Defendant further contends in its appeal that the court should have granted its cross-motion to dismiss the complaint in its entirety for the additional reason that the default judgment is invalid and unenforceable because it was procured through misconduct. We reject that contention. "[A] valid and enforceable judgment is a condition precedent to maintaining an action pursuant to Insurance Law § 3420 (a) (2) . . . [and a] judgment entered through fraud, misrepresentation, or other misconduct practiced on the court is a nullity and is subject to collateral attack" (*Bahnuk v Countryway Ins. Co.*, 214 AD3d 1218, 1220 [3d Dept 2023], quoting *Hernandez v American Tr. Ins. Co.*, 2 AD3d 584, 585 [2d Dept 2003]; see also *Bond v Giebel*, 101 AD3d 1340, 1343 [3d Dept 2012], *lv dismissed* 21 NY3d 884 [2013]). Here, the record evidence does not establish that the judgment was obtained through fraud, misrepresentation, or other misconduct inasmuch as there was no proof that Lisinski was promised a portion of the recovered damages or that the parties withheld information from the court (see generally *Oppenheimer v Westcott*, 47 NY2d 595, 603-604 [1979]; *Bond*, 101 AD3d at 1343; *Jakobleff v Jakobleff*, 108 AD2d 725, 726 [2d Dept 1985]).

We agree with plaintiff, on his cross-appeal, that defendant may not challenge the damages in the default judgment proceeding and that the court therefore erred in directing a new damages inquest. If an insurer "disclaims and declines to defend in the underlying lawsuit" without seeking a declaratory judgment concerning its duty to defend or indemnify the insured, "it takes the risk that the injured party will obtain a judgment against the . . . insured and then seek payment pursuant to Insurance Law § 3420" (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 356 [2004]; see generally *K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.*, 22 NY3d 578, 585-586 [2014], *rearg denied* 23 NY3d 939 [2014]). "Under those circumstances, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment" (*Lang*, 3 NY3d at 356). We therefore modify the order by granting that part of plaintiff's motion seeking summary judgment with respect to damages up to the policy limit under Insurance Law § 3420 (a) (2).

We also agree with plaintiff that the court erred when it dismissed plaintiff's claims based on defendant's alleged bad faith. "[I]n order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests—that is, a deliberate or reckless failure to place on equal footing the interests of [the] insured with [the insurer's] own interests" (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453 [1993], *rearg denied* 83 NY2d 779 [1994]; see *State Farm Fire & Cas. Co. v Ricci*, 96 AD3d 1571, 1572 [4th Dept 2012]). Here, defendant did not meet its initial burden on that part of its cross-motion with respect to its alleged bad faith and improper conduct (see generally *Zuckerman v City of New York*, 49

NY2d 557, 562 [1980]) and, consequently, we do not consider the sufficiency of plaintiff's opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We therefore modify the order by denying that part of defendant's cross-motion seeking to dismiss the first through fourth causes of action to the extent they allege bad faith and reinstating those causes of action in their entirety.

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

270

KA 24-00432

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHNATHAN RZOSKA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Suzanne Maxwell Barnes, J.), rendered February 15, 2024. The judgment convicted defendant upon his plea of guilty of making a terroristic threat (two counts), criminal contempt in the first degree, tampering with a witness in the third degree and aggravated harassment 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, inter alia, two counts of making a terroristic threat (Penal Law § 490.20 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Swiderski*, 217 AD3d 1416, 1417 [4th Dept 2023]), we conclude that the sentence is not unduly harsh or severe.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

271

KA 22-01210

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAQUAN WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered May 5, 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 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see People v Correia*, 240 AD3d 1440, 1441 [4th Dept 2025], *lv denied* 44 NY3d 992 [2025]; *People v Pluviose*, 239 AD3d 1326, 1326 [4th Dept 2025], *lv denied* 44 NY3d 984 [2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* 589 US 1302 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 256).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

272

KA 23-00565

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL ADAMS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered February 21, 2023. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction, following his plea of guilty, of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]) and sentencing him to a term of incarceration. Defendant's sole contention is that the sentence is unduly harsh and severe. Inasmuch as defendant has completed serving that sentence, the appeal is moot (*see People v Linn*, 194 AD3d 1420, 1420-1421 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]; *People v Pompeo*, 151 AD3d 1949, 1949-1950 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

273

KA 24-00512

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JACOB CARROLL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered October 23, 2023. The judgment convicted defendant upon a plea of guilty of arson 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 arson in the second degree (Penal Law § 150.15), defendant contends that his waiver of the right to appeal was not knowingly, intelligently, and voluntarily entered and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v John*, 244 AD3d 1782, 1782 [4th Dept 2025]; *People v Swiderski*, 217 AD3d 1416, 1417 [4th Dept 2023]), we conclude that the sentence is not unduly harsh or severe.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

274

KA 24-01065

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CLINT M. SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Oswego County Court (Melinda H. McGunnigle, A.J.), rendered May 30, 2023. The judgment convicted defendant upon his plea of guilty of attempted rape in the first degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from separate judgments convicting him upon his pleas of guilty during a single plea proceeding of, respectively, attempted rape in the first degree (Penal Law §§ 110.00, former 130.35 [3]) and attempted criminal sexual act in the first degree (§§ 110.00, former 130.50 [4]). We affirm in both appeals.

Contrary to defendant's contention with respect to both appeals, the record establishes that his waiver of the right to appeal was made knowingly, intelligently, and voluntarily (see *People v Weir*, 243 AD3d 1329, 1329 [4th Dept 2025], *lv denied* 45 NY3d 948 [2026]; *People v Coon*, 242 AD3d 1569, 1569 [4th Dept 2025], *lv denied* 45 NY3d 944 [2026]; see generally *People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* 589 US 1302 [2020]). We note that County Court used the appropriate model colloquy with respect to the waiver of the right to appeal (see generally *Thomas*, 34 NY3d at 567; *Weir*, 243 AD3d at 1329; *People v Osgood*, 210 AD3d 1426, 1427 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]). The valid waiver forecloses defendant's challenge in each appeal to the severity of the sentence (see *People v Lopez*, 6

NY3d 248, 255-256 [2006]; *People v Malcolm*, 231 AD3d 1503, 1504 [4th
Dept 2024], *lv denied* 43 NY3d 931 [2025]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

275

KA 24-01067

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CLINT M. SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Oswego County Court (Melinda H. McGunnigle, A.J.), rendered May 30, 2023. The judgment convicted defendant upon his plea of guilty of attempted criminal sexual act in the first degree.

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

Same memorandum as in *People v Smith* ([appeal No. 1] – AD3d – [June 5, 2026] [4th Dept 2026]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

276

KA 25-00332

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CECILIA SPEED, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Suzanne Maxwell Barnes, J.), rendered November 12, 2024. 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 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 her upon her plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arises from an incident wherein defendant fired a handgun at, among other things, a parked car. As defendant contends, and the People correctly concede, County Court erred in failing to determine whether defendant should be afforded youthful offender status (see *People v Rudolph*, 21 NY3d 497, 501 [2013]; *People v Lester*, 155 AD3d 1579, 1579 [4th Dept 2017], lv denied 32 NY3d 1206 [2019]). Defendant was 18 years old at the time of the offense and was convicted of an armed felony (see *People v Meridy*, 196 AD3d 1, 5-6 [4th Dept 2021], lv denied 37 NY3d 973 [2021]; see also CPL 1.20 [41]; Penal Law § 70.02 [1] [b]). The court was therefore required to determine whether she was an eligible youth pursuant to CPL 720.10 (3) (see *People v Middlebrooks*, 25 NY3d 516, 527 [2015]; *People v Freeman*, 206 AD3d 1694, 1696 [4th Dept 2022]). Because the court failed to make such a determination, we hold the case, reserve decision, and remit the matter to County Court to make and state for the record a determination whether defendant is an eligible youth within the meaning of CPL 720.10 (3) and, if so, whether defendant should be afforded youthful offender status (see *Freeman*, 206 AD3d at 1696).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

277

KA 24-01577

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY M. JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Wyoming County Court (Melissa Lightcap Cianfrini, A.J.), rendered July 18, 2024. The judgment convicted defendant upon his plea of guilty of aggravated family offense.

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 aggravated family offense (Penal Law § 240.75 [1]), defendant contends that his plea was involuntarily entered because, at sentencing, County Court misstated the agreed-upon sentence and pronounced that incorrect sentence before recalling the case later that same day and correcting the mistake. We agree with defendant, and the People concede, that defendant's challenge to the voluntariness of the plea survives his valid waiver of the right to appeal (see *People v McMurtry*, 224 AD3d 1310, 1310 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Gimenez*, 59 AD3d 1088, 1088-1089 [4th Dept 2009], *lv denied* 12 NY3d 816 [2009]). Nevertheless, by failing to move to withdraw his plea or to vacate the judgment of conviction, defendant failed to preserve his contention for our review (see *People v Santos*, 230 AD3d 1586, 1586 [4th Dept 2024], *lv denied* 43 NY3d 932 [2025]). The narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply here (see *Santos*, 230 AD3d at 1586).

Defendant further contends that he was denied effective assistance of counsel. That contention survives his guilty plea and valid waiver of the right to appeal "only if the plea bargaining process was infected by [the] allegedly ineffective assistance or [if] defendant entered the plea because of [the] attorney['s] allegedly poor performance" (*People v Johnson*, 229 AD3d 1300, 1302 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024] [internal quotation marks omitted]; see *People v Williams*, 246 AD3d 1370, 1371 [4th Dept 2026],

lv denied – NY3d – [2026])). “[I]n the context of a guilty plea, a defendant has been afforded meaningful representation when [they] receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel” (*People v Dale*, 142 AD3d 1287, 1290 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017] [internal quotation marks omitted]). Here, defense counsel secured a favorable plea bargain for defendant, including a sentence of the minimum term of imprisonment, and nothing in the record casts doubt on the apparent effectiveness of counsel (see *People v Lloyd*, 243 AD3d 1276, 1276-1277 [4th Dept 2025], *lv denied* 45 NY3d 946 [2026]; *Johnson*, 229 AD3d at 1302).

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

279

KA 23-01417

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAIQUIN GRAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 6, 2023. The judgment convicted defendant upon a jury verdict of murder in the second degree, robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]), robbery in the first degree (§ 160.15 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). We reject defendant's contention that the evidence is legally insufficient to establish his identity as the shooter. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence with respect to the issue of identity is legally sufficient (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence on the issue of identity (*see generally Bleakley*, 69 NY2d at 495). Defendant's codefendant identified him as the perpetrator, and defendant's ex-girlfriend testified that defendant admitted that he killed the victim. Defendant contends that those two witnesses were unreliable, but it is well settled that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]). Indeed, the fact that the codefendant testified pursuant to a cooperation agreement merely raised a

credibility issue for the jury to resolve (see *People v Johnson*, 176 AD3d 1392, 1393-1394 [3d Dept 2019], *lv denied* 34 NY3d 1129 [2020]; *People v Spagnuolo*, 173 AD3d 1832, 1834 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]; *People v Carr*, 99 AD3d 1173, 1174 [4th Dept 2012], *lv denied* 20 NY3d 1010 [2013]); the same applies with respect to the fact that defendant's ex-girlfriend was his estranged intimate partner (see *People v Fomby*, 101 AD3d 1355, 1356 [3d Dept 2012]). Although a different verdict would not have been unreasonable, the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded (see generally *Bleakley*, 69 NY2d at 495; *People v Kilgore*, 203 AD3d 1634, 1634-1635 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]; *People v Davis*, 115 AD3d 1167, 1168-1169 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014]).

Defendant next contends that improper and inflammatory testimony of the ex-girlfriend violated his right to a fair trial. Supreme Court sustained defendant's objection to the testimony concerning his prior criminal activity and issued a prompt curative instruction, which alleviated the prejudice to defendant (see *People v Smith*, 229 AD3d 1110, 1111-1112 [4th Dept 2024], *lv denied* 42 NY3d 1037 [2024]; *People v O'Neal*, 38 AD3d 1305, 1307 [4th Dept 2007], *lv denied* 9 NY3d 848 [2007]). We therefore reject defendant's contention that he was denied a fair trial (see *People v Cutaia*, 167 AD3d 1534, 1535-1536 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]) and, contrary to his further contention, defense counsel's failure to move for a mistrial does not constitute ineffective assistance inasmuch as such a motion would have had little or no chance of success (see *People v Harvey*, 235 AD3d 1243, 1244-1245 [4th Dept 2025], *lv denied* 43 NY3d 963 [2025]; see generally *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *People v Houghtaling*, 144 AD3d 1591, 1591-1592 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017], *reconsideration denied* 30 NY3d 950 [2017]).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct during opening remarks and on summation is unpreserved for our review (see *People v Nesmith*, 242 AD3d 1564, 1565 [4th Dept 2025], *lv denied* 44 NY3d 1067 [2026]). In any event, to the extent the prosecutor's remarks were improper, they were "not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020] [internal quotation marks omitted]; see *People v Rodriguez*, 236 AD3d 1306, 1307-1308 [4th Dept 2025], *lv denied* 43 NY3d 1058 [2025]; *People v Bubis*, 204 AD3d 1492, 1494-1495 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]). Inasmuch as we conclude "that defendant was not denied a fair trial by prosecutorial misconduct . . . , defendant was not denied effective assistance of counsel by defense counsel's failure to object to the allegedly improper remarks" (*People v Hills*, 234 AD3d 1311, 1314 [4th Dept 2025], *lv denied* 43 NY3d 963 [2025] [internal quotation marks omitted]; see *People v Reynolds*, 211 AD3d 1493, 1495 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

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

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CAF 24-01640

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

IN THE MATTER OF RONALD K., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RONALD K., RESPONDENT-APPELLANT.

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

ALICIA ARTIS, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Shannon E. Filbert, J.), entered April 11, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights over the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudicated the subject child to be permanently neglected by the father and terminated the father's parental rights. Contrary to the father's contention on appeal, we conclude that his failure to appear at the fact-finding hearing constituted a default under the circumstances of this case, "particularly where the [father's] attorney, although present, decline[d] to participate in the hearing in the [father's] absence and instead elect[ed] to stand mute" (*Matter of Reardon v Krause*, 219 AD3d 1710, 1711 [4th Dept 2023], lv denied 41 NY3d 905 [2024]; see *Matter of Jayden M. [Carlos M.]*, 237 AD3d 1560, 1561-1562 [4th Dept 2025], lv denied 44 NY3d 902 [2025]). Where, as here, the order appealed from is made upon a respondent's default, " 'review is limited to matters which were the subject of contest below' " (*Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386 [4th Dept 2019], lv denied 35 NY3d 904 [2020]; see *Matter of Tyrone O. [Lillian G.]*, 199 AD3d 1386, 1387 [4th Dept 2021], lv denied 38 NY3d 904 [2022]). Thus, review is limited to the denial of the request of the father's attorney for an adjournment (see *Matter of Hayden A. [Karen A.]*, 188 AD3d 1759, 1759

[4th Dept 2020]; *Ramere D.*, 177 AD3d at 1386-1387). Contrary to the father's contention, Family Court did not abuse its discretion in denying that request inasmuch as the father's attorney offered no reason for the father's failure to appear (see *Tyrone O.*, 199 AD3d at 1387).

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

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CAF 24-00960

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

IN THE MATTER OF DWANE MCDUFFIE, JR.,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TRAYLANTA COLEMAN, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 30, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole custody of the subject child.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order entered after an evidentiary hearing that, inter alia, granted the amended petition of petitioner father to modify an existing consent order regarding custody and visitation of the parties' older child and awarded the father sole custody of the subject child with limited visitation to the mother. In appeal No. 2, the mother appeals from an order entered after the same evidentiary hearing that, inter alia, granted the amended petition of the father seeking sole custody of the parties' younger child with limited visitation to the mother.

Initially, we note that appeal No. 1 is moot because the parties' older child has reached the age of 18 during the pendency of this appeal (*see Matter of Woodruff v Adside*, 26 AD3d 866, 866 [4th Dept 2006]; *Matter of Krest v Kawczynski*, 9 AD3d 907, 907-908 [4th Dept 2004]).

Contrary to the mother's contention in appeal No. 2, Family Court properly determined that joint legal custody was not appropriate inasmuch as the parties have an acrimonious relationship and are not able to communicate effectively with respect to the needs of the child (*see generally Matter of K.C. v N.C.*, 215 AD3d 1238, 1239-1240 [4th

Dept 2023], *lv denied* 40 NY3d 907 [2023]; *Matter of Ballard v Piston*, 178 AD3d 1397, 1398 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020]).

With respect to the award of sole custody to the father, although the court "erred in failing to set forth those facts essential to its decision . . . , the record is sufficiently complete for us to make our own findings of fact in the interests of judicial economy and the well-being of the child[]" (*Matter of Rawleigh v Gallt*, 229 AD3d 1093, 1093 [4th Dept 2024] [internal quotation marks omitted]). Upon our review of the relevant factors (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]; *Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]), we conclude, contrary to the mother's contention in appeal No. 2, that it is in the child's best interests that the father have sole custody of the child. Here, the father has had sole custody of the child, and the mother has had limited visitation, since a temporary order was issued in 2022. The record establishes that the father is better able to provide for the child's emotional and intellectual development, as evidenced by the fact that the child's attendance and grades at school have improved significantly while residing with the father. As to the quality of the home environment, the child's siblings also reside at the father's home and there, unlike at the mother's home, the child has appropriate supervision. Moreover, several crucial factors weigh against awarding the mother custody of the child. Most notably, the testimony at the fact-finding hearing established that the mother had engaged in corporal punishment of the children and that she had a history of alcohol abuse.

Finally, we reject the mother's further contention in appeal No. 2 that the record does not support the court's determination to award her limited visitation. It is well settled that "[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 [and substantial] basis in the record" (*Matter of Castle v Barnes*, 221 AD3d 1562, 1563 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024] [internal quotation marks omitted]). The mother admitted that she neglected the child and the record establishes that she interfered with the father's relationship with the child. We therefore conclude that it was not in the best interests of the child to award additional parenting time with the mother (*see id.*).

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

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CAF 24-00961

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

IN THE MATTER OF DWANE MCDUFFIE, JR.,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TRAYLANTA COLEMAN, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 30, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole custody of the subject child.

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

Same memorandum as in *Matter of McDuffie v Coleman* ([appeal No. 1] – AD3d – [June 5, 2026] [4th Dept 2026]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CAF 24-01224

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

IN THE MATTER OF DE'LAURENCE S., III
AND FREDERICKA S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DE'LAURENCE S., JR., RESPONDENT-APPELLANT.

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

RICHARD K. BARNEY, III, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered July 8, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudged that he neglected the subject children and continued the children's foster care placement. We affirm.

Contrary to the father's contention, we conclude that Family Court did not err in determining that petitioner established by a preponderance of the evidence that the father neglected the children by inflicting excessive corporal punishment on them (see *Matter of Vashti M. [Carolette M.]*, 214 AD3d 1335, 1336 [4th Dept 2023], appeal dismissed 39 NY3d 1177 [2023]; *Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1395 [4th Dept 2021], lv denied 37 NY3d 904 [2021]; see generally Family Ct Act § 1012 [f] [i] [B])). The older child's statements to petitioner's caseworkers about an incident in which the father slapped and punched the older child after she returned home late were corroborated by a caseworker's observations of the older child's visible injuries and by the father's admissions regarding that incident, and the older child's statements that the father regularly struck both her and the younger child were cross-corroborated by the younger child's statements to one of the caseworkers (see *Vashti M.*, 214 AD3d at 1336; *Balle S.*, 194 AD3d at 1395; *Matter of Janae R. [Antanet R.]*, 188 AD3d 1753, 1754 [4th Dept 2020]). To the extent that the father, in presenting his own testimony at the hearing,

denied hitting the children on any occasion other than during the aforementioned incident with the older child, the conflicting evidence presented the court with a credibility determination to make, which it resolved against the father, and we see no basis to disturb the court's assessment and resolution of that credibility issue (see *Matter of Ryanna H. [Monique H.]*, 214 AD3d 1308, 1310 [4th Dept 2023], *lv dismissed* 40 NY3d 964 [2023]; *Matter of Amarion M. [Faith W.]*, 214 AD3d 1457, 1458-1459 [4th Dept 2023], *lv denied* 39 NY3d 915 [2023]). The hearing evidence also established that the physical, mental or emotional condition of the children had been impaired or was in imminent danger of becoming impaired as a result of the father's infliction of excessive corporal punishment (see § 1012 [f] [i] [B]; *Vashti M.*, 214 AD3d at 1336; *Amarion M.*, 214 AD3d at 1458). We thus conclude that the court's determination that the father neglected the children by inflicting excessive corporal punishment is supported by a sound and substantial basis in the record (see *Vashti M.*, 214 AD3d at 1336).

The father further contends that the court erred in determining that it was in the best interests of the children to continue their placement in their current foster home. Even assuming, arguendo, that the father's contention is not rendered moot by the entry of superseding permanency hearing orders or that the exception to the mootness doctrine applies (see generally *Matter of Joshua J. [Tameka J.]*, 44 NY3d 394, 401-403 [2025]), we conclude that the contention lacks merit. "[T]he fashioning of an appropriate dispositional order is ordinarily a matter of discretion for . . . Family Court and such an order will be reversed [only] where it lacks [a] sound and substantial basis in the [record]" (*Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497 [4th Dept 2015], *lv denied in part & dismissed in part* 26 NY3d 941 [2015] [internal quotation marks omitted]). We conclude upon our review of the record that the court's dispositional determination to continue the placement of the children in their current foster home "reflect[s] a resolution consistent with the best interests of the children after consideration of all relevant facts and circumstances, and [is] supported by a sound and substantial basis in the record" (*id.* [internal quotation marks omitted]; see *Matter of Daniel K. [Mildred K.]*, 173 AD3d 1732, 1733 [4th Dept 2019], *lv denied* 35 NY3d 903 [2020]).

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

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CA 25-00104

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

SCOTT M. DEMING, JR., AS ADMINISTRATOR OF THE
ESTATE OF SCOTT M. DEMING, SR., DECEASED,
PLAINTIFF,

V

MEMORANDUM AND ORDER

COUNTY OF CHAUTAUQUA, CHAUTAUQUA COUNTY
DEPARTMENT OF PUBLIC FACILITIES, CHAUTAUQUA
COUNTY LANDFILL, AND JAMES CHRIST, DEFENDANTS.

COUNTY OF CHAUTAUQUA, CHAUTAUQUA COUNTY DEPARTMENT
OF PUBLIC FACILITIES, CHAUTAUQUA COUNTY LANDFILL,
AND JAMES CHRIST, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

BESTWAY CONTAINER SERVICES, LLC, THIRD-PARTY DEFENDANT,
AND CASELLA WASTE MANAGEMENT OF N.Y., INC.,
THIRD-PARTY DEFENDANT-APPELLANT.

THE COPPOLA FIRM, BUFFALO (KIMBERLY WALLACE OF COUNSEL), FOR
THIRD-PARTY DEFENDANT-APPELLANT.

GROSS SHUMAN P.C., BUFFALO (KEIFER S. TEHAN OF COUNSEL), FOR
DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS COUNTY OF CHAUTAUQUA,
CHAUTAUQUA COUNTY DEPARTMENT OF PUBLIC FACILITIES, AND CHAUTAUQUA
COUNTY LANDFILL.

Appeal from an order of the Supreme Court, Chautauqua County
(Grace Marie Hanlon, J.), entered December 31, 2024. The order denied
the motion of third-party defendant Casella Waste Management of N.Y.,
Inc. for an order dismissing the amended third-party complaint against
it.

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

Memorandum: Plaintiff, as administrator of the estate of Scott
M. Deming, Sr., deceased (decedent), commenced this negligence and
wrongful death action after decedent, while working as an employee of
third-party defendant Bestway Container Services, LLC (Bestway),
sustained fatal injuries. Decedent was struck by a bulldozer operated
by defendant-third-party plaintiff James Christ, an employee of
defendant-third-party plaintiff County of Chautauqua (County), at
defendant-third-party plaintiff Chautauqua County Landfill. At the

time of the accident, Bestway had a contract with the County for garbage and container services, pursuant to which Bestway agreed to indemnify the County. After decedent's accident, third-party defendant Casella Waste Management of N.Y., Inc. (Casella) entered into an asset purchase agreement (APA) with Bestway. Defendants-third-party plaintiffs commenced a third-party action against Bestway and Casella seeking contribution, common-law indemnification, and contractual indemnification. Casella moved pursuant to CPLR 3211 (a) (7) to dismiss the amended third-party complaint against it and submitted the APA in support of its motion. Supreme Court denied the motion, and Casella now appeals.

Initially, we agree with Casella that the court erred in applying the summary judgment standard to Casella's motion to dismiss. Although a court may convert a motion to dismiss to one for summary judgment, "it must first provide adequate notice to the parties, and thus give them an opportunity to make an appropriate record" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; see CPLR 3211 [c]; *Barker v Gervera*, 236 AD3d 1318, 1320 [4th Dept 2025]), which was not done here. Further, the parties did not "deliberately chart[] a summary judgment course" (*Barker*, 236 AD3d at 1320-1321 [internal quotation marks omitted]), and conversion to a summary judgment motion is inappropriate where, as here, such a motion would be premature (see *id.* at 1321). We therefore review Casella's contentions in the context of a motion to dismiss pursuant to CPLR 3211 (a) (7) (see *Klymn v Supreme Ct., Monroe County*, 240 AD3d 1320, 1321 [4th Dept 2025])).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction," and we must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see *Rovello*, 40 NY2d at 634). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002])). Where, however, "evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether [they have] stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer*, 43 NY2d at 275 [emphasis added]; see *Cohen & Lombardo, P.C. v Connors*, 169 AD3d 1399, 1401 [4th Dept 2019])).

Here, we conclude that the allegations in the amended third-party complaint, liberally construed, establish that defendants-third-party plaintiffs have causes of action for contribution, common-law indemnification, and contractual indemnification. "It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor" (*Schumacher v Richards Shear*

Co., 59 NY2d 239, 244 [1983])). However, "[a] corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*id.* at 245). This doctrine is also applicable to contractual liabilities (*see One Riv. Run Acquisition, LLC v Milde*, 239 AD3d 519, 521 [1st Dept 2025]; *R&D Elecs., Inc. v NYP Mgt., Co., Inc.*, 162 AD3d 1513, 1515 [4th Dept 2018]; *Hamilton Equity Group, LLC v Juan E. Irene, PLLC*, 101 AD3d 1703, 1704-1705 [4th Dept 2012]; *Nationwide Mut. Fire Ins. Co. v Long Is. A.C., Inc.*, 78 AD3d 801, 802 [2d Dept 2010])). The second and third exceptions are "based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984])).

Defendants-third-party plaintiffs alleged in the amended third-party complaint that, in acquiring Bestway, Casella assumed Bestway's obligations under its contract with the County, including Bestway's obligation to indemnify the County. Casella contends, however, that it did not purchase Bestway's assets until after the accident and, pursuant to the APA, Casella expressly assumed none of Bestway's liabilities that existed, or may have existed, before the purchase. We reject that contention inasmuch as the APA does not "demonstrate conclusively that" the second and third exceptions set forth in *Schumacher* do not apply (*Stuber v Stuber*, 209 AD3d 1297, 1297 [4th Dept 2022]; *see Schultz v Alamo Group Inc.*, 192 AD3d 1630, 1631 [4th Dept 2021])). We thus conclude that defendants-third-party plaintiffs sufficiently alleged causes of action against Casella for contribution, common-law indemnification, and contractual indemnification (*see generally Avamer 57 Fee LLC v Hunter Boot USA LLC*, 241 AD3d 401, 402 [1st Dept 2025])).

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

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CA 25-00651

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

GLORIA CALVANESO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN K. MOCHOL, PAUL T. FOURNIER ENTERPRISES,
INC., AND MODERN DISPOSAL SERVICES, INC.,
DEFENDANTS-APPELLANTS.

HURWITZ FINE P.C., BUFFALO (TYLER J. ECKERT OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

STEVE BOYD, P.C., BUFFALO (LEAH COSTANZO OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered March 24, 2025. The order denied the motion of defendants to bifurcate the liability and damages portions of the trial.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly resulting from a motor vehicle accident. In addition to plaintiff's vehicle, the accident involved a tractor-trailer owned by defendant Paul T. Fournier Enterprises, Inc., which was operated by defendant Shawn K. Mochol for the benefit of defendant Modern Disposal Services, Inc.

Following discovery, defendants moved to bifurcate the liability and damages portions of the trial. Supreme Court denied the motion, and defendants now appeal. Preliminarily, and contrary to plaintiff's assertion, we conclude that it was not necessary to include the transcript from oral argument of the motion in the record on appeal and, thus, defendants' failure to include the transcript does not warrant dismissal of the appeal (*cf. Christa Constr., LLC v Vanguard Light Gauge Steel Bldgs.* [appeal No. 3], 181 AD3d 1310, 1311 [4th Dept 2020]; *see generally* CPLR 5526; *OneWest Bank, FSB v Spencer*, 145 AD3d 1488, 1488-1489 [4th Dept 2016]).

We reject defendants' contention that the court erred in denying their motion. "As a general rule, '[i]ssues of liability and damages in a negligence action are distinct and severable issues that should be tried and determined separately' " (*Wesselenyi v Santiago* [appeal

No. 1], 286 AD2d 964, 964 [4th Dept 2001]; see *Abate v Black Wolf*, 219 AD3d 1118, 1120 [4th Dept 2023]; *Piccione v Tri-main Dev.*, 5 AD3d 1086, 1087 [4th Dept 2004]). However, a bifurcated trial is not warranted where " 'the nature of the injuries has an important bearing on the issue of liability' " (*Fox v Frometa*, 43 AD3d 1432, 1432 [4th Dept 2007]), or where "bifurcation would not assist in clarification or simplification of the issues or a more expeditious resolution of the action" (*Zbock v Gietz*, 162 AD3d 1636, 1636 [4th Dept 2018]). "The determination whether to conduct a bifurcated trial rests within the discretion of the trial court" (*Pittsford Canalside Props., LLC v Pittsford Vil. Green*, 154 AD3d 1303, 1305 [4th Dept 2017] [internal quotation marks omitted]; see *DeAngelis v Martens Farms, LLC*, 104 AD3d 1131, 1131 [4th Dept 2013]).

We conclude that the court did not abuse its discretion in denying the motion. Plaintiff established that "the nature of [her] injuries has an important bearing on the issue of liability" (*Ellis v J.M.G., Inc.*, 31 AD3d 1220, 1221 [4th Dept 2006] [internal quotation marks omitted]) and that bifurcation would not "assist in a clarification or simplification of the issues and a fair and more expeditious resolution of the action" (*Blajszczak v McGhee-Reynolds*, 191 AD3d 1339, 1340 [4th Dept 2021] [internal quotation marks omitted]; see *Bogumil v Greenbaum Family Holdings, LP*, 220 AD3d 1193, 1194 [4th Dept 2023]; *Abate*, 219 AD3d at 1120). In addition, we note that the court was in the best position to evaluate defendants' contentions that a defense verdict on liability "was likely so as to obviate the necessity of a second trial" (*Johnson v Hudson Riv. Constr. Co., Inc.*, 13 AD3d 864, 865 [3d Dept 2004]) and that settlement was likely if they did not prevail at the liability phase of a bifurcated trial (see *Zbock*, 162 AD3d at 1637; *Johnson*, 13 AD3d at 865). We decline to disturb, on either of those grounds, the court's exercise of discretion in declining to bifurcate the trial.

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

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CA 25-01144

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

CINDY W., AS PARENT AND NATURAL GUARDIAN
OF J. F., A MINOR, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

WATERLOO CENTRAL SCHOOL DISTRICT,
RESPONDENT-RESPONDENT.

CANTOR, WOLFF, NICASTRO & HALL, BUFFALO (KENNETH P. L. LOWE OF
COUNSEL), FOR CLAIMANT-APPELLANT.

GOLDBERG SEGALLA LLP, GARDEN CITY (JAMES M. SPECYAL OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Arthur B. Williams, A.J.), entered July 2, 2025. The order, insofar as appealed from, denied the application of claimant seeking leave to serve a late notice of claim.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the application is granted upon the condition that the proposed notice of claim is served within 30 days of the date of entry of the order of this Court.

Memorandum: As limited by her brief, claimant, as parent and natural guardian of her minor son, appeals from an order insofar as it denied her application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). Claimant alleges that her son was subjected to incidents of bullying and abuse while a student at the Waterloo Middle School in respondent, Waterloo Central School District. She further alleges that her son sustained injuries as a result of respondent's negligent actions or inactions in regard to those incidents. We agree with claimant that Supreme Court abused its discretion in denying her application.

"Pursuant to General Municipal Law § 50-e (1) (a), a party seeking to sue a public corporation, which includes a school district, must serve a notice of claim on the prospective defendant 'within ninety days after the claim arises' " (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016], *rearg denied* 29 NY3d 963 [2017]). "General Municipal Law § 50-e (5) permits a court, in its discretion, to [grant leave] extend[ing] the time for a [claimant] to serve a notice of claim" (*id.* at 460-461). "The decision whether to grant such leave 'compels consideration of all

relevant facts and circumstances,' including the 'nonexhaustive list of factors' in section 50-e (5)" (*Dalton v Akron Cent. Schools*, 107 AD3d 1517, 1518 [4th Dept 2013], *affd* 22 NY3d 1000 [2013]). " 'It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are [1] whether the claimant has demonstrated a reasonable excuse for the delay, [2] whether the [school district] acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and [3] whether the delay would substantially prejudice the [school district] in maintaining a defense on the merits' " (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). "The presence or absence of any given factor is not determinative of the application and, moreover, the factors are 'directive rather than exclusive' " (*Matter of Gumkowski v Town of Tonawanda*, 156 AD3d 1481, 1481 [4th Dept 2017]).

We agree with claimant that respondent possessed actual knowledge of the essential facts constituting the claim within 90 days of its accrual (see *Matter of Cayuga Nation v Peenstra*, 228 AD3d 1271, 1273 [4th Dept 2024]). Claimant averred in her affidavit in support of the application that, during the relevant time period, she made numerous calls to the Waterloo Middle School and the Waterloo Village Police about the ongoing abuse and bullying of her son. Additionally, claimant submitted documentation pertaining to a Family Court proceeding that was brought against her son due to actions he took apparently out of his frustration with the alleged abuse and bullying. The documentation states that the school counselor was involved in that investigation and that claimant's son was "well known" to him. The school counselor also expressed the opinion that the bullying incidents were "unfounded."

We further agree with claimant that she demonstrated a reasonable excuse for her delay in serving the notice of claim. Claimant was understandably preoccupied with the Family Court proceedings against her minor son, who has notable physical and mental impairments (see generally *Compass v County of Nassau*, 37 AD3d 752, 753 [2d Dept 2007]; *Marchetti v E. Rochester Cent. School Dist.*, 302 AD2d 930, 930 [4th Dept 2003]).

Finally, we agree with claimant that she met her initial burden of making a plausible argument that late notice would not substantially prejudice respondent (see generally *Newcomb*, 28 NY3d at 466). Respondent failed in response to "make a particularized showing of substantial prejudice caused by the late notice" (*Cayuga Nation*, 228 AD3d at 1273-1274 [internal quotation marks omitted]).

We therefore reverse the order insofar as appealed from and grant claimant's application upon the condition that the proposed notice of

claim is served within 30 days of the date of entry of the order of this Court.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CA 25-00152

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

VILLAGE OF ALLEGANY,
PETITIONER-PLAINTIFF-APPELLANT-RESPONDENT,
ET AL., PETITIONERS-PLAINTIFFS,

V

MEMORANDUM AND ORDER

CITY OF OLEAN,
REPOENDENT-DEFENDANT-RESPONDENT-APPELLANT.

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

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR
RESPONDENT-DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered January 21, 2025, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The order, among other things, granted in part and denied in part the motion of petitioner-plaintiff Village of Allegany to dismiss respondent-defendant's counterclaims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in its entirety and dismissing the counterclaims, and as modified the order is affirmed without costs.

Memorandum: Petitioner-plaintiff Village of Allegany (Village), among others, commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination of respondent-defendant, City of Olean (City), to charge the Village at a higher rate for sewer services than had been previously charged under the parties' longtime agreement. The City interposed several counterclaims, and the Village subsequently moved to dismiss the counterclaims on the ground that they asserted claims or legal theories that were not mentioned in the City's earlier notice of claim pursuant to CPLR 9802. Supreme Court granted the motion insofar as it sought to dismiss the City's second and sixth counterclaims and denied the motion insofar as it sought to dismiss the City's first, third, fourth, and fifth counterclaims. The Village appeals, and the City cross-appeals.

We agree with the Village on its appeal that the court erred in failing to grant the motion in its entirety, and we therefore modify

the order accordingly. "CPLR 9802 sets forth the procedure by which certain actions against villages may be maintained" (*Solow v Liebman*, 175 AD2d 867, 868 [2d Dept 1991], *lv dismissed* 79 NY2d 977 [1992]). "In addition to providing for the maintenance of contract actions against villages, the statute also provides, in pertinent part, that 'no other action shall be maintained against [a] village unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless a notice of claim shall have been made and served in compliance with [General Municipal Law § 50-e]' " (*id.* at 868-869, quoting CPLR 9802). Consequently, "[i]t is a condition precedent to, and indeed an essential element of, any cause of action . . . against a village that the [claimant] have served upon the village a notice of claim setting forth, inter alia, the nature of the claim and the items of damage or injuries claimed to have been sustained" (*Gonzalez v Povoski*, 149 AD3d 1472, 1474 [4th Dept 2017]; see General Municipal Law §§ 50-e [1], [2]; 50-i [1]; CPLR 9801, 9802; *Salesian Socy. v Village of Ellenville*, 41 NY2d 521, 523 [1977]). "A claimant need not state a precise cause of action in haec verba in a notice of claim . . . , but a claimant may not raise in the [pleading] causes of action or legal theories that were not directly or indirectly mentioned in the notice of claim and that change the nature of the earlier claim or assert a new one" (*Gonzalez*, 149 AD3d at 1474 [internal quotation marks omitted]; see *O'Dell v County of Livingston*, 174 AD3d 1307, 1308-1309 [4th Dept 2019]). Furthermore, "the requirements of notice of claim statutes[, including CPLR 9802,] apply to the filing of counterclaims" (*Incorporated Vil. of Freeport v Freeport Plaza W., LLC*, 206 AD3d 703, 705 [2d Dept 2022], *lv granted* 44 NY3d 904 [2025]; see e.g. *Village of Val. Stream v Zulli*, 64 AD2d 609, 609-610 [2d Dept 1978]; *Hart v East Plaza*, 62 AD2d 113, 117 [4th Dept 1978], *lv dismissed* 45 NY2d 706, 776 [1978]). "[T]he notice of claim requirements of CPLR 9802 [also] apply to . . . causes of action [or claims] for declaratory relief" (*Matter of BT Holdings, LLC v Village of Chester*, 162 AD3d 881, 881 [2d Dept 2018], *lv denied* 32 NY3d 913 [2019]; see *Marsh Sanctuary, Inc. v Town of Mount Kisco*, 241 AD3d 1329, 1330-1331 [2d Dept 2025]).

Here, the notice of claim was premised exclusively on the theory that the City was entitled to monetary damages and a declaratory judgment based on the Village's alleged breach of the parties' agreement. Conversely, the City's first counterclaim seeks a declaration that the agreement had actually expired before the breach alleged in the notice of claim, and the third counterclaim seeks monetary damages for debt allegedly incurred by the Village after the purported expiration of the agreement. The fourth and fifth counterclaims for quantum meruit and unjust enrichment, respectively, are also premised on legal theories other than breach of contract. We thus conclude that those counterclaims improperly raise claims or legal theories "that were not directly or indirectly mentioned in the notice of claim and that change the nature of the earlier claim[s] or assert . . . new one[s]" (*Gonzalez*, 149 AD3d at 1474 [internal quotation marks omitted]). For the same reason, contrary to the City's contention on its cross-appeal, the court properly granted the motion insofar as it sought to dismiss the second counterclaim seeking

a declaration that the City lawfully charged the Village for sewer services at the non-resident commercial use rate following expiration of the agreement and the sixth counterclaim seeking a declaration that the Village had violated the Environmental Conservation Law and local law in its operation of its sewer system (*see id.*). We have reviewed the City's remaining contentions and conclude that, to the extent that those contentions are properly before us, they lack merit.

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

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KA 23-01468

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTION METZGER, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered March 17, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a guilty plea, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and attempted assault in the first degree (§§ 110.00, 120.10 [1]). We affirm. Even assuming, arguendo, that defendant did not validly waive his right to appeal (*see People v John*, 244 AD3d 1782, 1782 [4th Dept 2025]; *People v Reed*, 244 AD3d 1815, 1815 [4th Dept 2025]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* 589 US 1302 [2020]), we conclude that defendant's sentence is not unduly harsh or severe.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

296

KA 22-00018

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY BONES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered August 24, 2021. The judgment convicted defendant upon his plea of guilty of reckless endangerment in the first degree.

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

Memorandum: Defendant appeals in appeal No. 1 from a judgment convicting him upon a plea of guilty of reckless endangerment in the first degree (Penal Law § 120.25) and, in appeal No. 2, from a judgment convicting him upon a plea of guilty, in the same plea proceeding, of burglary in the third degree (§ 140.20). Even assuming, arguendo, in each appeal that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence (see *People v Harrison*, 242 AD3d 1540, 1541 [4th Dept 2025]; *People v Free*, 217 AD3d 1422, 1422 [4th Dept 2023]), we conclude in each appeal that the sentence is not unduly harsh or severe.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

297

KA 22-00019

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY BONES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered August 24, 2021. The judgment convicted defendant upon his plea of guilty of burglary in the third degree.

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

Same memorandum as in *People v Bones* ([appeal No. 1] – AD3d – [June 5, 2026] [4th Dept 2026]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

298

KA 21-00430

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AGAPE A. TOWNS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL),
FOR DEFENDANT-APPELLANT.

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(Victoria M. Argento, J.), rendered November 4, 2019. The judgment
convicted defendant upon a plea of guilty of robbery in the first
degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea
of guilty of one count of robbery in the first degree (Penal Law
§ 160.15 [4]), defendant contends that Supreme Court abused its
discretion in denying his motion to withdraw his plea.

Preliminarily, we note that defendant was originally convicted in
County Court (DeMarco, J.) following a jury trial of six counts of
robbery in the first degree (Penal Law § 160.15 [2], [4]) and
sentenced to 17 years of incarceration. We affirmed that judgment
(*People v Towns*, 151 AD3d 1638, 1638 [4th Dept 2017], revd 33 NY3d 326
[2019]), but the Court of Appeals reversed and remitted the matter for
a new trial (33 NY3d at 333).

Upon remittal, defendant agreed to accept a plea offer for a term
of incarceration that amounted to essentially the same amount of time
he had already served, but he expressed concern about the status of
his release, i.e., whether he would be processed and released or taken
into custody. Both the prosecutor and Supreme Court (Argento, J.)
informed defendant, who was being released pending sentencing, that it
was their belief that he would need to go back to the Department of
Corrections and Community Supervision (DOCCS) to be processed and
released, and that they could not guarantee an automatic release as
part of the plea. Only DOCCS could make that determination after
making calculations of time served. The prosecutor specifically

informed defendant that the plea would not be "contingent on him . . . get[ting] out." Defendant nevertheless entered his plea of guilty.

Defendant contends that his plea was not knowing, voluntary or intelligent, and that it was obtained under coercion and duress (see generally *People v Mack*, 225 AD3d 1154, 1154-1155 [4th Dept 2024]; *People v Gast*, 114 AD3d 1270, 1270 [4th Dept 2014], *lv denied* 22 NY3d 1198 [2014]). We note that, because defendant's challenges regarding his plea would survive even a valid waiver of the right to appeal (see *Mack*, 225 AD3d at 1154; *Gast*, 114 AD3d at 1270), we need not address defendant's contention with respect to the validity of that waiver (see *People v Carmichael*, 227 AD3d 1432, 1433 [4th Dept 2024]; *People v Davis*, 206 AD3d 1603, 1604 [4th Dept 2022]). Furthermore, even assuming, arguendo, that defendant's challenges regarding his plea are preserved for our review by his motion to withdraw his plea (see *People v Gerena*, 174 AD3d 1428, 1430 [4th Dept 2019], *lv denied* 34 NY3d 981 [2019]; cf. *People v Williams*, 198 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 1149 [2021]), we conclude that they lack merit.

Defendant's contentions of coercion and duress "are unsupported by the record and are belied by the plea colloquy," during which defendant was informed that neither the court nor the prosecutor could guarantee an automatic release at sentencing (*People v Gray*, 189 AD3d 2135, 2135 [4th Dept 2020], *lv denied* 36 NY3d 1120 [2021]). Moreover, defendant averred that he had not been offered any other promises other than the sentence commitment, that he had enough time to discuss the plea with defense counsel and that he was pleading guilty of his own free will (see *id.*).

"[P]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017] [internal quotation marks omitted]; see *People v Fox*, 204 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]). Moreover, " 'a court does not abuse its discretion in denying a motion to withdraw a guilty plea where the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding' " (*People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]; see *Fox*, 204 AD3d at 1453).

Here, as in *Fox*, we conclude that the court did not abuse its discretion in summarily denying the motion because defendant's grievances with the plea process are "belied by his statements at the plea colloquy" (*Fox*, 204 AD3d at 1453). Moreover, defendant was "sentenced to the promised sentence . . . The expectation that defendant would be released on the date of sentencing was not a promise to do so inasmuch as the court indicated that DOCCS had the

final decision on that matter" (*People v Morrison*, 216 AD3d 1430, 1431 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-02010

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN SMALL, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 15, 2023. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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 Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the first degree (Penal Law § 140.30 [2]). We reverse. Initially, we agree with defendant that his waiver of the right to appeal is invalid. Supreme Court's oral colloquy was overbroad inasmuch as the court told defendant that his waiver of the right to appeal marks the "end of the case." Although the record establishes that defendant executed a written waiver of the right to appeal, the written waiver "does not cure the deficient oral colloquy because the court did not inquire of defendant whether he understood the written waiver or whether he had read the waiver before signing it" (*People v Augello*, 222 AD3d 1398, 1399 [4th Dept 2023], *lv denied* 41 NY3d 942 [2024]).

Defendant contends that his plea is invalid because the plea allocution negated an element of the crime to which he pleaded guilty. As defendant acknowledges, he never moved to withdraw his plea, nor did he ever seek to vacate the judgment of conviction. This case, however, falls within the rare exception to the preservation requirement (see *People v Vanwuyckhuyse*, 213 AD3d 1286, 1286-1287 [4th Dept 2023], *lv denied* 40 NY3d 931 [2023]; *People v Barlow*, 70 AD3d 1489, 1489 [4th Dept 2010]; see generally *People v Lopez*, 71 NY2d 662, 666 [1988]). Burglary in the first degree requires that a person knowingly enter or remain unlawfully in a dwelling with the "intent to

commit a crime therein" (Penal Law § 140.30). Here, defendant twice indicated during his factual allocution that he did not intend to commit any crimes when he entered the house in question and, while he admitted that he intended to retrieve his own property, retrieving one's own property does not establish larcenous intent (*see People v Green*, 5 NY3d 538, 544 [2005]; *see generally People v Mack*, 128 AD3d 1456, 1457 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015]). Although the court attempted to conduct an inquiry following defendant's insistence that he did not intend to commit any crimes when he entered the house, such inquiry was insufficient (*see People v Worden*, 22 NY3d 982, 985-986 [2013]; *People v Hernandez*, 185 AD3d 1428, 1429 [4th Dept 2020]). The court therefore erred in accepting defendant's guilty plea (*see Vanwuyckhuyse*, 213 AD3d at 1287-1288).

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

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

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CA 25-00824

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

UNIVERSITY HILL REALTY, LTD., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RONDA AKL AND ROSETTE AKSTEROWICZ, AS TRUSTEES
OF THE MILAD HATEM IRREVOCABLE TRUST UNDER AGREEMENT
DATED JANUARY 14, 2015, AND THE MILAD HATEM
IRREVOCABLE TRUST UNDER AGREEMENT DATED JANUARY 14, 2015,
DEFENDANTS-RESPONDENTS.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

ABRAHAM LAW, PLLC, SYRACUSE (IMAN ABRAHAM OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County
(Robert E. Antonacci, II, J.), entered November 26, 2024, in a breach
of contract and unjust enrichment action. The order, insofar as
appealed from, granted the motion of defendants for summary judgment
dismissing plaintiff's complaint and dismissed the complaint.

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

Memorandum: Plaintiff commenced this breach of contract and
unjust enrichment action, alleging that it is entitled to a real
estate broker's commission based on, inter alia, an implied extension
of a brokerage contract between it and defendants. As limited by its
brief, plaintiff appeals from an order insofar as it granted
defendants' motion for summary judgment dismissing the complaint. We
agree with plaintiff that Supreme Court erred in granting the motion,
and we therefore reverse the order insofar as appealed from.

We conclude with respect to the cause of action for breach of
implied contract that defendants failed to meet their initial burden
of establishing that the parties did not have an implied-in-fact
contract. An implied-in-fact contract is "[a] contract that the
parties presumably intended as their tacit understanding, as inferred
from their conduct and other circumstances" (Black's Law Dictionary
409 [12th ed 2024]). "Whether an implied-in-fact contract was formed
and, if so, the extent of its terms, involves factual issues regarding
the intent of the parties and the surrounding circumstances" (Arell's

Fine Jewelers v Honeywell, Inc., 147 AD2d 922, 923 [4th Dept 1989]; see *Rocky Point Props. v Sear-Brown Group*, 295 AD2d 911, 912 [4th Dept 2002]). In an action to recover a broker's commission under a theory of an implied contract, "the contract may be established in some cases by the mere acceptance of the labors of a broker" (*Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 152 [1st Dept 2003] [internal quotation marks omitted]). Here, defendants submitted, inter alia, text messages between defendant Rosette Aksterowicz and plaintiff's broker, which show that the two continued to discuss offers coming in after the expiration of the 12-month grace period provided for in the brokerage contract, thereby creating a question of fact whether an implied-in-fact contract existed (see *Joseph P. Day Realty Corp.*, 308 AD2d at 152). We further conclude that defendants failed to meet their initial burden on their motion with respect to the cause of action for unjust enrichment (see *Milherst Constr., Inc. v Natale Bldg. Corp.*, 218 AD3d 1310, 1311-1312 [4th Dept 2023]). Defendants' "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

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

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CA 25-00270

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

HAPPY LAKE HOUSE, LLC, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JAMES CROSS, ET AL., DEFENDANTS-RESPONDENTS.

HARRIS BEACH MURTHA CULLINA PLLC, SYRACUSE (LISA A. LECOURS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (MATTHEW W. O'NEIL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), dated January 24, 2025, in an action regarding the ownership of real property. The order converted defendants' CPLR 3211 motion to dismiss to a motion for summary judgment, granted defendants' motion for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a determination that it is a one-third owner of disputed land. Several defendants moved to dismiss the complaint against them pursuant to CPLR 3211 (a) (1), (5) and (7), and Supreme Court converted the motion to one for summary judgment pursuant to CPLR 3211 (c). Plaintiff now appeals from an order that granted the converted motion. We affirm.

Contrary to plaintiff's contention, the court did not abuse its discretion in converting the motion to dismiss to a motion for summary judgment. The court provided "adequate notice to the parties" of its determination to convert the motion pursuant to CPLR 3211 (c) (see *Barker v Gervera*, 236 AD3d 1318, 1320 [4th Dept 2025]; *Carcone v D'Angelo Ins. Agency*, 302 AD2d 963, 963 [4th Dept 2003]), and plaintiff failed to establish that summary judgment was premature inasmuch as it did not demonstrate that additional discovery would lead to relevant evidence or give rise to an identifiable issue of fact (see *Guarino v ProHEALTH Care Assoc., LLP*, 219 AD3d 467, 469 [2d Dept 2023]; see generally *Johnson-Neuland v New York Mun. Ins. Reciprocal*, 186 AD3d 1042, 1042-1043 [4th Dept 2020]).

Contrary to plaintiff's further contention, the court properly granted the converted motion on the ground that plaintiff's causes of

action are barred by *res judicata*, i.e., claim preclusion. " 'To establish claim preclusion, a party must show: (1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions' " (*Belton v Borg & Ide Imaging, P.C.*, 220 AD3d 1174, 1174 [4th Dept 2023], quoting *Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 73 [2018]; see generally *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). "Generally speaking, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Belton*, 220 AD3d at 1174-1175 [internal quotation marks omitted]). "Consequently, *res judicata* bars claims that were not actually decided in the prior action if they could have been decided in that action" (*id.* at 1175 [internal quotation marks omitted]).

Here, plaintiff's predecessor in title previously commenced an action to quiet title and recover possession of the disputed property, asserting interests through both adverse possession and "by virtue of a claim under written instrument." The parties thereafter entered into a stipulation in open court that was memorialized in a November 1971 order, pursuant to which plaintiff's predecessor waived "any and all rights in and to [the disputed property] by reason of adverse possession by written instrument or otherwise," and further stipulated that the action "be discontinued with prejudice."

We conclude that the moving defendants established that, as for the first element, the prior action was resolved on the merits through the stipulation and order (see *Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, 380 [1999]; *State of New York Mtge. Agency v Massarelli*, 167 AD3d 1296, 1296 [3d Dept 2018]; *Aard-Vark Agency, Ltd. v Prager*, 8 AD3d 508, 509 [2d Dept 2004]) and, as for the second element, there is a complete identity of parties inasmuch as privity includes a "successive relationship to the same right of property" (*Simmons v Capra*, 273 App Div 83, 87 [4th Dept 1947]; see *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 486 [1979]). With respect to the final element, plaintiff contends that *res judicata* does not apply because its predecessor in title limited the claims at issue to those sounding in adverse possession. We reject that contention inasmuch as both the prior action and the instant action seek to recover possession and quiet title to the disputed property based upon, *inter alia*, the chain of title (see *Sunny v Hossain*, 236 AD3d 699, 701 [2d Dept 2025]; 214 *Lafayette House LLC v Akasa Holdings, LLC*, 227 AD3d 75, 81 [1st Dept 2024]). In any event, to the extent that the complaint in this action asserts claims not contained in the prior complaint, we conclude that those claims are nonetheless precluded inasmuch as they are predicated on factual allegations that either were raised or could have been raised in the prior action (see *Belton*, 220 AD3d at 1177; see generally *Matter of Hunter*, 4 NY3d 260, 269 [2005]).

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

309

CA 25-00369

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

KYLE CASTLE, PLAINTIFF,

V

MEMORANDUM AND ORDER

JASON SWARTFIGUER, INDIVIDUALLY AND
DOING BUSINESS AS J.W. SERVICES, DEFENDANT.

JASON SWARTFIGUER, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

CHRISTOPHER CLEVELAND, THIRD-PARTY DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM LLP, SYRACUSE (THOMAS J. DAVIAU OF COUNSEL), FOR
THIRD-PARTY DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JAMES J. GASCON OF
COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), entered January 22, 2025, in a personal injury action. The order denied the motion of third-party defendant for summary judgment dismissing the amended third-party complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when, as he stepped onto a temporary basement staircase located in a modular home belonging to Christopher Cleveland (third-party defendant), the staircase suddenly collapsed underneath him. Plaintiff alleged that the staircase had been negligently installed several weeks before the accident by defendant-third-party plaintiff, Jason Swartfiguer (defendant), who was hired by third-party defendant to help install the home's HVAC and plumbing systems. Defendant installed the temporary staircase to help him, and others working on the site, to more easily move materials between the floors of the home. Defendant secured in place the top of the temporary staircase by using two three-inch screws; nothing affixed the staircase to the basement floor. Upon being sued by plaintiff, defendant commenced a third-party action against third-party defendant asserting claims of common-law indemnification and contribution on the ground that third-party defendant was negligent in connection with the installation of the basement staircase. Supreme Court denied third-

party defendant's motion for summary judgment dismissing the amended third-party complaint. Third-party defendant now appeals, and we affirm.

Third-party defendant contends that the court erred in denying his motion with respect to both common-law indemnification and contribution. We reject that contention. "[T]o establish a claim for common-law indemnification, the one seeking indemnity must prove not only that [he] was not guilty of any negligence . . . but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Provens v Ben-Fall Dev., LLC*, 163 AD3d 1496, 1499 [4th Dept 2018] [internal quotation marks omitted]; see *Lagares v Carrier Term. Servs., Inc.* [appeal No. 2], 204 AD3d 1456, 1459 [4th Dept 2022]; see generally *Ignatowski v Ledgestone Vil. LLC*, 242 AD3d 1620, 1621 [4th Dept 2025]). With respect to contribution, "where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 585 [1998] [internal quotation marks omitted]; see *Dole v Dow Chem. Co.*, 30 NY2d 143, 148-149 [1972]; see generally CPLR 1401).

Here, third-party defendant did not meet his initial burden of establishing "that [he] was free of any negligence that contributed to the cause of [plaintiff's] accident" (*Parsons v County of Steuben*, 240 AD3d 1333, 1337 [4th Dept 2025] [internal quotation marks omitted]). Indeed, viewing the facts in the light most favorable to defendant as the nonmovant and drawing every available inference in his favor (see generally *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we conclude that third-party defendant's own submissions raise triable questions of fact with respect to his own negligence in causing plaintiff's accident, requiring denial of the motion with respect to both contribution and common-law indemnification. Third-party defendant's submissions, which included the depositions of the parties, raise questions of fact whether, as the owner of the premises where the accident occurred, he either created or had actual or constructive notice of the dangerous condition that caused plaintiff's injury-i.e., the defectively installed temporary staircase (see generally *Morrison v New York City Hous. Auth.*, 41 NY3d 1023, 1024 [2024]; *Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1136 [2017]; *Mirco v Tops Mkts., LLC*, 225 AD3d 1125, 1126 [4th Dept 2024]).

Specifically, defendant testified at his deposition that, although third-party defendant did not provide detailed instructions on how to install the staircase, he did tell defendant to use as few fasteners as possible, which caused defendant to install the stairs with only two screws. Defendant further testified that he told third-party defendant that more than two fasteners should be used to properly install the stairs. It is undisputed that defendant also informed third-party defendant that the stairs were a temporary installation, and third-party defendant confirmed that he would finish the stairs with a more permanent installation. At his deposition,

third-party defendant testified that, when the stairs were installed, defendant did not utilize any supports to hold them up. Third-party defendant also indicated that he thought the stairs would be secured from the bottom. Defendant testified that third-party defendant never instructed him to install supports under the stairs. However, defendant would, at times, place temporary supports under the stairs, when he used them; those supports were no longer in place after defendant finished his work at the home. Under these circumstances, we conclude that third-party defendant's submissions did not establish, as a matter of law, that he did not create or have notice of the purportedly dangerous condition of the stairs sufficient to warrant dismissal of the contribution and common-law indemnification claims asserted against him (*see Mirco*, 225 AD3d at 1126; *Walsh v Super Value, Inc.*, 76 AD3d 371, 376 [2d Dept 2010]; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]). Inasmuch as third-party defendant's submissions raise triable issues of fact with respect to whether he created or had notice of the allegedly defective condition, we further conclude that the court did not err in denying the motion with respect to proximate cause and whether third-party defendant had a duty to warn plaintiff about the condition of the stairs (*see generally Taggart v Fandel*, 148 AD3d 1521, 1523 [4th Dept 2017], *lv denied* 30 NY3d 903 [2017]).

Because third-party defendant failed to meet his initial burden on the motion, the burden never shifted to defendant, and denial of the motion "was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see End of the Hill, LLC v Brock Acres Realty, LLC*, 206 AD3d 1587, 1588 [4th Dept 2022]).

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

314

KA 22-01805

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WINSTON JOHNSON, ALSO KNOWN AS
WINSTON MCBEAN JOHNSON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County
(Charles A. Schiano, Jr., J.), rendered April 18, 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 and Supreme Court, Monroe County, is directed to
redact all copies of defendant's presentence report in accordance with
the following memorandum: Defendant appeals from a judgment
convicting him, upon a plea of guilty, of criminal possession of a
weapon in the second degree (Penal Law § 265.03 [3]). We reject
defendant's contention that the sentence is unduly harsh and severe.
Based on our review of the record, we perceive no basis to exercise
our power to modify the sentence as a matter of discretion in the
interest of justice (see CPL 470.15 [6] [b]).

Defendant further contends that, inasmuch as it is undisputed
that he is not a second felony offender, Supreme Court should have
issued a directive that all such inaccurate information contained in
his presentence report (PSR) be redacted from all copies thereof.
Initially, we conclude that defendant failed to preserve that
contention for our review (see CPL 470.05 [2]; *People v Slattery*, 191
AD3d 1361, 1362 [4th Dept 2021], *lv denied* 36 NY3d 1123 [2021]; *People*
v Richardson, 142 AD3d 1318, 1319 [4th Dept 2016], *lv denied* 28 NY3d
1150 [2017]). Defense counsel stated during the sentencing proceeding
that he had no objection to the content of the PSR and, although the
court confirmed with the parties that defendant was not a second
felony offender and indicated that it had crossed off a reference
thereto on a single page of its own copy of the PSR, defense counsel
did not move to strike the erroneous information or request any
further corrective action (see *Slattery*, 191 AD3d at 1362; *Richardson*,

142 AD3d at 1319). Under the circumstances of this case, however, we exercise our power to address defendant's contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]; cf. *Slattery*, 191 AD3d at 1362).

"A failure 'to redact erroneous information from the PS[R] create[s] an unjustifiable risk of future adverse effects to [a] defendant in other contexts, including appearances before the Board of Parole or other agencies' " (*People v Washington*, 170 AD3d 1608, 1609 [4th Dept 2019], *lv denied* 33 NY3d 1036 [2019]). " 'An inaccurate PS[R] could keep a defendant incarcerated for a longer duration of time, affect future determinations of [their] legal status in court, as well as affect other rights regulated by the state. These risks are enough to justify redaction' " (*id.* at 1609-1610). Inasmuch as it is undisputed that defendant is not a second felony offender, we direct the court to redact from all copies of defendant's PSR the phrase on page 4 of the PSR stating that defendant pleaded guilty to a prior count of criminal possession of a weapon in the second degree "[a]s an adult"; the corresponding notation in the legal history attached to the PSR that the aforementioned prior conviction was part of defendant's "Adult History"; the sentence on page 4 of the PSR stating that "[t]he present offense makes the defendant a second felony offender"; and the phrase on page 8 of the PSR stating that "[t]he defendant is a second felony offender" (see *People v Wilmet*, 239 AD3d 1436, 1438-1439 [4th Dept 2025], *lv denied* 44 NY3d 985 [2025]).

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

354

CA 25-00993

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

TAMMY L. KELLY AND MICHELLE MOUDY, AS GUARDIANS
OF THE PERSON AND PROPERTY OF JOHN M. MOUDY,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

SNAP-ON INCORPORATED, SNAP-ON TOOLS COMPANY, LLC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

BURDEN & HANSEN, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 10, 2025. The order, among other things, directed that certain records be disclosed, with the exception of Medicaid billing records.

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

Memorandum: Plaintiffs Tammy L. Kelly and Michelle Moudy, as guardians of the person and property of John M. Moudy (Moudy), commenced this action seeking damages for injuries that Moudy sustained in a motor vehicle accident, which allegedly resulted in Moudy suffering from severe physical and cognitive deficits. Defendants Snap-on Incorporated and Snap-on Tools Company, LLC (collectively, defendants) appeal from an order of Supreme Court that denied the part of defendants' motion seeking to compel plaintiffs to produce Moudy's Medicaid billing records following the court's in camera inspection of the requested records. We affirm.

At the outset, we note that defendants' contention that the Medicaid billing records are not privileged was raised for the first time on appeal and is thus not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). With respect to defendants' preserved contention, we conclude that the court did not abuse its discretion in denying the motion to the extent that it sought an order compelling plaintiffs to produce the Medicaid billing records. "[T]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial

court's exercise of such authority should not be disturbed" (*Sanabria v SJ Trans, Inc.*, 238 AD3d 1502, 1502-1503 [4th Dept 2025] [internal quotation marks omitted]; see *Crysler v Erk* [appeal No. 2], 227 AD3d 1410, 1412 [4th Dept 2024]; *Manner v Yancey*, 218 AD3d 1196, 1197 [4th Dept 2023]).

Here, defendants moved to compel disclosure of, inter alia, Moudy's pre-accident medical, mental health, and substance abuse treatment records, including the Medicaid billing records. Following an in camera review of the requested records, the court granted the motion insofar as it sought disclosure of most of the records identified, but it denied defendants' motion to the extent that it sought disclosure of Moudy's Medicaid billing records. The court's determination to deny defendants' motion with respect to disclosure of the Medicaid billing records after reviewing them in camera "falls comfortably within the court's broad discretion to control discovery" (*Sims v Reyes*, 195 AD3d 133, 137 [4th Dept 2021] [internal quotation marks omitted]; see generally *Barnes v Habuda*, 118 AD3d 1443, 1444 [4th Dept 2014]), and we perceive no abuse of the court's discretion in that regard (see generally *Manner v Yancey*, 239 AD3d 1322, 1324 [4th Dept 2025]).

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

360

KA 23-01248

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TOMMY L. CLARK, DEFENDANT-APPELLANT.

VINCENT T. PARLATO, BUFFALO, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered March 27, 2023. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree and criminally using drug paraphernalia in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [7]). The police, acting on a tip, executed a search warrant at a hotel room where defendant was staying and recovered several bags of methamphetamine.

On several grounds, defendant contends that County Court erred in admitting in evidence text messages and improper expert opinion of a detective interpreting those messages. Defendant's contention is preserved only in part (see CPL 470.05 [2]), and we decline to exercise our power to review the unpreserved challenges as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). To the extent that defendant's contention is preserved for our review, we conclude that any error was harmless inasmuch as the evidence of defendant's guilt is overwhelming and there is no significant probability that he would have been acquitted in the absence of that evidence and testimony (see generally *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant further contends that the court erred in permitting the jury to consider evidence of untested suspected contraband. The police recovered one large bag and four smaller bags of suspected

methamphetamine from a dresser drawer. A detective's field test of "a small sample of the substance" indicated the presence of methamphetamine, and the parties stipulated that a subsequent laboratory test of the substance was positive for methamphetamine with an aggregate weight of slightly more than eight grams. The detective explained that laboratory personnel weighed a sufficient amount of the substance from the large bag to satisfy the charge and tested it but did not test the entire submission. The detective testified that each of the four smaller bags contained approximately one gram of the substance. Over defense counsel's objection, the smaller bags were admitted in evidence. We conclude that the untested smaller bags of suspected methamphetamine were properly admitted inasmuch as they were probative of an intent to sell and a reasonable jury could conclude that they contained the same substance as that of the tested substance in the larger bag (*see generally People v Gillyard*, 70 AD3d 854, 854-855 [2d Dept 2010], *lv denied* 14 NY3d 840 [2010]; *People v McGriff*, 201 AD2d 672, 673 [2d Dept 1994], *lv denied* 83 NY2d 913 [1994]; *People v Wilcox*, 198 AD2d 544, 545 [3d Dept 1993], *lv denied* 82 NY2d 932 [1994]).

We reject defendant's contention that the court's *Sandoval* ruling constituted an abuse of discretion. The fact that the prior convictions were similar to the crimes charged here does not automatically preclude their use on cross-examination (*see People v Walker*, 83 NY2d 455, 459 [1994]; *People v Bradley*, 227 AD3d 1420, 1420 [4th Dept 2024], *lv denied* 42 NY3d 1035 [2024]; *People v Poole*, 79 AD3d 1685, 1685-1686 [4th Dept 2010], *lv denied* 16 NY3d 862 [2011]). "[T]he record does not indicate a failure by the . . . court to balance the relevant factors," and the ruling, by "permitt[ing] inquiry about . . . defendant's prior convictions but forb[idding] reference to the underlying criminal acts, reflects sensitivity to the particular prejudice that may result when a jury is made aware of the fact that the defendant has previously committed crimes that are similar to the charged crime[s]" (*Walker*, 83 NY2d at 459).

Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising his right to a trial, inasmuch as he failed to raise that contention at sentencing (*see People v Mohamed*, 224 AD3d 1271, 1271-1272 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Britton*, 213 AD3d 1326, 1328 [4th Dept 2023], *lv denied* 39 NY3d 1140 [2023]). Contrary to defendant's further contention, we conclude that the sentence is not unduly harsh or severe.

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

Finally, we note that the certificate of conviction and the uniform sentence and commitment form incorrectly state that defendant was sentenced as a second felony offender and they must be amended to reflect that he was actually sentenced as a second felony drug

offender (*see People v Cruz*, 182 AD3d 999, 1000 [4th Dept 2020];
People v Johnson, 161 AD3d 1529, 1529 [4th Dept 2018]).

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

361

KA 12-01050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT PULLEY, ALSO KNOWN AS ROBERT WILSON,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County
(Daniel J. Doyle, J.), rendered April 20, 2012. 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: In these consolidated appeals, defendant appeals, in
appeal No. 1, 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 [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 second degree
(§ 265.03 [3]). In appeal No. 3, defendant appeals from a judgment
convicting him upon his plea of guilty of robbery in the first degree
(§ 160.15 [4]) and assault in the second degree (§ 120.05 [2]).

Initially, we note that defendant does not raise any contention
with respect to the judgment in appeal No. 3, and thus we dismiss the
appeal therefrom (*see People v Janowsky*, 162 AD3d 1699, 1699 [4th Dept
2018]; *People v Allen*, 93 AD3d 1340, 1340-1341 [4th Dept 2012], *lv*
denied 19 NY3d 956 [2012]).

With respect to appeal No. 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]). While a different
verdict would not have been unreasonable, we conclude that the jury

did not fail to give the evidence the weight it should be accorded (see generally *Bleakley*, 69 NY2d at 495). 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 Savino*, 239 AD3d 1452, 1453 [4th Dept 2025]), and we perceive no reason to disturb its credibility determinations (see *id.* at 1454; *People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]). Contrary to defendant's further contention with respect to the weight of the evidence, we conclude that "the verdict may not be revisited" based on the post-conviction affidavit of a juror who stated that she had felt pressured by other jurors to reach a verdict, inasmuch as "[a] jury verdict may only be impeached upon a showing of improper influence" (*People v Kahson B.*, 147 AD3d 538, 540 [1st Dept 2017], *lv denied* 29 NY3d 1082 [2017]; see generally *People v Brown*, 48 NY2d 388, 393 [1979]), which was not established here.

We likewise reject defendant's contention in appeal No. 1 that his due process right to prompt prosecution was violated by the preindictment delay. In determining whether a defendant was deprived of due process, we must consider the factors set forth in *People v Taranovich* (37 NY2d 442 [1975]), namely "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether . . . there has been an extended period of pretrial incarceration; and (5) whether . . . there is any indication that the defense has been impaired by reason of the delay" (*id.* at 445; see *People v Johnson*, 39 NY3d 92, 96 [2022]; *People v Belstadt*, 243 AD3d 1313, 1316 [4th Dept 2025], *lv denied* 45 NY3d 935 [2026]). Those factors must be reviewed "in light of the particular factors attending the specific case under scrutiny . . . , there are no clear cut answers in such an inquiry, . . . [and] no one factor or combination of the factors . . . is necessarily decisive" (*Taranovich*, 37 NY2d at 445). Here, although the 12½-year delay between the crimes and the indictment was substantial, the nature of the underlying charge of murder in the second degree was serious (see *Belstadt*, 243 AD3d at 1316), defendant was not arrested on that charge until he was indicted (see *People v Rogers*, 103 AD3d 1150, 1151 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]), the People demonstrated good cause for the delay inasmuch as they continued to investigate until they found eyewitnesses who were able and willing to identify defendant as the shooter (see *People v Decker*, 13 NY3d 12, 15 [2009]; *People v Walton*, 168 AD3d 1103, 1105 [2d Dept 2019], *lv denied* 33 NY3d 1036 [2019], *reconsideration denied* 34 NY3d 955 [2019]), and "there is no indication that the defense was significantly impaired by the delay" (*Decker*, 13 NY3d at 15; see *People v Wagoner*, 195 AD3d 1595, 1596-1597 [4th Dept 2021], *lv denied* 37 NY3d 1030 [2021], *reconsideration denied* 37 NY3d 1100 [2021], *cert denied* – US –, 142 S Ct 867 [2022]).

We reject defendant's contention in appeal No. 1 that Supreme Court erred in denying his objections to two of the People's peremptory challenges as discriminatory pursuant to *Batson v Kentucky* (476 US 79 [1986]). In order "to combat unlawful discrimination in the jury selection process . . . [t]here is a well-established

three-part test that courts employ to resolve applications made pursuant to *Batson*" (*People v Smouse*, 160 AD3d 1353, 1354 [4th Dept 2018]). "At step one, the moving party bears the burden of establishing a prima facie case of discrimination in the exercise of peremptory challenges . . . Once a prima facie case of discrimination has been established, the burden shifts, at step two, to the nonmoving party to offer a facially neutral explanation for each suspect challenge . . . At the third step, the burden shifts back to the moving party . . . to prove purposeful discrimination and the trial court must determine whether the proffered reasons are pretextual" (*People v Hecker*, 15 NY3d 625, 634-635 [2010], cert denied 563 US 947 [2011] [internal quotation marks omitted]; see *Smouse*, 160 AD3d at 1354-1355). In order to satisfy their burden at step one of the *Batson* inquiry, a defendant must demonstrate "that the facts and circumstances of the voir dire raise an inference that the [People] excused one or more jurors for an impermissible reason" (*People v Herrod*, 163 AD3d 1462, 1462 [4th Dept 2018] [internal quotation marks omitted]). While "[a] pattern of strikes made by the prosecutor may give rise to an inference of discrimination . . . [a] defendant is not required to demonstrate a discriminatory pattern" in order to establish a prima facie case of discrimination (*People v Boyd* [appeal No. 2], 184 AD3d 1151, 1152 [4th Dept 2020]). Rather, a defendant may instead satisfy their step one burden "by demonstrating that 'members of the cognizable group were excluded while others with the same relevant characteristics were not' or that the People excluded members of the cognizable group 'who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution' " (*Herrod*, 163 AD3d at 1462, quoting *People v Childress*, 81 NY2d 263, 267 [1993]).

Here, defendant's first *Batson* objection "failed to establish a prima facie case inasmuch as he offered [only] 'the kind of vague and conclusory assertions' that have been repeatedly rejected by the Court of Appeals" (*Boyd*, 184 AD3d at 1152) and thus, even though the court "based its reasoning [in denying the objection] on the erroneous notion that a discriminatory pattern of strikes must be shown . . . [,] because defendant failed to establish a prima facie case at step one, the court properly denied his [objection] without further inquiry" (*id.* at 1153). Defendant's second *Batson* objection was denied by the court at the third step after the People offered the facially neutral explanations for their peremptory challenge that the potential juror's son had been sentenced to a lengthy prison term for bank robbery and that the potential juror lived on the street where the shooting had occurred. The court's credibility determinations with respect to *Batson* objections are entitled to great deference (see *People v Luciano*, 10 NY3d 499, 505 [2008]; see also *Hecker*, 15 NY3d at 656-657), and we conclude that the court properly determined that the People offered a race-neutral explanation for the exercise of the peremptory challenge (see *People v Brown*, 145 AD3d 1483, 1483-1484 [4th Dept 2016], lv denied 29 NY3d 1029 [2017]; *People v Garcia*, 143 AD3d 1283, 1284 [4th Dept 2016], lv denied 28 NY3d 1184 [2017]).

We reject defendant's contention in appeal No. 1 that the court

should have precluded an in-court identification of defendant by a witness because the prosecutor did not provide a CPL 710.30 notice for that witness within 15 days after defendant's arraignment (see CPL 710.30 [1] [b]; [2]). Pursuant to that statute, a court may permit service of a notice that the People intend to introduce identification testimony from a witness at trial more than 15 days after the defendant's arraignment "[f]or good cause shown" if the defense is given a "reasonable opportunity . . . to make a suppression motion" (CPL 710.30 [2]). Here, the witness's identification procedure took place months after defendant's arraignment, and the People thereafter provided prompt notice to defendant of the identification procedure, which was served four months before suppression hearings. Under the circumstances of this case, we conclude that the People's notice of the witness's post-arraignment identification procedure "was in compliance with the spirit of [CPL 710.30] and met [the People's] continuing obligation to give prompt notice" (*People v Green*, 127 AD3d 1473, 1476 [3d Dept 2015], *lv denied* 27 NY3d 965 [2016]; see *People v Johnson*, 184 AD3d 1102, 1104 [4th Dept 2020], *lv denied* 36 NY3d 929 [2020]; see generally *People v Pacquette*, 25 NY3d 575, 579 [2015]).

Defendant expressly consented to the court's *Sandoval* compromise and thus waived his contention in appeal No. 1 that the court erred in permitting the People to cross-examine him in accordance with that compromise (see *People v Spencer*, 225 AD3d 1200, 1200 [4th Dept 2024], *lv denied* 43 NY3d 1012 [2025]; *People v Wright*, 214 AD3d 1327, 1328 [4th Dept 2023], *lv denied* 39 NY3d 1158 [2023], *reconsideration denied* 40 NY3d 953 [2023]).

With respect to appeal No. 2, defendant contends that County Court (Geraci, J.) erred in refusing to suppress physical evidence obtained by the police following an inventory search of his vehicle, asserting that the underlying stop was unlawful, the car was not lawfully impounded, and no inventory report was produced. We reject that contention. It is well established that the police may stop a vehicle "when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Spencer*, 84 NY2d 749, 753 [1995], *cert denied* 516 US 905 [1995]; see *People v Lopez*, 149 AD3d 1545, 1547 [4th Dept 2017]), and " '[a] police officer's suspicion may be characterized as reasonable when it is based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion' " (*People v Floyd*, 158 AD3d 1146, 1147 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]; see *People v Taylor*, 31 AD3d 1141, 1142 [4th Dept 2006]). Here, testimony at the suppression hearing established that police officers were searching for defendant because he had been identified as the shooter of the victim in appeal No. 1 and that the stop of defendant's vehicle was initiated because that vehicle was registered to defendant and observed leaving a location that defendant was known to frequent. That evidence established a reasonable suspicion that the driver had committed a crime inasmuch as it was reasonable for the officers to infer that the registered owner of the vehicle—defendant—would be driving the vehicle (see *Kansas v Glover*, 589 US 376, 381 [2020];

People v Zubidi, 233 AD3d 55, 59-60 [1st Dept 2024], *affd* — NY3d —, 2026 NY Slip Op 00964 [2026]). Furthermore, evidence and testimony at the suppression hearing established that defendant's vehicle was lawfully impounded. Specifically, upon his arrest, defendant left his vehicle parked in the middle of a narrow street; it is the written policy of the Rochester Police Department (RPD) to tow a vehicle in its control whenever, inter alia, the vehicle presents a hazard or inconvenience to the public and to conduct an inventory search of all vehicles before taking them to the impound lot; and the police officers followed the procedure set forth in the written RPD policy in towing, impounding, and conducting the inventory search of defendant's vehicle (see *People v Williams*, 214 AD3d 1395, 1395-1396 [4th Dept 2023], *lv denied* 40 NY3d 931 [2023]; *People v McPherson*, 213 AD3d 1261, 1263 [4th Dept 2023], *lv denied* 39 NY3d 1112 [2023]; see also *People v Brundige*, 243 AD3d 1329, 1331 [4th Dept 2025], *lv denied* 44 NY3d 1064 [2026]). Contrary to defendant's further contention, an inventory report was produced by the police.

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

362

KA 12-01097

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT PULLEY, ALSO KNOWN AS ROBERT WILSON,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered December 8, 2011. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Pulley* ([appeal No. 1] – AD3d – [June 5, 2026] [4th Dept 2026]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

363

KA 12-01627

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT L. PULLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered July 26, 2012. The judgment convicted defendant upon his plea of guilty of robbery in the first degree and assault in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Pulley* ([appeal No. 1] – AD3d – [June 5, 2026] [4th Dept 2026]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

364

KA 25-00605

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANNA M. GALLAND, DEFENDANT-APPELLANT.

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

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO (NICHOLAS A. TRIPPANY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered February 4, 2025. The judgment convicted defendant upon her plea of guilty of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting her upon a plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]), defendant contends that County Court should have granted her motion to dismiss the indictment in the furtherance of justice pursuant to CPL 210.40 (1). We affirm. Based on our review of the criteria listed in CPL 210.40 (1), we perceive no abuse of discretion in the court's refusal to dismiss the indictment in the interest of justice (see *People v Gazzillo*, 177 AD3d 1406, 1407 [4th Dept 2019]; see generally *People v Hirsch*, 85 AD2d 902, 902 [4th Dept 1981]). Considering that defendant twice sold methamphetamine to a confidential informant and that she declined the opportunity to participate in drug treatment court, we cannot conclude that this is "one of those rare cases in which failure to dismiss [the indictment] would constitute an injustice" (*People v May*, 100 AD3d 1411, 1413 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013] [internal quotation marks omitted]; see *People v Quadrozzi*, 55 AD3d 93, 103 [2d Dept 2008], *lv denied* 12 NY3d 761 [2009]).

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

368

KA 25-00189

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL J. RELYEA, DEFENDANT-APPELLANT.

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

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO (BRANDY L. SHAFER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered November 7, 2024. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction following his plea of guilty of failure to register as a sex offender (Correction Law §§ 168-f, 168-t) and sentencing him to an indeterminate term of 1½ to 4 years' incarceration.

As an initial matter, defendant failed to preserve for our review his contention that County Court deprived him of the presumption of innocence by allowing him to wear jail-issued clothing when he appeared at the violation of probation hearing (*see People v Douglas*, 94 NY2d 807, 808 [1999]; *People v Bailey*, 181 AD3d 1243, 1245 [4th Dept 2020]; *People v Irizarry*, 160 AD3d 1384, 1385 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]).

We reject defendant's contention that the People failed to establish by a preponderance of the evidence that he violated the terms and conditions of his probation (*see People v Robinson*, 147 AD3d 1351, 1351 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *People v Ortiz*, 94 AD3d 1436, 1436 [4th Dept 2012], *lv denied* 19 NY3d 999 [2012]; *People v Wells*, 69 AD3d 1228, 1229 [3d Dept 2010]). The People presented uncontradicted testimony of defendant's probation officers that defendant, inter alia, admitted to searching the Internet to access pornography and other sexually graphic content and to using his cell phone after the monitoring software on it had been

deactivated. Defendant admitted to committing multiple violations of the conditions of his probation to his probation officers (see *Matter of Peek v Dennison*, 39 AD3d 1239, 1240 [4th Dept 2007], *appeal dismissed* 9 NY3d 860 [2007]), and the violations were "[neither] de minimis nor a mere technicality" (*People v Swick*, 147 AD3d 1346, 1346 [4th Dept 2017], *lv denied* 29 NY3d 1001 [2017]; see *People v Cummings*, 134 AD3d 1566, 1566 [4th Dept 2015], *lv denied* 27 NY3d 995 [2016]). We thus conclude that there was the necessary " 'residuum of competent legal evidence' " that defendant violated a condition of his probation (*Robinson*, 147 AD3d at 1351; see *People v Pringle*, 72 AD3d 1629, 1630 [4th Dept 2010], *lv denied* 15 NY3d 855 [2010]).

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

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

372

CA 25-01121

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

STEPHANIE L. HURST AND RHYLAN C. HURST,
CLAIMANTS-APPELLANTS,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 135775.)

MAXWELL MURPHY, LLC, BUFFALO (CHRISTOPHER M. BORGATTI OF COUNSEL), FOR
CLAIMANTS-APPELLANTS.

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

Appeal from a judgment of the Court of Claims (Stephanie Saunders, J.), entered January 7, 2025, in a personal injury action. The judgment dismissed claimants' claim.

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

Memorandum: Claimants commenced this action seeking damages for injuries sustained by Stephanie L. Hurst (claimant) in a snow tubing accident that took place in a state park. Following a bifurcated trial on liability, the Court of Claims dismissed the claim, determining that claimant assumed the risk of injury and that defendant was immune from liability pursuant to General Obligations Law § 9-103. Claimants appeal, and we affirm.

" '[O]n a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence' " (*Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1525 [4th Dept 2015]), and, here, we cannot say that the court's determination with respect to the assumption of risk could not have been reached under any fair interpretation of the evidence (see generally *Graham v State of New York*, 161 AD3d 1586, 1586-1587 [4th Dept 2018]).

The evidence at trial established that claimant had sledged at the park several times prior to the date of the accident. On the day of the accident, claimant went down the hill on a snow tube without incident. On her second run, which she took with her daughter, the snow tube veered toward the left and struck a pile of snow at the

bottom of the hill, adjacent to a paved turnaround circle for vehicular traffic. The snow piles had been created by plowing of the turnaround circle. Claimant became airborne and sustained injuries when she landed on the pavement.

"Under the primary assumption of risk doctrine, [a] person who chooses to participate in a sport or recreational activity consents to certain risks that are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Katleski v Cazenovia Golf Club, Inc.*, 44 NY3d 212, 218 [2025] [internal quotation marks omitted]; see *Morgan v State of New York*, 90 NY2d 471, 484 [1997], rearg denied 90 NY2d 936 [1997]). "[I]t is not necessary to the application of assumption of risk that the injured [claimant] have foreseen the exact manner in which [their] injury occurred, so long as [they are] aware of the potential for injury of the mechanism from which the injury results" (*Grady v Chenango Val. Cent. Sch. Dist.*, 40 NY3d 89, 95 [2023]; see *Maddox v City of New York*, 66 NY2d 270, 278 [1985]). A participant is not, however, deemed to have assumed "risks that are concealed or unreasonably enhanced" (*Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012]).

Here, the risk of hitting a snowbank and being propelled in the air "was a reasonably foreseeable consequence" of claimant's participation in the recreational activity of sledding (*Tremblay v West Experience*, 296 AD2d 780, 781 [3d Dept 2002]; see *Reyes v City of New York*, 181 AD3d 422, 422 [1st Dept 2020]). Contrary to claimants' contention, the court's determination that the snow piles, which were an open and obvious condition, did not unreasonably enhance that risk is supported by a fair interpretation of the evidence (see generally *Trevett v City of Little Falls*, 24 AD3d 1197, 1198 [4th Dept 2005], *affd* 6 NY3d 884 [2006], rearg denied 7 NY3d 845 [2006]; *Reyes*, 181 AD3d at 422).

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

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

374

CA 25-00667

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

IN THE MATTER OF LAMON MCKOY, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DANIEL F. MARTUSCELLO, III, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Wyoming County Court (Donald G. O'Geen, A.J.), entered April 3, 2025, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: In this proceeding pursuant to CPLR article 78, petitioner appeals from a judgment dismissing his petition seeking to annul the determination of the Parole Board denying his request for release to parole supervision. In February 2026, petitioner reappeared before the Parole Board, which again denied his request for release. Consequently, this appeal must be dismissed as moot (see *Matter of Romano v Annucci*, 196 AD3d 1176, 1176 [4th Dept 2021]; *Matter of Colon v Annucci*, 177 AD3d 1393, 1394 [4th Dept 2019]; see generally *Matter of Moissett v Travis*, 97 NY2d 673, 674 [2001]). We conclude that the exception to the mootness doctrine does not apply (see generally *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

378

OP 25-01388

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

IN THE MATTER OF TODD C. CARVILLE,
AS DISTRICT ATTORNEY OF COUNTY OF ONEIDA,
PETITIONER,

V

MEMORANDUM AND ORDER

HON. BERNADETTE T. CLARK, AS JUSTICE OF THE
SUPREME COURT OF NEW YORK, AND KAITLYN CONLEY,
RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR
RESPONDENT HON. BERNADETTE T. CLARK, AS JUSTICE OF THE SUPREME COURT
OF NEW YORK.

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

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) seeking judicial review of an order issued by respondent Justice Bernadette T. Clark, Supreme Court, Oneida County, dated June 12, 2025. The order, among other things, directed the Oneida County District Attorney's Office to cease and desist from any further re-presentment of sealed evidence to the grand jury and refused to unseal the record to allow for re-presentment of the appropriate charges to the grand jury.

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

Memorandum: Petitioner commenced this original CPLR article 78 proceeding seeking a writ of prohibition barring respondents from enforcing an order that, inter alia, denied the application of the Oneida County Sheriff's Office pursuant to CPL 160.50 (1) to unseal the record of a criminal action terminated in favor of respondent Kaitlyn Conley (*see generally People v Conley*, 234 AD3d 1363 [4th Dept 2025]). We conclude that the petition must be dismissed.

Applications to unseal a record of a terminated criminal action are civil in nature (*see Matter of Katherine B. v Cataldo*, 5 NY3d 196, 201 n 1 [2005]; *Matter of Hynes v Karassik*, 47 NY2d 659, 661 n 1 [1979], *rearg denied* 48 NY2d 656 [1979]; *People v M.E.*, 121 AD3d 157,

159 [4th Dept 2014]), and an article 78 proceeding may not be brought "to challenge a determination . . . which was made in a civil action . . . unless it is an order summarily punishing a contempt committed in the presence of the court" (CPLR 7801 [2]; see *Matter of Gench v Manchester Realty Assoc.*, 106 AD3d 735, 736 [2d Dept 2013]; *Matter of Kearse v Coughlin*, 151 AD2d 760, 760 [2d Dept 1989], lv denied 74 NY2d 614 [1989]; see generally *Matter of Sibley v Steuben County Pistol Permit Clerk*, 194 AD3d 1393, 1393 [4th Dept 2021]).

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

381

KA 23-01584

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES R. GREFER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 21, 2023. The judgment convicted defendant, upon a jury verdict, of offering a false instrument for filing in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of offering a false instrument for filing in the first degree (Penal Law § 175.35 [1]). The conviction arises from an incident in which defendant falsely reported on an employment application for a position with the County of Cayuga that he was never convicted of a crime and falsely stated on a resume accompanying the employment application that he was a licensed mental health counselor.

Defendant's contention that the evidence is legally insufficient to establish his intent to defraud is not preserved for our review inasmuch as defendant failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61-62 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Cordell*, 188 AD3d 1620, 1621 [4th Dept 2020], *lv denied* 36 NY3d 1056 [2021]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that County Court abused its discretion in denying defendant's motion for a mistrial after the prosecutor violated the court's *Sandoval* ruling by asking defendant on cross-examination about the underlying facts of a prior conviction. The decision whether to grant a motion for a mistrial lies within the

sound discretion of the trial court, which is in the best position to determine whether a mistrial is necessary to protect a defendant's right to a fair trial (see *People v White*, 129 AD3d 1642, 1643 [4th Dept 2015], *appeal dismissed* 27 NY3d 990 [2016]; see also *People v Ortiz*, 54 NY2d 288, 292 [1981]). Here, defendant opened the door to the prosecutor's questioning and, thus, a mistrial was not warranted (see generally *People v Rodriguez*, 85 NY2d 586, 591 [1995]; *People v Hall*, 169 AD3d 1379, 1381 [4th Dept 2019], *lv denied* 33 NY3d 976 [2019]). We reject defendant's further contention that the motion should have been granted on the ground that the prosecutor violated the court's prior instructions by failing to seek a revised *Sandoval* determination once defendant opened the door to questions regarding the facts of the prior conviction. Here, nothing in the record suggests that, in failing to follow the court's directive, the People engaged in "willful misconduct" that would warrant the drastic remedy of a mistrial (*White*, 129 AD3d at 1643 [internal quotation marks omitted]).

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

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

384

KA 24-01371

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL P. SEMAR, DEFENDANT-APPELLANT.

LEAH R. NOWOTARSKI, PUBLIC DEFENDER, WARSAW (FARES A. RUMI OF COUNSEL), FOR DEFENDANT-APPELLANT.

VINCENT A. HEMMING, DISTRICT ATTORNEY, WARSAW (CHELSIE A. HAMILTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Melissa Lightcap Cianfrini, A.J.), rendered June 14, 2024. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree.

It is hereby ORDERED that the appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree (Penal Law § 220.34 [1]), arising from defendant's sale of Suboxone to another person.

We note at the outset that, inasmuch as the sentence originally imposed has been superseded by a resentencing, the appeal from the judgment insofar as it imposed sentence must be dismissed (*see People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173 [4th Dept 2016], *lv denied* 28 NY3d 975 [2016]; *People v Primm*, 57 AD3d 1525, 1525 [4th Dept 2008], *lv denied* 12 NY3d 820 [2009]).

Defendant contends that County Court had no authority to issue an order of protection in favor of an individual who was neither a victim of nor a witness to the crime to which defendant pleaded guilty. Defendant failed to object at sentencing to the issuance of the order of protection and thus failed to preserve for our review his challenge to the validity of that order of protection (*see People v Loverde*, 151 AD3d 1738, 1739 [4th Dept 2017]; *People v Russell*, 120 AD3d 1594, 1594-1595 [4th Dept 2014], *lv denied* 24 NY3d 1046 [2014]; *People v Collins*, 117 AD3d 1535, 1535 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014], *reconsideration denied* 24 NY3d 1218 [2015]). We decline to

exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

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

386

KA 25-00421

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALONZO JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Julie M. Hahn, J.), rendered January 17, 2025. The judgment convicted defendant upon a jury verdict of attempted aggravated murder, attempted aggravated assault upon a police officer or a peace officer and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed for attempted aggravated murder under count 1 of the indictment to an indeterminate term of 30 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted aggravated murder (Penal Law §§ 110.00, 125.26 [1] [a] [i]; [b]), attempted aggravated assault upon a police officer (§§ 110.00, 120.11), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]).

Defendant contends that County Court erred in denying that part of his motion seeking dismissal of the indictment under CPL 30.30. In particular, defendant contends that, at the time the People filed their initial certificate of compliance (COC), they had not provided him with a video recording of the police interviewing defendant in an interrogation room, thereby rendering the COC invalid and their statement of readiness illusory. After considering the factors set forth in *People v Bay* (41 NY3d 200, 212 [2023]), we reject defendant's contention. It would not have been particularly obvious to the People that the video footage was missing given the format in which all of the video footage was forwarded from the sheriff's office and the volume of the discovery materials (see *People v Rojas-Aponte*, 242 AD3d 1537, 1540 [4th Dept 2025], lv denied 44 NY3d 1086 [2026]). Applying "a holistic assessment of the People's efforts to comply with the

automatic discovery provisions, rather than a strict item-by-item test" (*People v Cooperman*, 225 AD3d 1216, 1220 [4th Dept 2024]), we conclude that the People exercised due diligence and made reasonable efforts to satisfy their obligations under CPL article 245 (see *People v Lawrence*, 231 AD3d 1497, 1500-1501 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]; *People v Watkins*, 224 AD3d 1342, 1344 [4th Dept 2024], *lv denied* 41 NY3d 986 [2024]).

We reject defendant's contention that the court abused its discretion in denying his request to remove the safety mechanisms from the gun during the cross-examination of the firearm examiner in order to show the ease of the trigger pull. Here, the court acted within its broad discretion in concluding that the value of the proposed demonstration by the expert did not outweigh its potential for prejudice inasmuch as the conditions surrounding the demonstration in the courtroom were not substantially similar to those on the day of defendant's arrest (see *People v Caballero*, 34 AD3d 690, 692 [2d Dept 2006], *lv denied* 8 NY3d 878 [2007]; cf. *People v Kendall*, 254 AD2d 809, 810 [4th Dept 1998], *lv denied* 92 NY2d 983 [1998]; see generally *People v Acevedo*, 40 NY2d 701, 704-705 [1976]). We further conclude that the court properly considered the safety of those in the courtroom when it denied the request.

Viewing the evidence in light of the elements of the crimes of attempted aggravated murder, attempted aggravated assault, and criminal possession of a weapon in the second degree under count 3 of the indictment as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to defendant's intent to kill and his knowledge that he was firing his gun at a police officer (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention that the procedure pursuant to which he was sentenced as a second violent felony offender (see Penal Law § 70.06) is unconstitutional in light of the United States Supreme Court's decision in *Erlinger v United States* (602 US 821 [2024]) is not properly before us because defendant failed to give the requisite notice to the Attorney General (see Executive Law § 71 [3]; see generally *People v Brown*, 148 AD3d 1534, 1535 [4th Dept 2017], *lv denied* 29 NY3d 1076 [2017]).

Upon consideration of the mitigating circumstances in this case, we agree with defendant that his sentence is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]; *People v Delgado*, 80 NY2d 780, 783 [1992]) by reducing the sentence of imprisonment imposed for attempted aggravated murder under count 1 of the indictment to an indeterminate term of 30 years to life, which results in an aggregate sentence of imprisonment of 30 years to life.

We have considered defendant's remaining contentions and conclude

that none warrants further modification or reversal of the judgment.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

387

KA 23-00848

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DUSTIN POST, DEFENDANT-APPELLANT.

NATHANIEL L. BARONE, II, PUBLIC DEFENDER, MAYVILLE (MATTHEW B. SCHUTTE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (DANIEL C. GARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered April 10, 2023. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (six 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 six counts of predatory sexual assault against a child (Penal Law former § 130.96). We affirm.

We reject defendant's contention that County Court erred in refusing to suppress evidence seized pursuant to warrantless searches of his electronic and digital devices. Contrary to defendant's contention, the record establishes that he voluntarily provided investigators with written consent to search those devices (*see People v Martin*, 197 AD3d 955, 955 [4th Dept 2021], *lv denied* 37 NY3d 1162 [2022]; *People v Fioretti*, 155 AD3d 1662, 1662-1664 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]; *see generally People v Gonzalez*, 39 NY2d 122, 127-130 [1976]).

Defendant further contends that the court erred in refusing to suppress the statements that he made to investigators when he first met with them outside of his residence before he received *Miranda* warnings and that the court also should have suppressed his subsequent post-*Miranda* statements and other evidence as the fruit of an unlawful custodial interrogation. We reject that contention. The court properly concluded that defendant was not in custody inasmuch as the record of the suppression hearing established that "a reasonable person, innocent of any crime, would not have believed that [they were] in custody during that time, given the circumstances of the

initial [interview]" (*People v Walker*, 87 AD3d 1352, 1352 [4th Dept 2011], *lv denied* 18 NY3d 862 [2011]; *see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]).

Defendant next contends that the court, in its *Molineux* ruling, erred in refusing to require redaction from recordings of defendant's second interview with law enforcement of his references to having made, possessed, and exchanged child pornography. We conclude that the court properly permitted the admission in evidence of those references. The references were " 'inextricably interwoven with the charged crimes, provide[d] necessary background [and] complete[d] [the] narrative' " of the events charged in the indictment, particularly considering the evidence that defendant recorded his sexual activity with certain victims and showed child pornography to at least one victim in an effort to coax that victim into performing the same sexual act depicted therein (*People v Sorrell*, 108 AD3d 787, 792 [3d Dept 2013], *lv denied* 23 NY3d 1025 [2014]; *see People v Watkins*, 224 AD3d 1342, 1344-1345 [4th Dept 2024], *lv denied* 41 NY3d 986 [2024]). Moreover, " 'the probative value of the *Molineux* evidence outweighed the prejudicial effect, which was minimized by the court's repeated limiting instructions to the jury' " (*Watkins*, 224 AD3d at 1345; *see Sorrell*, 108 AD3d at 792). We further conclude that any error with respect to the admission of *Molineux* evidence is harmless inasmuch as "[t]he evidence of defendant's guilt is overwhelming . . . and there is no significant probability that the jury would have acquitted defendant if the allegedly improper *Molineux* evidence had been excluded" (*People v Casado*, 99 AD3d 1208, 1211-1212 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]; *see generally People v Frankline*, 27 NY3d 1113, 1115 [2016]; *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Finally, defendant contends that the court committed reversible error by admitting in evidence at trial a recording of the second interview. The second interview included a lengthy polygraph examination to which defendant voluntarily submitted and during which he made inculpatory statements, and defendant contends that the mere disclosure that he underwent a polygraph examination was unduly prejudicial. We reject that contention. The court properly precluded the People from introducing evidence concerning the results of the polygraph examination (*see generally People v Leone*, 25 NY2d 511, 517 [1969]), and the court further provided a limiting instruction to the jury that evidence regarding defendant's performance on the polygraph examination was inadmissible and that the jury was prohibited from speculating about any such evidence (*see People v Meyers*, 182 AD3d 1037, 1039 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]; *see generally People v Deskovic*, 201 AD2d 579, 580 [2d Dept 1994], *lv denied* 83 NY2d 1003 [1994]). Further, we conclude that any error in the admission of the recording of the second interview was harmless under the circumstances of this case (*see People v Strzelecki*, 108

AD3d 644, 645 [2d Dept 2013], *lv denied* 22 NY3d 959 [2013]; *see generally Crimmins*, 36 NY2d at 241-242).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

388

KA 24-00662

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE CONCEPCION, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Wyoming County Court (Melissa Lightcap Cianfrini, A.J.), rendered April 24, 2024. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [3]). As defendant contends and the People correctly concede, County Court misadvised defendant as to both the minimum term of incarceration and the maximum period of postrelease supervision to which he was exposed. Thus, defendant did not knowingly, voluntarily, and intelligently plead guilty (see *People v Scott*, 44 NY3d 302, 314-315 [2025]; *People v Keller*, 168 AD3d 1098, 1099-1100 [2d Dept 2019]). We therefore reverse the judgment and vacate the plea, and we remit the matter to County Court for further proceedings on the indictment.

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

389

CAF 25-00177

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

IN THE MATTER OF ANDRE BEAL, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

VES' SHAWNA JACKSON, RESPONDENT-APPELLANT.

MICHAEL J. PULVER, SYRACUSE, FOR RESPONDENT-APPELLANT.

H. KATHRYN KILMARTIN, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Lourdes P. Rosario, R.), entered August 8, 2024, in a proceeding pursuant to Family Court Act article 6. The order, *inter alia*, awarded primary physical custody of the subject children to petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that modified the parties' prior order of custody and visitation by, *inter alia*, awarding the parties joint legal custody of the children with primary physical custody and final decision-making authority to the father. We affirm.

Initially, we note that the mother does not dispute that there has been a change in circumstances since the prior order, and thus the issue before us is whether Family Court properly determined that the best interests of the children would be served by a change in custody (*see Matter of Manioci v Schreiber*, 210 AD3d 1523, 1523 [4th Dept 2022], *lv denied* 39 NY3d 907 [2023]). Contrary to the mother's contention, we conclude that a sound and substantial basis in the record supports the court's determination that an award of physical custody and final decision-making authority to the father was in the children's best interests (*see Matter of Schram v Nine*, 193 AD3d 1361, 1361-1362 [4th Dept 2021], *lv denied* 37 NY3d 905 [2021]; *see also Matter of Emmanuel A. v Evelyn R.M.G.*, 242 AD3d 481, 482 [1st Dept 2025]). The record establishes that the father was better able to provide a stable home environment, better able to provide for the children's emotional and intellectual development, and better able to provide financially for the children inasmuch as the mother did not have a steady or stable home and was not employed (*see generally Matter of Wojciulewicz v McCauley*, 166 AD3d 1489, 1490 [4th Dept

2018], *lv denied* 32 NY3d 918 [2019])). The court's determination following a hearing that the best interests of the children would be served by such an award is entitled to great deference, particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses, and we will not disturb that determination where, as here, the record establishes that it is the product of the court's careful weighing of the appropriate factors (see *Matter of Timothy MYC v Wagner*, 151 AD3d 1731, 1732 [4th Dept 2017]).

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

390

CA 25-00965

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

IN THE MATTER OF SYRACUSE UNIVERSITY,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF SYRACUSE AND ASSESSOR AND
BOARD OF ASSESSMENT REVIEW, RESPONDENTS-RESPONDENTS.

JENNER & BLOCK LLP, WASHINGTON, DC (ZACHARY C. SCHAUF, ADMITTED PRO HAC VICE, OF COUNSEL), AND BARCLAY DAMON LLP, BUFFALO, FOR
PETITIONER-APPELLANT.

SUSAN R. KATZOFF, CORPORATION COUNSEL, SYRACUSE (TREVOR MCDANIEL OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered March 19, 2025, in proceedings pursuant to RPTL article 7. The order denied the motion of plaintiff for summary judgment, granted the cross-motion of respondents for summary judgment and dismissed the petitions.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross-motion is denied, the petitions are reinstated, the motion is granted, and the petitions are granted insofar as they seek a tax exemption pursuant to RPTL 420-a (1) (a) for real property located at 200-10 Waverly Avenue in the City of Syracuse for the tax years 2022 and 2023, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Petitioner, an educational institution, commenced these proceedings pursuant to RPTL article 7 seeking, inter alia, to challenge the tax assessments on a parcel of property it owns in the City of Syracuse for the tax years 2022 and 2023. Petitioner moved for summary judgment on its petitions, seeking, among other things, a full tax exemption pursuant to RPTL 420-a, and respondents cross-moved for, inter alia, summary judgment in their favor. Supreme Court deemed respondents' cross-motion to be one seeking dismissal pursuant to RPTL 525 (2) (a), granted that motion, and dismissed the petitions. Petitioner appeals, and we now reverse.

We agree with petitioner that the court erred in sua sponte dismissing the petitions on a ground that was expressly waived by respondents (see *Vial v Velocity Servers, Inc.*, 225 AD3d 1234, 1235 [4th Dept 2024]), i.e., petitioner's purported willful failure to

comply with legitimate and reasonable requests for information that were made by respondent Board of Assessment Review during the prior administrative review process pursuant to RPTL article 5 (see RPTL 525 [2] [a]; see generally *Matter of Finger Lakes Racing Assn., Inc. v Town of Farmington*, 79 AD3d 1815, 1815-1816 [4th Dept 2010]). Although respondents' initial motion papers contained brief references to RPTL 525, counsel for respondents expressly stated in both a reply memorandum and again at oral argument that any reference to that statute was an "oversight," that respondents were not alleging that any attempt to frustrate the administrative process was made by petitioner, and that respondents were "not willing to dismiss the case based on [RPTL] 525." Contrary to the court's conclusory assertion, RPTL 525 (2) (a) does not implicate a threshold jurisdictional issue. Rather, although "failure to respond to material questions at a hearing and failure to produce documents requested may affect the right to reduction of the assessment, an owner does not, by such failures, forfeit his right to maintain the [RPTL article 7] proceeding" (*Matter of State of New York v Town of Northampton*, 156 AD2d 857, 858 [3d Dept 1989]; see *People ex rel. Irving Sav. Bank v Howes*, 266 App Div 1024, 1024 [2d Dept 1943]; see generally RPTL 706 [2]; *Matter of Fifth Ave. Off. Ctr. Co. v City of Mount Vernon*, 89 NY2d 735, 742 [1997]). Respondents' argument in support of finding willful noncompliance on the part of petitioner is raised for the first time on appeal and thus is not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Although the court improperly dismissed the petitions without considering the merits of the motion and cross-motion, we nonetheless conclude in the interest of judicial economy that the motion should be granted inasmuch as petitioner established its entitlement to summary judgment on the issue of its right to a full tax exemption under RPTL 420-a for the subject property (see generally *Scally v Regional Indus. Partnership*, 9 AD3d 865, 869 [4th Dept 2004]). Here, petitioner met its burden of establishing that the entirety of the subject property is used exclusively in furtherance of its educational purpose (see RPTL 420-a [1] [a]; *Matter of Merry-Go-Round Playhouse, Inc. v Assessor of City of Auburn*, 24 NY3d 362, 367-369 [2014]; *Matter of Faculty-Student Assn. of State Univ. Coll. at Oswego v Sharkey*, 35 AD2d 161, 166 [4th Dept 1970], *affd* 29 NY2d 621 [1971]; *Matter of Pace Coll. v Boyland*, 4 NY2d 528, 532-533 [1958]; see generally *Matter of Salvation Army v Town of Ellicott Bd. of Assessment Review*, 100 AD2d 361, 364 [4th Dept 1984]). Respondents' submissions failed to raise a material issue of fact with respect to petitioner's entitlement to the full exemption (see generally *Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 1277 [4th Dept 2005]; *Fusco v Assessor of City of Utica*, 178 AD2d 995, 995-996 [4th Dept 1991]). We therefore reverse the order, deny the cross-motion, reinstate the petitions, grant petitioner's motion, and grant the petitions insofar as they seek a tax exemption pursuant to RPTL 420-a (1) (a) for real property located at 200-10 Waverly Avenue in the City of Syracuse for tax years 2022 and 2023, and we remit the matter to Supreme Court to calculate the amount of real property tax, if any, to be refunded to petitioner (see *Matter of Merry-Go-Round*

Playhouse, Inc. v Assessor of City of Auburn, 104 AD3d 1294, 1295-1296 [4th Dept 2013], *affd* 24 NY3d 362 [2014]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

426

CA 25-00228

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

ERIE INSURANCE COMPANY, AS SUBROGEE OF
MAY JEN CHINESE RESTAURANT, PLAINTIFF-APPELLANT,

V

ORDER

FUOCO ENTERPRISES, LLC, DOING BUSINESS AS
ADVANCE HOOD CLEANING SOLUTIONS, AND ELWOOD FIRE
PROTECTION, INC., DEFENDANTS-RESPONDENTS.

RUPP PFALZGRAF LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

KNYCH & WRITENOUR, LLC, EAST SYRACUSE (MATTHEW E. WRITENOUR OF
COUNSEL), FOR DEFENDANT-RESPONDENT FUOCO ENTERPRISES, LLC, DOING
BUSINESS AS ADVANCE HOOD CLEANING SOLUTIONS.

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

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered January 17, 2025, in a negligence and breach of contract action. 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: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

429

KA 23-01462

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH T. MARTINO, ALSO KNOWN AS JOSEPH MARTINO,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Melissa
Lightcap Cianfrini, J.), rendered August 1, 2023. The judgment
convicted defendant, upon his plea of guilty, of grand larceny in the
fourth degree.

It is hereby ORDERED that said appeal is unanimously dismissed as
moot (*see People v Nice*, 189 AD3d 2141, 2141-2142 [4th Dept 2020]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

435

CA 25-01410

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

IN THE MATTER OF ARBITRATION BETWEEN
CHEEKTOWAGA-SLOAN UNION FREE SCHOOL DISTRICT,
PETITIONER-APPELLANT,

AND

ORDER

MARK OSTEMPOWSKI, RESPONDENT-RESPONDENT.

HORTON LAW PLLC, ORCHARD PARK (SCOTT P. HORTON OF COUNSEL), AND BOND,
SCHOENECK & KING, PLLC, BUFFALO, FOR PETITIONER-APPELLANT.

ROBERT T. REILLY, WILLIAMSVILLE (JENNA S. BURKE OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered February 7, 2025. The order denied the petition to vacate an arbitration opinion and award.

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

463

KA 23-01433

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

RONALD A. AGEE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 17, 2023. The appeal was held by this Court by order entered February 7, 2025, decision was reserved and the matter was remitted to Cayuga County Court for further proceedings (235 AD3d 1247 [4th Dept 2025]). The proceedings were held and completed.

It is hereby ORDERED that said appeal is unanimously dismissed (see *People v Odyssty D.R.*, 208 AD3d 1596, 1596-1597 [4th Dept 2022]).

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

469

KA 23-01684

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

LOGAN LIVINGSTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 31, 2023. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

473

CAF 25-00891

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

IN THE MATTER OF SHAWN MCGUIRK,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

SARA MCGUIRK, RESPONDENT-RESPONDENT.

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

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

H. KATHRYN KILMARTIN, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County
(Salvatore A. Pavone, R.), entered May 12, 2025, in a proceeding
pursuant to Family Court Act article 6. The order dismissed the
amended petition.

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, petitioner father appeals from an order that
dismissed his amended petition seeking modification of a prior order
of custody and visitation, at the close of the father's proof, for
failure to establish a change in circumstances. We affirm.

Contrary to the father's contention, Family Court did not err in
taking judicial notice of the prior family court proceedings between
the father and respondent mother. "At the outset of the hearing . . .
and without objection from the [father], the court took judicial
notice of the prior orders and proceedings involving the parties,
which was proper in any event" (*Matter of Hermann v Williams*, 179 AD3d
1545, 1546 [4th Dept 2020]; see *Matter of Gugino v Tsvasman*, 118 AD3d
1341, 1342 [4th Dept 2014]).

With respect to the merits, "[i]t is well established that
alteration of an established custody arrangement will be ordered *only*
upon a showing of a change in circumstances which reflects a real need
for change to ensure the best interest[s] of the child" (*Matter of*
Austin v Wright, 151 AD3d 1861, 1862 [4th Dept 2017] [internal
quotation marks omitted]). On appeal, the father contends that he

established a change in circumstances because the prior order's requirement that he request visitation with 72 hours' advance notice was hindering his visitation. Even assuming, *arguendo*, that the father's contention is properly before us, we note that the father conceded at the hearing that the mother had never unreasonably denied him visitation and that he was able to request additional visitation from the mother, but he simply had not done so. Thus, "the record supports the court's determination that [the father] failed to meet [his] burden of establishing a sufficient change in circumstances since the entry of the prior order" (*Matter of Graham v Thering*, 55 AD3d 1319, 1320 [4th Dept 2008], *lv denied* 11 NY3d 714 [2008]).

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

479

CA 25-01761

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

IN THE MATTER OF JAMES F. JERGE, JR.,
PETITIONER-RESPONDENT,

V

ORDER

SYCAMORE MAPLE FAMILY LIMITED PARTNERSHIP,
RESPONDENT-APPELLANT,
ET AL., RESPONDENT.

HOOVER & DURLAND LLP, BUFFALO (SPENCER L. DURLAND OF COUNSEL), FOR
RESPONDENT-APPELLANT.

THE KNOER GROUP, PLLC, BUFFALO (COLIN M. KNOER OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered September 18, 2025. The order granted the petition to dissolve 504 Delaware Avenue Associates, LLC.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 2, 2026,

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

482

CA 25-00577

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

IN THE MATTER OF TOWN OF LEROY, PETITIONER-APPELLANT,

V

ORDER

ROUTE 5 BUSINESS PARK, LLC, AND STEVEN A. WEBER,
RESPONDENTS-RESPONDENTS.

BARCLAY DAMON LLP, ROCHESTER (RADHIKA SHUKLA OF COUNSEL), FOR
PETITIONER-APPELLANT.

TAYLOR DYKEMA PLLC, HOUSTON, TEXAS (ISAAC M. DISKIND OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Diane Y. Devlin, J.), entered February 26, 2025. The order, insofar as appealed from, denied the request of petitioner for attorney's fees.

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

497

CA 25-00568

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

IN THE MATTER OF DANIELLE DILL, PSY.D.,
EXECUTIVE DIRECTOR OF CENTRAL NEW YORK
PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V

ORDER

DAVID M., RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered March 6, 2025, in a proceeding for authorization to administer medical treatment over respondent's objection. The order granted the petition for an involuntary treatment order.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 13, 2026,

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

503

KA 23-00557

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SAMUEL LOVE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered February 8, 2023. 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.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

506

KA 25-01756

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MICHAEL GRUNDMAN, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF
COUNSEL), FOR RESPONDENT.

Appeal from an order of the Jefferson County Court (David A.
Renzi, J.), dated October 10, 2025. The order determined that
defendant is a level two risk pursuant to the Sex Offender
Registration Act.

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

518

CA 25-00538

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

WILLIE M. IVEY, PLAINTIFF-RESPONDENT,

V

ORDER

SWAN GROUP LIMITED PARTNERSHIP,
DEFENDANT-APPELLANT-RESPONDENT
AND CR1 CONTRACTING, LLC,
DEFENDANT-RESPONDENT-APPELLANT.

SWAN GROUP LIMITED PARTNERSHIP, THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT,

V

CR1 CONTRACTING, LLC, THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT,
ET AL., THIRD-PARTY DEFENDANTS.

WOOD SMITH HENNING & BERMAN LLP, WHITE PLAINS (MEGHAN A. DIBBINI OF
COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AND THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT.

RUPP PFALZGRAF LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT AND THIRD-PARTY DEFENDANT-RESPONDENT-
APPELLANT.

THE BARNES FIRM P.C., ROCHESTER (BRETT L. MANSKE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal and cross-appeal from an order of the Supreme Court,
Monroe County (James A. Vazzana, J.), dated March 19, 2025. The
order, among other things, denied in part the motions for summary
judgment of defendant-third-party plaintiff and defendant-third-party
defendant.

Now, upon reading and filing the stipulation of discontinuance
signed by the attorneys for the parties on May 5, 2026,

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

520

CA 25-01820

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

BETH L. HOSKINS, INDIVIDUALLY AND ON BEHALF OF
THE JOHN T. HOSKINS LIVING TRUST AND
THE SUSAN S. HOSKINS LIVING TRUST,
PLAINTIFF-APPELLANT,

V

ORDER

JOHN T. HOSKINS, JR., DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

ADAMS LECLAIR LLP, ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 16, 2025. The order, insofar as appealed from, denied in part the motion of plaintiff for partial summary judgment.

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

521

CA 25-01181

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

SMTC CORPORATION, PLAINTIFF-APPELLANT,

V

ORDER

ICM CONTROLS CORP., DEFENDANT-RESPONDENT.

WILK AUSLANDER LLP, NEW YORK CITY (SCOTT J. WATNIK OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LIPPES MATHIAS LLP, BUFFALO (TESSA R. SCOTT OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County
(Joseph E. Lamendola, J.), entered April 11, 2025. The order denied
plaintiff's motion to dismiss defendant's counterclaims.

Now, upon reading and filing the stipulation of discontinuance
signed by the attorneys for the parties on May 18, 2026,

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

523

KA 25-00924

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

NICHOLAS J. G., DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered October 23, 2024. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

529

KA 23-00796

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SHERRITA L. C., DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, COZEN O'CONNOR, MIAMI, FLORIDA (KURT K. LUNKENHEIMER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), rendered April 10, 2023. The order denied defendant's application for resentencing pursuant to the Domestic Violence Survivors Justice Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

534

CA 25-00683

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

NEWCO CAPITAL GROUP VI, LLC, PLAINTIFF-APPELLANT,

V

ORDER

LOGAN MARKETING GROUP, LLC, DOING BUSINESS AS
INTELLUS/INTELLUS MARKETING, ET AL., DEFENDANTS,
MARY MARGARET ORTIZ AND MARIA GORETTI HERMAN,
DEFENDANTS-RESPONDENTS.

BERKOVITCH & BOUSKILA, PLLC, POMONA (ARIEL BOUSKILA OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

COPOBIANCO & ASSOCIATES, GARDEN CITY (DAVID D. BENZ OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Daniel J. Doyle, J.), entered March 28, 2025. The order, inter alia, granted in part the motion of defendants Mary Margaret Ortiz and Maria Goretti Herman to vacate a default judgment.

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

536

TP 25-00111

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

IN THE MATTER OF RYAN JAMES REEDER, PETITIONER,

V

ORDER

DANIEL MARTUSCELLO, COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, SUPERINTENDENT GERARD JONES,
SERGEANT M. MANWHIR AND SERGEANT R. PHILLIPS,
RESPONDENTS.

RYAN JAMES REEDER, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Jon E. Budelmann, A.J.], entered October 2, 2024) to review a determination of respondents. The determination found after a tier III hearing that petitioner violated various incarcerated individual rules.

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

538

CA 25-00357

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

MARGUERITE M. LEGNETTO, PLAINTIFF-RESPONDENT,

V

ORDER

A&P MARINA SERVICES, LLC, AND GUY W. HART, JR.,
DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (KAYLA A. ARIAS OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County
(Gerard J. Neri, J.), entered February 11, 2025. The order granted
plaintiff's motion for summary judgment.

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

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court

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

503

KA 23-00557

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SAMUEL LOVE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered February 8, 2023. 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.

Entered: June 5, 2026

Ann Dillon Flynn
Clerk of the Court