SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 18, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED NOVEMBER 18, 2022

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_____	607	CA 21 01789	ASHLEY C. PUTNAM V MICHAEL J. KIBLER
_____	621	KA 18 00847	PEOPLE V GAELEN S. ANDERSON
_____	635	CA 21 00810	ROBERT DIGIACCO V GRENELL ISLAND CHAPEL
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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

445/22

CA 21-00822

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

DEANNA M. FLINT, AS THE EXECUTRIX OF THE
ESTATE OF MICHAEL J. FLINT, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

AGRO TREND MANUFACTURING, AS A DIVISION
OF ROJAC INDUSTRIES, INC., DEFENDANT-APPELLANT,
JAVA FARM SUPPLY, INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

AGRO TREND MANUFACTURING, AS A DIVISION OF
ROJAC INDUSTRIES, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

FLINT'S DAIRY FARM, LLC, THIRD-PARTY
DEFENDANT-APPELLANT.

JAVA FARM SUPPLY, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

FLINT'S DAIRY FARM, LLC, THIRD-PARTY
DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-RESPONDENT AGRO TREND MANUFACTURING, AS A DIVISION OF ROJAC INDUSTRIES, INC.

BOND, SCHOENECK & KING, PLLC, BUFFALO (DANIEL J. PAUTZ OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (RICHARD P. WEISBECK, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GOLDBERG SEGALLA LLP, BUFFALO (ALBERT J. D'AQUINO OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-RESPONDENT JAVA FARM SUPPLY, INC.

Appeals from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered April 23, 2021. The order, among

other things, denied in part the motion for summary judgment by defendant-third-party plaintiff Agro Trend Manufacturing, as a Division of Rojac Industries, Inc., and denied the motion for summary judgment by third-party defendant Flint’s Dairy Farm, LLC.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 1, 2022,

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

Entered: November 18, 2022 Ann Dillon Flynn

Clerk of the Court

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

607

CA 21-01789

PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND NEMOYER, JJ.

ASHLEY C. PUTNAM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. KIBLER, JASON D. KIBLER, DEFENDANTS,
AND ANDREW R. GNIAZDOWSKI, DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN TROP, ROCHESTER (MATTHEW T. MURRAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DIFILIPPO, FLAHERTY & STEINHAUS, PLLC, EAST AURORA (ROBERT D. STEINHAUS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered December 3, 2021. The order denied the motion of defendant Andrew R. Gniazdowski to dismiss plaintiff's complaint and any cross claims against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint and any cross claims are dismissed against defendant Andrew R. Gniazdowski.

Memorandum: Plaintiff was riding as a passenger on a snowmobile operated by defendant Jason D. Kibler (Kibler) and owned by defendant Michael J. Kibler (collectively, Kiblers) when a snowmobile operated by defendant Andrew R. Gniazdowski (defendant), who was traveling on the same trail in the opposite direction, struck the Kiblers' snowmobile head-on. All three individuals who had been snowmobiling sustained injuries and were transported to the hospital. Kibler, who reported to the police that he was operating the snowmobile as far to the right as possible and was not going fast, was not issued a ticket. Conversely, defendant, who could not recall whether he was on the correct side of the trail as he approached a blind spot on a hill just before the collision, was issued a ticket for reckless operation.

Plaintiff and Kibler both retained the same law firm to represent them. The attorney at the law firm thereafter negotiated settlements, which Kibler accepted. The attorney then informed plaintiff that defendant, through his insurance carrier, had offered to settle any personal injury action against him for $25,000. Plaintiff subsequently signed a release that was witnessed and notarized by the attorney. A few days later, the law firm emailed a copy of the executed release to the insurer with a request that the insurer send a

settlement check in the amount of $25,000 and payable to plaintiff to the law firm's office. According to the insurer's senior claims service specialist, the settlement check was issued about one week later and mailed to the law firm.

Plaintiff subsequently commenced the present personal injury action alleging that she suffered injuries as a result of the negligence or recklessness of defendant and the Kiblers. Defendant moved pursuant to CPLR 3211 (a) (5) to dismiss plaintiff's complaint and any cross claims against him on the basis of the release. Supreme Court denied the motion without explanation. Defendant contends on appeal that the court erred in denying the motion because he met his initial burden of establishing that he was released from the claims now brought against him in plaintiff's action and plaintiff failed to meet her burden in opposition to the motion. We agree, and we therefore reverse.

"Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release . . . If the language of a release is clear and unambiguous, the signing of a release is a jural act binding on the parties" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks omitted]). "A release 'should never be converted into a starting point for . . . litigation except under circumstances and under rules which would render any other result a grave injustice' " (*id.*, quoting *Mangini v McClurg*, 24 NY2d 556, 563 [1969]). Thus, "[a] release may be invalidated . . . for any of 'the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake' " (*id.*, quoting *Mangini*, 24 NY2d at 563). "Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release 'shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release' " (*id.*, quoting *Fleming v Ponziani*, 24 NY2d 105, 111 [1969]).

"In assessing a motion to dismiss on the ground that an action may not be maintained because of a release (*see* CPLR 3211 [a] [5]), the allegations in the complaint are to be treated as true, all inferences that reasonably flow therefrom are to be resolved in [the plaintiff's] favor, and where, as here, the plaintiff has submitted an affidavit in opposition to the motion, it is to be construed in the same favorable light" (*Armenta v Preston*, 196 AD3d 1197, 1197 [4th Dept 2021] [internal quotation marks omitted]; *see Fimbel v Vasquez*, 163 AD3d 1120, 1121 [3d Dept 2018]; *Sacchetti-Virga v Bonilla*, 158 AD3d 783, 784 [2d Dept 2018]). "At the same time, however, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [internal quotation marks omitted]).

Here, as a preliminary matter, plaintiff asserts that defendant waived his defense based on the release by failing to raise it in his answer (*see* CPLR 3211 [e]). Although we may consider that contention

despite the fact that it is raised for the first time on appeal (*see Edwards v Siegel, Kelleher & Kahn*, 26 AD3d 789, 790 [4th Dept 2006]; *Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]), we agree with defendant that plaintiff's assertion is devoid of merit. The record establishes that defendant asserted in one of his affirmative defenses that "plaintiff has provided a signed release to this answering defendant, such that this action is barred by the release." Defendant further asserted in the answer that he was "entitled to dismissal of the complaint and any cross-claims by virtue of the release" and then demanded dismissal "based upon the release running in favor of this answering defendant."

On the merits, we conclude that defendant met his initial burden of establishing that he was released from any claims by submitting the release executed by plaintiff (*see Armenta*, 196 AD3d at 1197; *Cain-Henry v Shot*, 194 AD3d 1465, 1466 [4th Dept 2021]; *Ford v Phillips*, 121 AD3d 1232, 1233 [3d Dept 2014]). As defendant contends, "the language of [the] release is clear and unambiguous" and plaintiff's action against defendant to recover for personal injuries is barred (*Booth v 3669 Delaware*, 92 NY2d 934, 935 [1998]; *see Carew v Baker*, 175 AD3d 1379, 1381 [2d Dept 2019]; *Kulkarni v Arredondo & Co., LLC*, 151 AD3d 705, 706 [2d Dept 2017]).

"[A] general release is governed by principles of contract law" (*Mangini*, 24 NY2d at 562). "A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties" (*Brad H. v City of New York*, 17 NY3d 180, 185 [2011]). "To determine whether a writing is unambiguous, language should not be read in isolation because the contract must be considered as a whole" (*id.*). An agreement "is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

The release in this case contains preliminary broad language releasing defendant from "any and all claims, demands, damages, costs, expenses, loss of services, actions, and causes of action whatsoever . . . arising from any act or occurrence up to the present time and particularly on account of BODILY INJURY, loss or damages of any kind" that plaintiff sustained or may sustain as a consequence of the accident, which is later narrowed by the language stating that the "agreement only releases the parties named above with respect to BODILY INJURY damages arising out of the accident" and that the "agreement does not waive any other party or parties from making any other claims that are not discharged or settled by this release" (*see Lexington Ins. Co. v Combustion Eng'g*, 264 AD2d 319, 321-322 [1st Dept 1999]). It is well established that where the language of a release is "limited to only particular claims, demands, or obligations, the instrument will be operative as to those matters alone, and will not release other claims, demands or obligations" (*Dury v Dunadee*, 52 AD2d 206, 209 [4th Dept 1976] [internal quotation marks omitted]; *see*

Lexington Ins. Co., 264 AD2d at 322).

Even so, the release of defendant for any "bodily injury damages" arising from the accident clearly and unambiguously encompasses plaintiff's action against defendant to recover for personal injuries sustained in the accident (*see Ford*, 121 AD3d at 1233*; Galatioto v Hanes*, 224 AD2d 923, 923 [4th Dept 1996]; *DeQuatro v Zhen Yu Li*, 211 AD2d 609, 609-610 [2d Dept 1995]). While plaintiff attempts to manufacture ambiguity in the phrase "bodily injury damages" by asserting that the release does not "define what those damages are" and by questioning whether medical expenses, pain and suffering, and wage loss would be included therein, that attempt is unavailing inasmuch as the plain meaning of damages for "bodily injury" refers to personal injury damages, including the items listed by plaintiff (*see Le Blanc v Allstate Ins. Co.*, 279 AD2d 876, 877 [3d Dept 2001]; *see also* CPLR 4111 [e]). Additionally, the inclusion of some isolated legalese in the release does not render the release ambiguous where, as here, the release is readily understandable when appropriately considered as a whole (*see Brad H.*, 17 NY3d at 185); nor is the document ambiguous on the ground that it releases parties other than defendant, such as the insurer and its affiliates (*see e.g. Ford*, 121 AD3d at 1232-1233).

The burden thus shifted to plaintiff " 'to show that there has been fraud, duress or some other fact which will be sufficient to void the release' " (*Centro Empresarial Cempresa S.A.*, 17 NY3d at 276; *see Armenta*, 196 AD3d at 1197). Plaintiff failed to meet that burden.

First, we agree with defendant that plaintiff "cannot avoid the effect of th[e] 'plain and unambiguous' release [merely by stating] that [she] did not understand its terms" (*Goode v Drew Bldg. Supply*, 266 AD2d 925, 925 [4th Dept 1999]; *see Dempski v State Farm Mut. Auto. Ins. Co.*, 291 AD2d 911, 911 [4th Dept 2002], *appeal dismissed and lv denied* 98 NY2d 661 [2002]; *DeQuatro*, 211 AD2d at 610; *see also Galster Rd. Props., LLC v Penske Truck Leasing Co., L.P.*, 195 AD3d 1502, 1502 [4th Dept 2021]). Here, in her affidavit, plaintiff simply averred in conclusory fashion that, although she had the opportunity to read the release before signing it, she "did not fully understand what it meant other than [she] was to receive $25,000[ ]." However, inasmuch as plaintiff entered into a plain and unambiguous contract, she "cannot avoid it by [merely] stating that [she] erred in understanding its terms," and "[r]elief from a release may not be granted on the basis of vague or conclusory allegations of error" such as those put forth by plaintiff (*Cortino v London Terrace Gardens*, 170 AD2d 305, 306 [1st Dept 1991], *lv denied* 78 NY2d 853 [1991]). Because her claimed lack of understanding is based entirely on conclusory allegations, plaintiff, who was nearly 19 years old when she signed the release, "has failed to show that [she] lacked the competence to understand the nature and meaning of the release" (*Galatioto*, 224 AD2d at 924; *see Verstreate v Cohen*, 242 AD2d 862, 862 [4th Dept 1997]). We conclude that, at best, plaintiff established "a mere unilateral mistake . . . with respect to the meaning and effect of the release. Such a mistake does not constitute an adequate basis for invalidating a clear,

unambiguous and validly executed release" (*Booth v 3669 Del.*, 242 AD2d 921, 922 [4th Dept 1997], *affd* 92 NY2d 934 [1998]; *see Phillips v Savage*, 159 AD3d 1581, 1581 [4th Dept 2018]).

Next, even assuming, arguendo, that a lawyer's conflict of interest could constitute a ground upon which to set aside a release as "not 'fairly and knowingly made' " (*Bronson v Hansel*, 16 NY3d 850, 851 [2011]; *see Mangini*, 24 NY2d at 567), we agree with defendant that plaintiff's claim that her attorney necessarily had a conflict of interest in simultaneously representing plaintiff and Kibler at the time of the release—which constitutes a " 'bare legal conclusion[]' " not entitled to favorable consideration—is insufficient to raise a question of fact in that regard (*Simkin*, 19 NY3d at 52; *cf. Sacchetti-Virga*, 158 AD3d at 784). With respect to a conflict of interest arising from representation of multiple clients, the Rules of Professional Conduct provide, in relevant part, that "a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7 [a] [1]). Here, the information available immediately following the accident was that plaintiff and Kibler had been riding together on a snowmobile on the right side of a trail when they were struck head-on by a snowmobile operated by defendant, who could not recall whether he was on the correct side of the trail and received a ticket for reckless operation. In light of that information, a reasonable attorney would conclude that, at the time of the settlement negotiations, plaintiff and Kibler did not have differing interests inasmuch as they were both injured by the negligence of defendant (*see Benevolent & Protective Order of Elks of United States of Am. v Creative Comfort Sys., Inc.*, 175 AD3d 887, 889 [4th Dept 2019]; *Saint Annes Dev. Co. v Batista*, 165 AD3d 997, 998 [2d Dept 2018]). Thus, there is no basis to deny defendant's motion on the ground that a conflict of interest rendered the release not fairly and knowingly made.

We also agree with defendant that there is no factual or legal basis for setting aside the release for lack of consideration. With respect to the facts, plaintiff incorrectly represents on appeal that "the record is devoid of evidentiary proof in admissible form to support" defendant's suggestion that the settlement amount of $25,000 was forwarded to the law firm. In reply to plaintiff's claim made in opposition to the motion that she never "received" any settlement money, defendant submitted the affidavit of the insurer's senior claims service specialist, who handled plaintiff's claim and averred that a check in the amount of $25,000 and payable to plaintiff and the law firm was mailed to the law firm. An affidavit of an individual with personal knowledge of the facts constitutes evidentiary proof in admissible form (*see Desola v Mads, Inc.*, 213 AD2d 445, 446 [2d Dept 1995]). Thus, to the extent that plaintiff claimed as a factual matter that the settlement amount was never paid by defendant and the insurer, that claim is "flatly contradicted by documentary evidence" and is not entitled to any favorable consideration (*Simkin*, 19 NY3d at 52 [internal quotation marks omitted]). As a legal matter, plaintiff's claim that she "never received the compensation called for

in the release," while perhaps giving rise to a breach of contract claim, is not a valid basis upon which to set aside the release itself (*see* General Obligations Law § 15-303; *Icdia Corp. v Visaggi*, 135 AD3d 820, 823 [2d Dept 2016]; *Sampson v Savoie*, 90 AD3d 1382, 1383 [3d Dept 2011]; *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369 [1st Dept 2007]; *Goode*, 266 AD2d at 925).

Finally, we agree with defendant that there are no other grounds upon which the release could be invalidated. Based on the foregoing, we reverse the order, grant the motion, and dismiss the complaint and any cross claims against defendant.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

621

KA 18-00847

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GAELEN S. ANDERSON, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 13, 2018. 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 case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: 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 correctly contends that his waiver of the right to appeal is invalid. Even assuming, arguendo, that the initial misstatements of Supreme Court regarding the sentence did not invalidate defendant's appeal waiver (*see People v Carpenter*, 176 AD2d 890, 891 [2d Dept 1991]), we conclude that the waiver is nevertheless invalid because "the rights encompassed by [the] appeal waiver were mischaracterized during the oral colloquy and in [the] written form[] executed by defendant[], which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and . . . advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' " (*People v Bisono*, 36 NY3d 1013, 1017-1018 [2020], quoting *People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Fontanez-Baez*, 195 AD3d 1448, 1449 [4th Dept 2021], *lv denied* 37 NY3d 971 [2021]).

Defendant further contends that his plea was not knowingly, voluntarily or intelligently entered due to the court's misstatements regarding sentencing. That contention, however, is unpreserved for our review inasmuch as defendant did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]), and the narrow exception to the preservation requirement set forth in *People v*

Lopez (71 NY2d 662, 666 [1988]) does not apply.

Defendant contends that the court erred in denying that part of his omnibus motion seeking to preclude identification testimony based on an error in the CPL 710.30 notice. We conclude, however, that, "[b]y pleading guilty, defendant forfeited his right to appellate review of his contention regarding the People's alleged failure to comply with the notice requirements of CPL 710.30" (*People v La Bar*, 16 AD3d 1084, 1084 [4th Dept 2005], *lv denied* 5 NY3d 764 [2005]; *see People v Taylor*, 65 NY2d 1, 6-7 [1985]; *People v Rodgers*, 162 AD3d 1500, 1501 [4th Dept 2018], *lv denied* 32 NY3d 940 [2018]).

Defendant further contends that the court should have suppressed identification evidence and physical evidence. In his omnibus motion, defendant contended, as relevant here, that he "was not engaged in any conduct creating a reasonable suspicion that he had committed a crime or was armed or dangerous" and that "[n]o other circumstances existed to create probable cause or reasonable suspicion." At the suppression hearing, the People presented evidence that on the night in question, a police officer was flagged down by an unnamed citizen, who stated that shots had been fired in that area. During that conversation, the officer himself heard a gunshot. He went immediately to the location and observed several people hiding or running into a nearby store. One man took flight, grabbing his waistband with both hands. According to the officer, such a gesture was indicative of a person "holding a very heavy object or a handgun." That individual was the only person not attempting to hide or seek cover. At that point, the officer began his pursuit, but lost sight of the individual. The officer broadcast a description of the suspect, including specifics of his clothing, over the radio, at which point other officers in the area observed a man fitting that description and pursued him, eventually arresting him at a residence and bringing him to the location of the shooting, where he was identified by two eyewitnesses as the person who had fired the shots. Surveillance video from the store and body camera footage from the officers involved confirms the sequence of events. Following the hearing, the court ruled, inter alia, that there was "more than adequate probable cause." However, the court did not explain when probable cause existed or rule on whether the officer who initially observed the suspect had reasonable suspicion to pursue him.

On appeal, defendant contends that the police lacked reasonable suspicion for the initial pursuit of the suspect and that, given the fact that the initial officer lost sight of the suspect, the police lacked probable cause to arrest defendant at the residence.

It is well settled that this Court lacks the power to review issues that were either decided in an appellant's favor, or were not ruled upon, by the trial court (*see People v Concepcion*, 17 NY3d 192, 195 [2011]). Inasmuch as the court did not rule on the threshold issue whether the police had the requisite reasonable suspicion to justify the initial pursuit, we cannot rule on that issue in the first instance and we therefore hold the case, reserve decision, and remit the matter to Supreme Court to rule on that issue based on the

evidence presented at the suppression hearing (*see People v Rainey*, 110 AD3d 1464, 1466 [4th Dept 2013]).

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

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

635

CA 21-00810

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

ROBERT DIGIACCO, PLAINTIFF-APPELLANT,
AND MARY ANN GRASSI, PLAINTIFF,

V MEMORANDUM AND ORDER

GRENELL ISLAND CHAPEL, DEFENDANT-RESPONDENT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (GREGORY D. ERIKSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered May 11, 2021. The order denied the motion of plaintiff Robert DiGiacco for leave to amend the complaint.

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

Memorandum: In this action seeking, among other things, to quiet title to real property, Robert DiGiacco (plaintiff) appeals from an order denying his motion for leave to amend the complaint to add causes of action for slander of title and removal of a cloud on title by reformation or cancellation of a deed.

We agree with plaintiff that Supreme Court abused its discretion in denying the motion. "Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Uhteg v Kendra*, 200 AD3d 1695, 1699 [4th Dept 2021] [internal quotation marks omitted]; *see* CPLR 3025 [b]). "A court should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient *on its face*" (*Matter of Clairol Dev., LLC v Village of Spencerport*, 100 AD3d 1546, 1546 [4th Dept 2012] [internal quotation marks omitted and emphasis added]; *see generally Great Lakes Motor Corp. v Johnson*, 156 AD3d 1369, 1371 [4th Dept 2017]). Here, we conclude that the court erred in denying the motion inasmuch as there was no showing of prejudice arising from the proposed amendments (*see generally Greco v Grande*, 160 AD3d 1345, 1346 [4th Dept 2018]; *Williams v New York Cent. Mut. Fire Ins. Co.* [appeal No. 2], 108 AD3d 1112, 1114 [4th Dept 2013]) and the proposed amended complaint adequately asserts causes of action for slander of title (*see 39 Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 455 [2d Dept 2006]; *Fink v Shawangunk Conservancy, Inc.*, 15 AD3d 754, 756 [3d Dept 2005]; *see generally Pelc v Berg*, 68 AD3d 1672, 1674 [4th

Dept 2009]) and removal of a cloud on title by reformation or cancellation of a deed (*see Nurse v Rios*, 160 AD3d 888, 888 [2d Dept 2018]; *see generally Fonda v Sage*, 48 NY 173, 181 [1872]). In making its determination that the proposed causes of action were palpably insufficient, the court improperly looked beyond the face of the proposed pleading to the documents establishing the chain of title to plaintiffs' properties and a 2011 deed from the Trustees of Grenell Island Chapel to defendant.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

636

CA 20-01367

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

MATTHEW A. BURNS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER A. GRANDJEAN, DEFENDANT-APPELLANT.

WALTER BURKARD, ESQ., ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 1.)

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

AFFRONTI, LLC, ROCHESTER (FRANCIS C. AFFRONTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered October 5, 2020. The order, inter alia, expanded plaintiff's visitation with the subject children.

It is hereby ORDERED that said appeal from the twelfth through fifteenth ordering paragraphs is unanimously dismissed (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]), and the order is modified on the law by denying that part of plaintiff's February 14, 2020 amended order to show cause seeking to modify the amended judgment of divorce by increasing plaintiff's visitation, that part of plaintiff's March 16, 2020 order to show cause seeking to impose penalties to compel compliance with visitation, and that part of plaintiff's June 18, 2020 order to show cause seeking suspension of his child support obligation, and by vacating the second, third, fifth through tenth, and seventeenth through twenty-third ordering paragraphs, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant mother and plaintiff father share joint legal custody of their three children pursuant to a separation agreement (agreement) that was incorporated but not merged into an amended judgment of divorce (judgment). The agreement granted the mother primary physical residence of the children and the father one weekday visit per week and overnight visitation every other weekend. The agreement also allowed the father to seek modification of the visitation schedule if he moved closer to the mother's residence, "which the [c]ourt will determine in the children's best interests."

For a period of time following their divorce, the parties followed a more flexible visitation schedule to accommodate the children's extracurricular activities. After relocating slightly closer to the mother's home, however, the father became less agreeable to the children's requests for flexibility in the visitation schedule. When the children thereafter refused to attend visitation, the father moved by orders to show cause to, among other things, modify the parties' custody and visitation arrangement, hold the mother in contempt for failing to abide by the visitation schedule, and terminate his child support obligation based on the children's failure to attend visitation. In those applications, the father also sought an award of counsel fees and downward modification of his child support obligation. Before the original order to show cause was served on her, the mother petitioned in Family Court to reduce the father's visitation on the grounds that the children's wishes had changed and that the weekday visits were negatively impacting their school work and sports activities. Upon the father's request, the mother's petitions were transferred to Supreme Court, then denied in an interim order from which no appeal was taken.

At an early appearance, the court suggested imposing its "house rules" on the children and the mother until the children complied with visitation. Those rules barred the children from many activities, including leaving the mother's home except for school and church, using cell phones and other electronic devices, engaging in any extracurricular activities, and conversing with, socializing with, or visiting family and friends. Without holding a hearing, the court issued temporary orders that increased the father's visitation time, directed the mother to enforce that visitation, and imposed the house rules. The mother and the Attorney for the Children (AFC) subsequently requested that the court remove the house rules and hold a hearing to evaluate whether the rules and the visitation schedule were in the children's best interests.

In appeal No. 1, the mother and the AFC appeal from an order that, inter alia, granted in part the father's February 14, 2020 amended order to show cause and June 18, 2020 order to show cause by expanding the father's visitation, suspending his child support obligation, formally imposing the house rules, finding the mother in civil contempt for violating prior court orders, and directing the mother to, among other things, pay the father's counsel fees and the initial costs of reunification therapy in order to purge the contempt.

The mother thereafter moved for leave to reargue her opposition to the father's applications. In addition, the mother and the AFC again requested that the court remove the house rules and hold a best interests hearing. They alleged, among other things, that the father had removed the children's bedroom doors in his house, that he had removed all food from his house, and that the children had called the police during at least one of the visits because the father refused to feed them. The AFC made further requests for a *Lincoln* hearing as well as counseling to permit the children and the father to rebuild their relationship because the visits were causing mental, emotional, and educational harm to the children. The AFC also moved to, inter

alia, suspend the father's visitation pending family therapy, and the father cross-moved to dismiss the AFC's motion and restrict her communication with the children. The father filed additional applications to have the mother held in contempt for further alleged violations of the house rules and also asked the court to force the children to "remain in their bedrooms all day every day except for meals" while at their mother's house if they continued to refuse visitation. In appeal No. 2, the mother and the AFC appeal from an order that, among other things, granted the father's October 23, 2020 cross motion seeking to dismiss the AFC's motion and prohibit the AFC from disclosing pleadings or other court documents to the children and from discussing the documents' contents with them and granted in part the mother's motion for leave to reargue and, upon reargument, adhered to two of the prior contempt determinations and the penalties previously imposed. In appeal No. 3, the mother appeals from an order that, inter alia, granted in part the father's January 13, 2021 motion seeking, among other things, appointment of a family reunification therapist, required the mother to pay the first $7,500 in reunification therapy costs, and continued the imposition of the house rules. In appeal No. 4, the mother and the AFC appeal from an order that, inter alia, denied the mother's motion for permission to sign a work permit for the parties' oldest child. In appeal No. 5, the mother and the AFC appeal and the father cross-appeals from an order that, following a hearing on the father's allegations of contempt, found the mother to be in civil contempt for violating the judgment and subsequent orders and penalized the mother for that contempt by, inter alia, sentencing her to six weekends in jail and directing her to pay, inter alia, the AFC's fees, the full costs of reunification therapy, and $20,000 for the father's counsel fees and costs for the contempt proceeding and other unspecified matters. The order also further modified the judgment by assigning the parents certain zones of interest and continued the imposition of the house rules. This Court stayed enforcement of the penalty portions of the order in appeal No. 5.

Initially, we note that the mother and the AFC have not raised any contentions with respect to the order in appeal No. 4, and we therefore dismiss their appeals from that order (*see Matter of Dawley v Dawley* [appeal No. 2], 144 AD3d 1501, 1502 [4th Dept 2016]). We further note that each of the remaining orders contains one decretal paragraph, followed by paragraphs with varying names that we deem to be ordering paragraphs, and our modifications are based on that nomenclature.

The mother and the AFC contend in appeal Nos. 1, 3, and 5 that the court erred in altering the terms of the parties' custody and visitation arrangement and in imposing its house rules without conducting a hearing to determine the children's best interests. We agree. We therefore modify the orders in appeal Nos. 1, 3, and 5 accordingly, and we reinstate the provisions of the agreement and remit the matter to Supreme Court for a hearing, including a *Lincoln* hearing, to determine whether modification of the parties' custody and visitation arrangement is the children's best interests.

Where there is "a dispute between divorced parents, the first concern of the court is and must be the welfare and the interests of the children" (*Matter of Lincoln v Lincoln*, 24 NY2d 270, 272 [1969]), and "[a]ny court in considering questions of child custody must make every effort to determine what is for the best interest of the child[ren], and what will best promote [their] welfare and happiness" (*Eschbach v Eschbach*, 56 NY2d 167, 171 [1982] [internal quotation marks omitted]). Consequently, visitation and "custody determinations should '[g]enerally' be made 'only after a full and plenary hearing and inquiry' " (*S.L. v J.R.*, 27 NY3d 558, 563 [2016], quoting *Obey v Degling*, 37 NY2d 768, 770 [1975]), "[u]nless there is sufficient evidence before the court to enable it to undertake a comprehensive independent review of" the children's best interests (*Matter of Balls v Doliver*, 72 AD3d 1618, 1619 [4th Dept 2010] [internal quotation marks omitted]).

Here, the court erred in concluding that the agreement "was designed to allow the father more time if he moved closer" and thus that no best interests hearing was necessary. Where a stipulation of settlement that is incorporated but not merged into a judgment of divorce is clear and unambiguous, the intent of the parties must be gleaned from the language used therein (*see Matter of Meccico v Meccico*, 76 NY2d 822, 824 [1990], *rearg denied* 76 NY2d 889 [1990]; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Contrary to the court's interpretation, although the plain terms of the agreement (*see Laveck v Laveck*, 160 AD3d 1397, 1397 [4th Dept 2018]) identify a move by the father as a substantial change of circumstances that would permit the father to seek more time with the children, they also require the court to determine such a request "in the children's best interests." Absent an evidentiary hearing, however, the court here lacked "sufficient evidence . . . to enable it to undertake a comprehensive independent review of the [children]'s best interests" (*Balls*, 72 AD3d at 1619 [internal quotation marks omitted]; *see Matter of Almasi v Bauer*, 27 AD3d 1155, 1156 [4th Dept 2006]).

We similarly conclude that the court's determination following the contempt hearing to modify the custody arrangement by assigning the parents zones of interest that, inter alia, granted the father final decision-making authority "for all matters involving the [children's] sports, extracurriculars (including extracurriculars sponsored or associated with the children's school)[,] and employment" is not "supported by a sound and substantial basis in the record" (*Matter of Delgado v Frias*, 92 AD3d 1245, 1245 [4th Dept 2012]; *cf. Matter of Andross v Aiello*, 183 AD3d 1266, 1267 [4th Dept 2020]; *see also Chamberlain v Chamberlain*, 24 AD3d 589, 591-592 [2d Dept 2005]).

With respect to the imposition of the court's house rules on the mother and the children, even assuming, arguendo, that the court had the authority to impose such rules (*cf. Ritchie v Ritchie*, 184 AD3d 1113, 1115 [4th Dept 2020]), we conclude that the record fails to demonstrate that the imposition of the house rules in this case was in the children's best interests.

We agree with the mother and the AFC that the court erred in refusing the AFC's repeated requests for a *Lincoln* hearing and in otherwise declining to consider the children's views in determining visitation. One of the parties' children was a teenager throughout these proceedings, and another entered his teenage years while this matter was being litigated. Although " 'the express wishes of children are not controlling, they are entitled to great weight, particularly where[, as here,] their age and maturity . . . make[s] their input particularly meaningful' " (*Matter of Minner v Minner*, 56 AD3d 1198, 1199 [4th Dept 2008]; *see also Matter of Townsend v Mims*, 167 AD3d 1584, 1584 [4th Dept 2018], *lv denied* 32 NY3d 919 [2019]; *Matter of Rohr v Young*, 148 AD3d 1681, 1681 [4th Dept 2017]). The father contends that the mother's challenge to the court's refusal to hold a *Lincoln* hearing is not preserved because the AFC withdrew her request for a *Lincoln* hearing at the end of the contempt hearing. We reject that contention. Inasmuch as the mother joined in the requests for that hearing and did not withdraw her request, the issue is before us on her appeal (*see Matter of Lorimer v Lorimer*, 167 AD3d 1263, 1265 [3d Dept 2018], *app dismissed and lv denied* 33 NY3d 1040 [2019]). With respect to the merits, it is well settled that "[a] *Lincoln* hearing serves the vital purpose of allowing a court to ascertain a child's preference and concerns, as well as corroborating information obtained during the fact-finding hearing" (*Matter of Patrick UU. v Frances VV.*, 200 AD3d 1156, 1160 [3d Dept 2021]). Under the circumstances presented here, we conclude that a *Lincoln* hearing would have "on the whole benefit[ted] the child[ren] by obtaining for the Judge significant pieces of information need[ed] to make the soundest possible decision" (*Lincoln*, 24 NY2d at 272; *see Matter of Noble v Brown*, 137 AD3d 1714, 1715 [4th Dept 2016]).

We agree with the mother and the AFC in appeal No. 2 that the court further erred in granting that part of the father's October 23, 2020 cross motion seeking to limit the AFC's interactions with her clients. It is an "AFC's obligation to 'consult with and advise the child[ren] to the extent of and in a manner consistent with [their] capacities' " (*Matter of Jennifer VV. v Lawrence WW.*, 182 AD3d 652, 654 [3d Dept 2020]; *see* 22 NYCRR 7.2 [d] [1]; *Silverman v Silverman*, 186 AD3d 123, 125 [2d Dept 2020]; *see e.g. Matter of McDermott v Bale*, 94 AD3d 1542, 1543 [4th Dept 2012]; *Matter of Vandusen v Riggs*, 77 AD3d 1355, 1355 [4th Dept 2010]). The court also erred in granting that part of the cross motion seeking to dismiss the AFC's motion. The mother joined in the AFC's requests, and thus any issue regarding whether the AFC has standing to seek affirmative relief on behalf of the children is moot. We therefore modify the order in appeal No. 2 by denying the father's October 23, 2020 cross motion and reinstating the AFC's motion, and we further modify the orders in appeal Nos. 2 and 5 by vacating the restrictions placed on the AFC. Because neither *Lincoln* nor best interests hearings were held, we lack sufficient information to determine the issues raised in the AFC's motion, and we thus remit the matter to Supreme Court for determination thereof.

We also agree with the mother and the AFC in appeal No. 1 that the court erred in granting that part of the father's June 18, 2020

order to show cause seeking suspension of the father's child support obligation on the ground that the mother was frustrating the father's right to visitation, and we further modify the order in appeal No. 1 accordingly. Although "a custodial parent's deliberate frustration of visitation rights can, under appropriate circumstances, warrant the suspension of future child support payments" (*Matter of Coleman v Murphy*, 89 AD3d 1500, 1501 [4th Dept 2011] [internal quotation marks omitted]), we conclude that the father failed to establish that the mother deliberately frustrated his visitation rights to such an extent that suspension of his support obligation was warranted (*see Matter of Maldonado v Cappetta*, 195 AD3d 1562, 1563-1564 [4th Dept 2021], *lv dismissed* 37 NY3d 1104 [2021]; *Matter of Saunders v Aiello*, 59 AD3d 1090, 1092 [4th Dept 2009]). In light of our determination, that part of the father's March 16, 2020 order to show cause seeking to modify his child support obligation is no longer academic. This Court lacks sufficient financial information to determine whether modification of the father's child support obligation is warranted, however, and we therefore direct the court upon remittal to reconsider the modification request de novo, along with the mother's request for child support arrears.

The mother and the AFC contend in appeal Nos. 2 and 5 that the court erred in finding the mother in civil contempt. We agree in part. A finding of civil contempt must be supported by evidence that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, that the order has been disobeyed, that the party to be held in contempt had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party, and that the right of a party to the litigation has been prejudiced (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; *Matter of Mundell v New York State Dept. of Transp.*, 185 AD3d 1470, 1472 [4th Dept 2020]). A movant seeking a contempt order bears the burden of establishing the foregoing elements by clear and convincing evidence (*see El-Dehdan*, 26 NY3d at 29; *Belkhir v Amrane-Belkhir*, 128 AD3d 1382, 1382 [4th Dept 2015]). "A motion to punish a party for civil contempt is addressed to the sound discretion of the [hearing] court" (*Matter of Philie v Singer*, 79 AD3d 1041, 1042 [2d Dept 2010] [internal quotation marks omitted]; *see Fernandez v Fernandez*, 278 AD2d 882, 882 [4th Dept 2000]).

With respect to appeal No. 5, we conclude that the court properly granted that part of the father's March 16, 2020 order to show cause seeking to hold the mother in contempt based on allegations that she declined to schedule visitation with the father on several occasions between January 3, 2020, and the end of February 2020. The court did not abuse its discretion in determining that the father met his burden of establishing by clear and convincing evidence that the mother violated the parts of the judgment that required her to permit the father to have visitation with the children on those dates (*cf. Matter of Amrane v Belkhir*, 141 AD3d 1074, 1076-1077 [4th Dept 2016]) and that her actions unjustifiably impaired the father's right to visit with the children. Thus, we conclude that the court properly determined that the mother violated a lawful and unequivocal mandate of the court that was in effect at the time of the filing of a

petition and that her actions caused prejudice to the visitation rights of the father, who was a party (*see* Judiciary Law § 753 [A]; *McCain v Dinkins*, 84 NY2d 216, 226 [1994]). Contrary to the mother's contention, wilfulness is not a required element of civil contempt (*see El-Dehdan*, 26 NY3d at 33-34).

We reject the mother's contention that the remaining findings of contempt in appeal Nos. 2 and 5 must be vacated because they are based on violations of the house rules. "It is well settled that an appeal from a contempt order that is jurisdictionally valid does not bring up for review the prior order" (*Matter of North Tonawanda First v City of N. Tonawanda*, 94 AD3d 1537, 1538 [4th Dept 2012]). Thus the mother was bound to adhere to the orders imposing those rules "[however misguided and erroneous [they] may have been" (*Matter of Balter v Regan*, 63 NY2d 630, 631 [1984], *cert denied* 469 US 934 [1984]; *see Matter of Bickwid v Deutsch*, 229 AD2d 533, 534-535 [2d Dept 1996], *lv denied* 89 NY2d 802 [1996]).

Nevertheless, we conclude in appeal No. 5 that the court erred in granting those parts of the father's February 14, 2020 amended order to show cause and his March 16, 2020 order to show cause seeking to hold the mother in civil contempt based on allegations that she failed to permit the father to engage in visitation on January 2, 2020, in violation of the judgment and that she violated orders to show cause signed by the court by discussing a pending Family Court modification petition with the children after receiving an order prohibiting that conduct. With respect to each of those allegations, the father "failed to prove by clear and convincing evidence that [the judgment and order that were allegedly violated] constituted a clear and unequivocal mandate" (*Matter of John U. v Sara U.*, 195 AD3d 1280, 1283 [3d Dept 2021]; *see Rienzi v Rienzi*, 23 AD3d 447, 448-449 [2d Dept 2005]; *see generally El–Dehdan*, 26 NY3d at 29), and he therefore failed to meet his burden regarding those allegations (*see Belkhir*, 128 AD3d at 1382; *Rienzi*, 23 AD3d at 449).

With respect to appeal Nos. 2 and 5, we conclude that the court further erred in granting those parts of the father's June 18, 2020 and August 31, 2020 orders to show cause and March 10, 2021 cross motion seeking to hold the mother in civil contempt for violating the temporary orders, the court's house rules, and the judgment of divorce by, among other things, allowing the children to use their electronic devices, driving the older child to work on several occasions, enrolling and continuing the children in a soccer program before they began visiting with the father, allowing the children's maternal grandmother to help tutor them during the pandemic, and allowing the children to be present during the mother's birthday celebration with her parents. "[P]rejudice to the rights of a party to the litigation must be demonstrated" in order to sustain a civil contempt (*McCain*, 84 NY2d at 226; *see* Judiciary Law § 753 [A]; *El–Dehdan*, 26 NY3d at 29; *Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 239–240 [1987]), and the father failed to establish by clear and convincing evidence that he was harmed by those actions (*cf. Matter of Moreno v Elliott*,

155 AD3d 1561, 1562 [4th Dept 2017], *lv dismissed in part and denied in part* 30 NY3d 1098 [2018]). Also with respect to appeal Nos. 2 and 5, we conclude that the court erred in granting those parts of the father's March 16, 2020, June 18, 2020, and August 31, 2020 orders to show cause and March 10, 2021 cross motion seeking to have the mother held in contempt for violating the court's orders on those occasions on which the children refused to visit with the father (*see Whitehead v Whitehead*, 122 AD3d 921, 922 [2d Dept 2014]). We therefore further modify the orders in appeal Nos. 2 and 5 by denying the applications and cross motion in part and vacating those findings of contempt.

In subparagraph B (2) of the fourth ordering paragraph in the order at issue in appeal No. 2, the court adhered to its prior determination implicitly directing the parties to undergo family reunification therapy and directing the parties to mutually select a therapist, among other things. The only bases for those directives, however, were the findings of contempt adhered to in that order. Inasmuch as we are vacating those findings of contempt, those stated and implied directives must also be vacated, and we therefore further modify the order in appeal No. 2 by vacating the second sentence in paragraph (B) (2) of the fourth ordering paragraph thereof. For the same reason, in appeal No. 3, we vacate the first ordering paragraph, which adheres to and restates those directives. We express no opinion concerning whether the court upon remittal should order counseling, therapy, or any other measures that might assist this family to heal.

With respect to the sustained findings of contempt, we note that civil contempt exists to permit "the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right" (*El-Dehdan*, 26 NY3d at 34 [internal quotation marks omitted]). Thus, " '[a]ny penalty imposed [for civil contempt] is designed *not to punish* but, rather, *to compensate* the injured private party or to coerce compliance with the court's mandate or both' " (*Mundell*, 185 AD3d at 1472, quoting *Department of Envtl. Protection of City of N.Y.*, 70 NY2d at 239). Here, the penalties imposed in the order in appeal No. 5 include six weekends in jail, payment of the AFC's expenses, payment of the full costs of reunification counseling—which we deem to have superseded the prior penalties imposed in the orders in appeal Nos. 2 and 3—and payment of counsel fees. We conclude that those penalties are punitive and excessive (*see Evans v Evans*, 242 AD2d 955, 955 [4th Dept 1997]). In addition, the award to the father of $20,000 for "attorney[']s fees and costs incurred to date, *including* the fees to bring this contempt application" (emphasis added) improperly includes additional legal work that was not " 'directly related to [the mother's] contemptuous conduct' " (*Oxman v Oxman*, 184 AD3d 404, 405 [1st Dept 2020]). Consequently, we vacate the penalties imposed by the court and, in the exercise of our discretion (*see Evans*, 242 AD2d at 955), substitute as a penalty for the sustained findings of contempt a total fine of $250 (*see Vider v Vider*, 85 AD3d 906, 908 [2d Dept 2011]) and counsel fees of $1,000. For the same reasons, we reject the father's contention on his cross appeal that the penalty for contempt should be increased. The father's further contention that the court erred in denying those

parts of his March 10, 2021 cross motion seeking additional findings of contempt is " 'beyond our review' " inasmuch as the father did not appeal from the order denying the cross motion in that respect (*Matter of Carroll v Chugg*, 141 AD3d 1106, 1106 [4th Dept 2016]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

637

CA 21-00413

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

MATTHEW A. BURNS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER A. GRANDJEAN, DEFENDANT-APPELLANT.

WALTER BURKARD, ESQ., ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 2.)

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

AFFRONTI, LLC, ROCHESTER (FRANCIS C. AFFRONTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered March 12, 2021. The order, inter alia, granted in part the motion of defendant for leave to reargue and, upon reargument, adhered to two prior contempt determinations.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]) and the order is modified on the law by denying those parts of plaintiff's June 18, 2020 order to show cause seeking to hold defendant in contempt based on allegations that she violated court orders by allowing the children's maternal grandmother to tutor them and allowing the children to be present when the maternal grandparents visited her, denying plaintiff's October 23, 2020 cross motion, vacating the third ordering paragraph and subparagraph B (2) of the fourth ordering paragraph, and reinstating the motion of the Attorney for the Children, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the same memorandum as in *Burns v Grandjean* ([appeal No. 1] — AD3d — [Nov. 18, 2022] [4th Dept 2022]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

638

CA 21-00414

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

MATTHEW A. BURNS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER A. GRANDJEAN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

AFFRONTI, LLC, ROCHESTER (FRANCIS C. AFFRONTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered March 12, 2021. The order, inter alia, appointed a family reunification therapist and directed defendant to pay the first $7,500 in family reunification therapy costs.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and plaintiff's January 13, 2021 motion is denied in its entirety.

Same memorandum as in *Burns v Grandjean* ([appeal No. 1] — AD3d — [Nov. 18, 2022] [4th Dept 2022]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

639

CA 21-00415

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

MATTHEW A. BURNS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER A. GRANDJEAN, DEFENDANT-APPELLANT,

WALTER BURKARD, ESQ., ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 4.)

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

AFFRONTI, LLC, ROCHESTER (FRANCIS C. AFFRONTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered March 12, 2021. The order, inter alia, denied the motion of defendant to, inter alia, allow her to sign a new work permit for the parties' son.

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

Same memorandum as in *Burns v Grandjean* ([appeal No. 1] — AD3d — [Nov. 18, 2022] [4th Dept 2022]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

640

CA 21-01756

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

MATTHEW A. BURNS,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JENNIFER A. GRANDJEAN,
DEFENDANT-APPELLANT-RESPONDENT.

WALTER BURKARD, ESQ., ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 5.)

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

AFFRONTI, LLC, ROCHESTER (FRANCIS C. AFFRONTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered December 8, 2021. The order, inter alia, found defendant in contempt for violating a judgment of divorce and other orders.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and in the exercise of discretion by denying in part those portions of plaintiff's February 14, 2020 amended order to show cause, March 16, 2020 order to show cause, June 18, 2020 order to show cause, August 31, 2020 order to show cause, and March 10, 2021 cross motion seeking to hold defendant in contempt or to modify the custody and visitation provisions of the amended judgment of divorce, vacating the first, second, fourth through eleventh, thirteenth through seventeenth and nineteenth ordering paragraphs in their entirety, vacating subparagraphs C, D, and E of the eighteenth ordering paragraph, and reducing the penalty to a total fine of $250 and counsel fees of $1,000, and as modified the order is affirmed without costs.

Same memorandum as in *Burns v Grandjean* ([appeal No. 1] — AD3d — [Nov. 18, 2022] [4th Dept 2022]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

642

CA 21-00543

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

DANIEL RYAN, DOING BUSINESS AS GREENCO HOME SERVICES, PLAINTIFF-RESPONDENT, AND GREENCO HOME SERVICES, INC., PLAINTIFF,

V ORDER

CAPITAL HEAT, INC., DEFENDANT-APPELLANT.

ROBERT R. RADEL, ATTORNEYS AT LAW, BUFFALO (ROBERT R. RADEL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF JOSEPH G. MAKOWSKI, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered March 10, 2021. The order denied defendant's motion for summary judgment.

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

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

670

CA 21-01542

PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

MARK A. STONEHAM AND BONNIE STONEHAM,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JOSEPH BARSUK, INC., ET AL., DEFENDANTS,
AND DAVID J. BARSUK, DEFENDANT-RESPONDENT.

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

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered October 12, 2021. The order denied plaintiffs' motion for partial summary judgment and granted the cross motions of defendant David J. Barsuk for summary judgment dismissing the Labor Law § 240 (1) cause of action against him.

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

Memorandum: Plaintiffs commenced this common-law negligence and Labor Law action to recover damages for injuries sustained by Mark A. Stoneham (plaintiff) while he was working on a flatbed trailer owned by defendant-respondent (defendant). At the time of the accident, plaintiff had utilized a front-end loader to lift the flatbed trailer and was replacing a leaking air tank on the trailer's brake system. The front-end loader lifting the flatbed trailer rolled backward, dropping the trailer on top of plaintiff. Plaintiffs moved for summary judgment on the issue of defendant's liability under Labor Law § 240 (1), and defendant filed cross motions for summary judgment dismissing the third cause of action, alleging the violation of Labor Law § 240 (1), against him. Plaintiffs now appeal from an order that denied their motion and granted defendant's cross motions.

We affirm. We agree with Supreme Court that plaintiff was not engaged in a protected activity within the meaning of Labor Law § 240 (1) at the time of the accident. Plaintiffs contend that plaintiff was engaged in a protected activity because, first, the replacement of the air tank constituted a repair, an enumerated activity within the meaning of the statute. Second, they contend that the flatbed trailer itself is a "production or piece of work artificially built up or

composed of parts joined together in some definite manner" and, therefore, it is a "structure" within the meaning of Labor Law § 240 (1) (*Caddy v Interborough R.T. Co.*, 195 NY 415, 420 [1909]). Even assuming, arguendo, that the replacement of the air tank is appropriately considered a repair, we conclude that the narrow view of the statutory elements proffered by plaintiffs is "too simple, and [accepting it] would lead to an expansion of section 240 (1) liability that [prior Labor Law] cases do not support and that . . . the Legislature never intended" (*Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 525 [2012]). The holding in *Dahar*, as well as the Court of Appeals' more recent decision in *Preston v APCH, Inc.* (34 NY3d 1136, 1137 [2020], *affg* 175 AD3d 850 [4th Dept 2019]), instruct that individual statutory terms such as "repairing" or "structure" cannot be considered in isolation. Instead, any activity must be considered in light of the text of Labor Law § 240 (1) as a whole and the statute's "central concern[, which] is the dangers that beset workers in the construction industry" (*Dahar*, 18 NY3d at 525).

Here, plaintiff, a certified diesel technician, was injured while installing an air tank on a flatbed trailer on the premises of a recycling plant. Inasmuch as plaintiff was "engaged in his 'normal occupation' of repairing [vehicles] . . . , a task not a part of any construction project or any renovation or alteration to the [recycling plant] itself," he was not engaged in a protected activity within Labor Law § 240 (1) at the time of the accident (*Warsaw v Eastern Rock Prods.*, 193 AD2d 1115, 1115 [4th Dept 1993]; *see Foster v Joseph Co.*, 216 AD2d 944, 944-945 [4th Dept 1995]). Indeed, it would be inconsistent with the purpose of the statute to conclude that the vehicle repair work at issue here is entitled to the protections of Labor Law § 240 (1) when the activities associated with construction projects in *Dahar* and *Preston* were not (*see Dahar*, 18 NY3d at 523; *Preston*, 175 AD3d at 851). In light of our determination, plaintiffs' remaining contentions are academic.

All concur except WINSLOW and BANNISTER, JJ., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent and would modify the order by denying the cross motions of defendant-respondent (defendant) and reinstating the third cause of action against him. The majority concludes that the repair of the flatbed trailer by Mark A. Stoneham (plaintiff) is not an activity falling within the protections of Labor Law § 240 (1) as a matter of law. We disagree.

"Labor Law § 240 (1) provides special protection to those engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880 [2003]). "Over a century ago, the Court of Appeals made clear that the meaning of the word 'structure,' as used in the Labor Law, is not limited to houses or buildings . . . The Court stated, in pertinent part, that 'the word "structure" in its broadest sense includes any production or piece of work artificially built up or composed of parts joined together in some definite manner' " (*McCoy v Abigail Kirsch at Tappan Hill, Inc.*, 99 AD3d 13,

15-16 [2d Dept 2012], quoting *Caddy v Interborough R.T. Co.*, 195 NY 415, 420 [1909]; *see Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943 [1991]; *Cornacchione v Clark Concrete Co.* [appeal No. 2], 278 AD2d 800, 801 [4th Dept 2000]). In *Cornacchione*, we held that it was error to dismiss a Labor Law § 240 (1) claim because the crane upon which the plaintiff's decedent was working fit "squarely within" the definition of a "structure" as set forth by the Court of Appeals (278 AD2d at 801; *see Lewis-Moors*, 78 NY2d at 943). We have also held that a plaintiff engaged in the conversion of a utility van into a cargo van "was engaged in a protected activity at the time of the accident" and that the van was "a structure" (*Moore v Shulman*, 259 AD2d 975, 975 [4th Dept 1999], *lv dismissed* 93 NY2d 998 [1999]). "Indeed, courts have applied the term 'structure' to several diverse items such as a utility pole with attached hardware and cables . . . , a ticket booth at a convention center . . . , a substantial free-standing Shell gasoline sign . . . , a shanty located within an industrial basement used for storing tools . . . , a power screen being assembled at a gravel pit . . . , a pumping station . . . , and a window exhibit at a home improvement show" (*McCoy*, 99 AD3d at 16). Here, the flatbed trailer upon which plaintiff was working also fits "squarely within" the definition of a "structure" (*Cornacchione*, 278 AD2d at 801).

We would further hold that defendant failed to establish "a prima facie showing of entitlement to judgment as a matter of law" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) because his submissions failed to eliminate all triable issues of fact whether plaintiff was engaged in routine maintenance—which falls outside of the protections of Labor Law § 240 (1)—or a repair of the flatbed trailer, a protected activity (*see generally Kostyo v Schmitt & Behling, LLC*, 82 AD3d 1575, 1576 [4th Dept 2011]). "[D]elineating between routine maintenance and repairs is frequently a close, fact-driven issue" (*Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728 [4th Dept 2010] [internal quotation marks omitted]). "That distinction depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work . . . , and whether the work involved the replacement of components damaged by normal wear and tear" (*id.* [internal quotation marks omitted]). "[W]ork consisting of remedying a common problem is generally considered routine maintenance" (*id.* at 1729; *see generally Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53 [2004]; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). Here, defendant failed to establish that the replacement of the air tank was a common occurrence due to normal wear and tear (*see generally Pieri*, 74 AD3d at 1728-1729). Although we are cognizant of the concerns raised by the majority and by the Court of Appeals in *Dahar v Holland Ladder & Mfg. Co.* (18 NY3d 521, 525 [2012]), under the unique circumstances of this case, we cannot conclude that plaintiff was not engaged in a protected activity as a matter of law.

Finally, even assuming, arguendo, that defendant established on his cross motions that plaintiff is not entitled to the protection of Labor Law § 240 (1) inasmuch as plaintiff was engaged in the task of replacing the air tank as a volunteer (*see generally Cromwell v Hess*, 63 AD3d 1651, 1652 [4th Dept 2009]), we conclude that plaintiffs

raised a triable issue of fact in opposition in that regard (*see generally Stringer v Musacchia*, 46 AD3d 1274, 1276-1277 [3d Dept 2007], *affd* 11 NY3d 212 [2008]; *Thompson v Marotta*, 256 AD2d 1124, 1125 [4th Dept 1998]; *Vernum v Zilka*, 241 AD2d 885, 886-887 [3d Dept 1997]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

710

CA 21-00911

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

OSVALDO GARCIA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA AND COUNTY OF ERIE,
DEFENDANTS-RESPONDENTS.

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (RYAN L. GELLMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF TONAWANDA.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KENNETH R. KIRBY OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF ERIE.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered June 2, 2021. The order granted the motions of defendants Town of Tonawanda and County of Erie for summary judgment and dismissed the complaint and all cross claims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and in the exercise of discretion by denying the motion of defendant Town of Tonawanda and reinstating the complaint against it and by granting plaintiff's motion in part and directing that the Town of Tonawanda disclose the documents requested therein and as modified the order is affirmed without costs.

Memorandum: After plaintiff was injured when his bicycle hit a signpost that had fallen and obstructed the sidewalk on which he was riding, plaintiff commenced this personal injury action against defendant Town of Tonawanda (Town) and defendant County of Erie (County). Plaintiff moved to strike the Town's answer in the event that the Town failed to produce certain requested discovery materials within 30 days. Supreme Court denied plaintiff's motion. Subsequently, the Town moved for summary judgment dismissing the complaint against it, and the County separately moved for summary judgment seeking, inter alia, dismissal of the complaint against it. As relevant, the Town and County each contended that it had not received prior written notice of the alleged hazardous condition as required by Town of Tonawanda Code § 68-2 (A) and Local Law No. 3-2004 of the County of Erie, respectively. The court granted the motions and dismissed the complaint against the Town and the County. Plaintiff now appeals from the order granting defendants' summary

judgment motions, and we modify.

We reject plaintiff's contention that the court erred in granting the County's motion insofar as it sought summary judgment dismissing the complaint against it. The County met its initial burden on the motion by establishing that it did not receive prior written notice of the allegedly defective condition as required by Local Law No. 3-2004 (*see Craig v Town of Richmond*, 122 AD3d 1429, 1429 [4th Dept 2014]; *see generally Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). The burden thus shifted to plaintiff to demonstrate, as relevant here, that the County "affirmatively created the defect through an act of negligence . . . that immediately result[ed] in the existence of a dangerous condition" (*Yarborough*, 10 NY3d at 728 [internal quotation marks omitted]). Plaintiff failed to meet his burden. Mere "speculation that [the County] created the allegedly dangerous condition is insufficient to defeat the motion" (*Hall v City of Syracuse*, 275 AD2d 1022, 1023 [4th Dept 2000]).

We agree with plaintiff, however, that the court erred in granting the Town's motion for summary judgment dismissing the complaint against it, and we therefore modify the order accordingly. The Town had the initial burden on the motion of establishing that no prior written notice of the alleged condition was given to either the Town Clerk or the Town Superintendent of Highways (*see* Town of Tonawanda Code § 68-2 [A]). In support of its motion, the Town submitted, inter alia, the deposition testimony of an administrative aide in the Town Highway Department and the Town's sign shop fabricator, each of whom testified that he did not learn of the fallen sign until he received the police report for the incident. However, neither employee testified that he searched the Highway Department's or the Town Clerk's records. Thus, the Town failed to establish as a matter of law that neither the Town Clerk nor the Town Superintendent of Highways received prior written notice of the alleged condition (*see Weinstein v County of Nassau*, 180 AD3d 730, 732 [2d Dept 2020]; *see generally Horst v City of Syracuse*, 191 AD3d 1297, 1298-1299 [4th Dept 2021]). Because the Town failed to meet its initial burden, we need not consider the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiff further contends that the court erred in denying his motion seeking to strike the Town's answer in the event that the Town failed to produce certain requested discovery materials within 30 days. Initially, we note that the appeal from the final order granting defendants' summary judgment motions brings up for review the interlocutory order that denied plaintiff's motion and thus the propriety of that order is properly before us (*see* CPLR 5501 [a] [1]; *see generally Christiana Trust v Rice* [appeal No. 3], 187 AD3d 1495, 1496 [4th Dept 2020]).

With respect to the merits, we conclude that plaintiff's motion should be granted insofar as it seeks to compel discovery of the requested documents (*see generally Rivera v Rochester Gen. Health Sys.*, 144 AD3d 1540, 1541 [4th Dept 2016]). Plaintiff sought certain

discovery from the Town consisting of a spreadsheet documenting all repairs to the Town's signs for the three years immediately before the accident, copies of all repair orders for "no standing" and "no parking" signs in the Town for the same period, and a copy of a global inventory of all signs in the Town (collectively, discovery documents).

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matters material and necessary in the prosecution or defense of an action." "The words, 'material and necessary,' are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see Snow v DePaul Adult Care Communities, Inc.*, 149 AD3d 1573, 1574 [4th Dept 2017]; *Rawlins v St. Joseph's Hosp. Health Ctr.*, 108 AD3d 1191, 1192 [4th Dept 2013]). Documents are "material and necessary" where "they may contain information reasonably calculated to lead to relevant evidence" (*Goetchius v Spavento*, 84 AD3d 1712, 1713 [4th Dept 2011] [internal quotation marks omitted]). "In opposing a motion to compel discovery, a party must 'establish that the requests for information are unduly burdensome, or that they may cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts' " (*Rawlins*, 108 AD3d at 1192). "While discovery determinations rest within the sound discretion of the trial court, the Appellate Division is vested with a corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]; *see Daniels v Rumsey*, 111 AD3d 1408, 1409 [4th Dept 2013]; *Radder v CSX Transp., Inc.*, 68 AD3d 1743, 1745 [4th Dept 2009]). Here, we conclude that plaintiff met his burden of establishing that the discovery documents were material and necessary to the prosecution of the action (*see generally* CPLR 3101 [a]). In opposing the motion, the Town failed to establish that the discovery requests were unduly burdensome (*see generally Kimball v Normandeau*, 83 AD3d 1522, 1523 [4th Dept 2011]). Under the circumstances of this case, we therefore substitute our own discretion for that of the motion court, and we modify the order by granting plaintiff's motion in part and directing the Town to disclose the discovery materials.

We have considered plaintiff's remaining contentions and conclude that they do not require reversal or further modification of the order.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

722

KA 22-00400

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODERICK WRIGHT, DEFENDANT-APPELLANT.

JEREMY D. SCHWARTZ, LACKAWANNA, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered October 13, 2021. 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: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress physical evidence and his statements as the fruit of an unlawful search and seizure. We reject that contention.

According to the evidence presented at the suppression hearing, a police officer (officer) with the Lancaster Police Department (LPD) was dispatched on an afternoon in late November 2020 to a motel in the Town of Lancaster (Lancaster) in response to a 911 call. In particular, the complainant had reported that a coworker—described as a black male with gold teeth operating a silver Ford SUV with out-of-state license plates—had threatened the complainant with a handgun. The information provided to the officer indicated that, while the complainant had not actually seen the handgun, the complainant believed the suspect had a handgun because the complainant heard a slide rack and the suspect tapping on a closed door with what sounded like a handgun while threatening to kill the complainant.

The officer was provided further information from the complainant that the suspect was staying at an inn located in Cheektowaga. Although the location of the inn was not along the officer's typical patrol route for the LPD, the officer was familiar with that area and noted that the inn was about one mile beyond the border with

Lancaster. The officer proceeded in his patrol vehicle to the inn and pulled into the parking lot approximately 15 minutes after receiving the initial complaint. The officer immediately observed a silver Ford SUV with out-of-state license plates parked adjacent to the entrance of the parking lot. The officer parked directly in front of the SUV about 20 feet away and, as soon as he parked, he noticed that a black male with gold teeth—later identified as defendant—exited the SUV from the driver's door.

The officer exited his patrol vehicle and, from about midway between his patrol vehicle and the SUV, a distance of approximately 10 feet, the officer noticed a very strong odor of burnt marihuana. The officer confirmed that he was familiar with that smell from his extensive professional experience. The officer repeatedly insisted that the strong scent of marihuana was emanating from the vicinity of both defendant's person and the SUV. When pressed further on cross-examination, however, the officer agreed that it was "fair to say" that, when he was positioned 10 feet away as defendant stepped out of the SUV, he did not know whether the source of the marihuana scent was something in the SUV or something on defendant's person because defendant and the SUV were right next to each other at that point.

Given the possibility of a gun being involved and the odor of marihuana, the officer immediately directed defendant to the rear of the patrol vehicle and instructed defendant to place his hands on the trunk. Defendant ignored the instruction and, instead, continued to walk toward the inn as if conveying that the officer was wrongly hassling him. The officer attempted to physically place defendant's hands on the patrol vehicle, defendant began to resist by pulling his hands away, and the officer then forcibly handcuffed defendant. By that time, three other police officers from the LPD were on the scene, one of whom assisted the officer with defendant. After defendant was handcuffed, the officer frisked defendant's pockets. According to the officer, defendant was detained based on the strong odor of marihuana and the fact that he matched the description of the suspect who had reportedly threatened the complainant with a gun at the motel in Lancaster.

Two of the other police officers searched the SUV and discovered a handgun. As the officer was placing defendant, who was handcuffed, in the back of his patrol vehicle, one of the other police officers announced aloud that he had found a loaded handgun, and defendant spontaneously responded by saying "hey, that's my gun" as though questioning why the police were taking the handgun that belonged to him. Neither the officer nor any of the other police officers had their service weapons drawn during the interaction. Defendant did not produce a permit for the handgun.

Contrary to defendant's initial contention on appeal that the officer immediately initiated a level four intrusion, i.e., an arrest, without probable cause, we agree with the People that the officer engaged in a forcible nonarrest detention supported by reasonable

suspicion. "It is well established that not every forcible detention constitutes an arrest" (*People v Drake*, 93 AD3d 1158, 1159 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]; *see People v Hicks*, 68 NY2d 234, 239 [1986]), and that an officer may handcuff a detainee out of concern for officer safety (*see People v Allen*, 73 NY2d 378, 379-380 [1989]; *People v Pruitt*, 158 AD3d 1138, 1139 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]; *People v Wiggins*, 126 AD3d 1369, 1370 [4th Dept 2015]). "A corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed" (*People v De Bour*, 40 NY2d 210, 215, 223 [1976]; *see Wiggins*, 126 AD3d at 1370).

Here, based on the evidence adduced at the suppression hearing, we conclude that the court properly found that the encounter, from its outset, constituted a forcible stop and nonarrest detention of defendant (*see People v Hough*, 151 AD3d 1591, 1592 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]). In particular, contrary to defendant's contention, he was "not subjected to an unlawful de facto arrest when, after exiting his patrol vehicle and approaching defendant on foot, the officer [ultimately] handcuffed [defendant], conducted a pat frisk, and [started to] place[him] in the back of the patrol vehicle" prior to discovery of the handgun (*Pruitt*, 158 AD3d at 1139; *see People v Griffin*, 188 AD3d 1701, 1703 [4th Dept 2020], *lv denied* 36 NY3d 1050 [2021], *cert denied* — US —, 141 S Ct 2538 [2021]; *People v Harmon*, 170 AD3d 1674, 1675 [4th Dept 2019], *lv denied* 34 NY3d 932 [2019]; *People v McCoy*, 46 AD3d 1348, 1349 [4th Dept 2007], *lv denied* 10 NY3d 813 [2008]). Instead, given the detailed description by the known complainant that a person matching defendant's characteristics and location was in possession of and had threatened to use a handgun, along with the strong odor of marihuana emanating from defendant's vicinity and his evasive and resistant behavior when first confronted, the officer effectuated a forcible nonarrest detention—including through the use of handcuffs—to facilitate the investigation before the handgun was located (*see Harmon*, 170 AD3d at 1675; *Pruitt*, 158 AD3d at 1139; *see also People v McKee*, 174 AD3d 1444, 1445 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019]; *People v McDonald*, 173 AD3d 1633, 1634 [4th Dept 2019], *lv denied* 34 NY3d 934 [2019]; *see generally Allen*, 73 NY2d at 379-380). In sum, "the police action fell short of the level of intrusion upon defendant's liberty and privacy that constitutes an arrest" (*Hicks*, 68 NY2d at 240; *see People v Howard*, 129 AD3d 1654, 1655-1656 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; *see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]).

We further agree with the People that the forcible nonarrest detention was supported by the requisite reasonable suspicion (*see generally People v Cooper*, 196 AD3d 855, 857 [3d Dept 2021], *lv denied* 37 NY3d 1160 [2022]). A nonarrest investigative detention must be "justified by reasonable suspicion that a crime [had] been, [was] being or [was] about to be committed" (*People v Roque*, 99 NY2d 50, 54 [2002]), i.e., "that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to

believe criminal activity is at hand" (*People v Woods*, 98 NY2d 627, 628 [2002] [internal quotation marks omitted]; *see Howard*, 129 AD3d at 1656).

Here, we conclude that, "[b]ased upon the totality of the circumstances, including the short period of time between the 911 call [by the known complainant] reporting [that a specifically described male had] a handgun and the arrival of the police officer at the reported location [where the suspect was known to be staying], defendant's presence at that location, and the officer's observations that defendant's physical characteristics and [the vehicle he was exiting] matched the description of the suspect [and his SUV], the officer was justified in forcibly detaining defendant in order to quickly confirm or dispel [his] reasonable suspicion of defendant's possible [possession of a weapon]" (*Pruitt*, 158 AD3d at 1139 [internal quotation marks omitted]). To the extent that defendant contends that the information conveyed to the officer was insufficient to establish the requisite reasonable suspicion because the complainant only heard what sounded like a handgun behind a closed door and provided a name that the People did not prove was associated with defendant, we reject that contention. The information provided by the complainant, an identified person, was based upon his personal knowledge, included precise descriptions of particular sounds associated with named parts of a firearm, and accused defendant of committing a specific crime by threatening to kill him with a gun (*see* Penal Law § 265.03 [1] [b]). That information thus "provided the [police] with at least a reasonable suspicion that a crime had been, or was being, committed, [thereby] authorizing the detention" (*People v Whorley*, 125 AD3d 1484, 1485 [4th Dept 2015], *lv denied* 25 NY3d 1173 [2015]; *see People v Clark*, 191 AD3d 1485, 1486 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]). The fact that the People never proved that the name of the suspect provided by the complainant was associated with defendant is of no moment inasmuch as every other piece of detailed information provided by the complainant was confirmed by the officer's observations (*see Whorley*, 125 AD3d at 1485; *see generally People v Argyris*, 24 NY3d 1138, 1140-1141 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* 577 US 1069 [2016]).

Furthermore, at the time of the encounter, the officer's "detection of the odor of burning marihuana emanating from the vicinity of defendant . . . supplied the officer[] with [additional] reasonable suspicion of criminal activity sufficient to warrant stopping [and detaining defendant]" (*Hough*, 151 AD3d at 1592).

The next issue is whether, as defendant was being detained, the police lawfully searched the SUV where the handgun was located. The court decided that issue solely on the ground that the police had probable cause to search the vehicle based on the strong odor of marihuana emanating from both defendant and the SUV, and our review is therefore limited to that ground (*see People v Clark*, 171 AD3d 1530, 1532 [4th Dept 2019]; *see generally People v Ingram*, 18 NY3d 948, 949 [2012]; *People v Concepcion*, 17 NY3d 192, 195 [2011]).

As applicable to this case, "[t]he odor of marihuana emanating

from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants" (*People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014] [internal quotation marks omitted]; *see People v Chestnut*, 43 AD2d 260, 261 [1974], *affd* 36 NY2d 971 [1975]; *People v Boswell*, 197 AD3d 950, 951 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]). Here, the officer testified that he was a 12½-year veteran police officer who was familiar with the smell of marihuana based on his extensive professional experience, and that he detected the strong odor of burnt marihuana emanating from both defendant and the SUV as he approached from about 10 feet away after defendant had exited the SUV. Defendant does not challenge the officer's testimony with respect to his training and experience (*see People v Walker*, 128 AD3d 1499, 1500 [4th Dept 2015], *lv denied* 26 NY3d 936 [2015]); instead, defendant contends that the proof was insufficient to establish probable cause to search the SUV because the officer could say only that the scent was emanating from defendant's person but not necessarily from the SUV.

We conclude that defendant's restrictive reading of the officer's testimony is not supported by the record, nor does the law support the conclusion that the police lacked probable cause here. The officer repeatedly insisted that he detected the scent of marihuana emanating from *both* defendant's person and the SUV (*see People v Rasul*, 121 AD3d 1413, 1416 [3d Dept 2014]; *cf. People v Smith*, 98 AD3d 590, 591-592 [2d Dept 2012]) and, although he ultimately agreed on cross-examination that he could not know the precise location of the source of that scent, "[p]robable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support *a reasonable belief* that an offense has been or is being committed or that evidence of a crime *may be* found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985] [emphasis added]). Contrary to defendant's contention, the officer's admission that, while the strength of the scent led him to conclude that the odor was coming from both defendant and the SUV, he could not olfactorily pinpoint the location of the source of the odor is materially different from testimony admitting that no scent whatsoever had been detected coming from the vehicle itself (*cf. Smith*, 98 AD3d at 591-592). Here, the fact that the scent was so strong, and permeated the area of both defendant and the SUV, was sufficient to support a reasonable belief that evidence of a crime may be found in the SUV (*see People v Wright*, 158 AD3d 1125, 1126-1127 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]).

Inasmuch as the police had probable cause to search the SUV, the seizure of the handgun therein was lawful, and the police had probable cause to arrest defendant for criminal possession of a weapon (*see Wiggins*, 126 AD3d at 1370). Finally, contrary to defendant's contention, the officers from the LPD were authorized to arrest defendant in Cheektowaga outside the geographical area of their employment because they had probable cause to believe that defendant had committed the crime of criminal possession of a weapon (*see* CPL 140.10 [1] [b]; [3]; *People v Nenni*, 269 AD2d 785, 785 [4th Dept

2000], *lv denied* 95 NY2d 801 [2000]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

726

CA 21-01752

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

MATTHEW S. GRACE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CAYUGA YOUTH ATHLETIC ASSOCIATION, INC.,
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 26, 2021. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was hit with a baseball bat at a youth baseball game. Plaintiff was struck in the face by a bat swung by a teammate, in an off-field area behind the dugout, near spectators, and outside the areas designated for practice swings, i.e., home plate on the field or the caged on-deck area. Defendant moved for summary judgment dismissing the complaint on the ground, inter alia, that plaintiff assumed the risks associated with playing baseball. Supreme Court denied the motion, and we affirm.

The doctrine of assumption of the risk acts as a complete bar to recovery where a plaintiff is injured in the course of a sporting or recreational activity through a risk inherent in that activity (*see Turcotte v Fell*, 68 NY2d 432, 438-439 [1986]). "As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*id*. at 439). Thus, "primary assumption of the risk applies when a consenting participant in a qualified activity 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' " (*Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012]). "Whether a plaintiff should be deemed to have made an informed estimate of the risks involved in an activity before deciding to participate depends upon the openness and obviousness of the risk,

the plaintiff's background, skill and experience, the plaintiff's own conduct under the circumstances, and the nature of the defendant's conduct" (*Butchello v Herberger*, 145 AD3d 1586, 1587 [4th Dept 2016]; *see Morgan v State of New York*, 90 NY2d 471, 485-486 [1997]; *Lamey v Foley*, 188 AD2d 157, 164 [4th Dept 1993]). "It is not necessary to the application of assumption of [the] risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (*Maddox v City of New York*, 66 NY2d 270, 278 [1985]). "The doctrine of primary assumption of the risk, however, will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased" (*Ribaudo v La Salle Inst.*, 45 AD3d 556, 557 [2d Dept 2007], *lv denied* 10 NY3d 717 [2008]; *see Morgan*, 90 NY2d at 485). Moreover, inasmuch as "the assumption of risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for a jury . . . , dismissal of a complaint as a matter of law is warranted [only] when on the evidentiary materials before the court no fact issue remains for decision by the trier of fact" (*Maddox*, 66 NY2d at 279; *see McKenney v Dominick*, 190 AD2d 1021, 1021 [4th Dept 1993]).

" '[T]he danger associated with people swinging bats on the sidelines while warming up for the game' is inherent in the game of baseball and, accordingly, a risk assumed, even by child participants" (*Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246, 248 [1st Dept 2008], *affd* 10 NY3d 889 [2008]). Here, however, defendant's own submissions raise a triable issue of fact whether the injury-causing event was a known, apparent or reasonably foreseeable consequence of plaintiff's participation because the incident occurred off the fenced field of play behind a dugout, near spectators, outside the areas designated for practice swings, such as the caged on-deck area, and in a location where players had never previously been observed taking practice swings (*cf. Roberts*, 10 NY3d at 889; 51 AD3d at 248-249). Indeed, in contrast to *Roberts*, in which the evidence established as a matter of law that the plaintiff assumed the risk of being struck by a swinging bat in the area where the accident occurred, defendant's submissions here raise a triable issue of fact whether the teammate was "left to take practice swings precipitately in [a] place[] where such activity had no prior obvious presence" (*Roberts*, 51 AD3d at 249-250).

Defendant further contends that, regardless of assumption of risk, plaintiff's claim of negligent supervision must be rejected as a matter of law. We conclude, however, that defendant's own submissions raise "an issue of fact whether inadequate supervision was responsible for the accident or . . . [whether] better supervision could have prevented it" (*Hochreiter v Diocese of Buffalo*, 309 AD2d 1216, 1218 [4th Dept 2003] [internal quotation marks omitted]; *see Sheehan v Hicksville Union Free School Dist.*, 229 AD2d 1026, 1026 [4th Dept 1996]).

We therefore conclude that the court properly denied the motion

for summary judgment dismissing the complaint.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

748

CAF 21-01162

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

IN THE MATTER OF ERIC M. SLOMA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHELE A. SAYA, RESPONDENT-RESPONDENT.

SUSAN B. MARRIS, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

Appeal from an order of the Family Court, Onondaga County (Robert E. Antonacci, II, J.), entered July 9, 2021 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, dismissed the petition for a modification of custody.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, the Attorney for the Child (AFC), as limited by her brief, appeals from an order insofar as it dismissed petitioner father's petition seeking to modify the parties' custody arrangement. Family Court determined at the conclusion of the father's presentation of evidence at a trial that he failed to establish a change in circumstances and granted respondent mother's motion to dismiss the father's petition. Initially, we agree with the AFC that, under the circumstances of this case, she has standing to appeal the order (*see Matter of Newton v McFarlane*, 174 AD3d 67, 71-74 [2d Dept 2019]; *cf. Matter of Lawrence v Lawrence*, 151 AD3d 1879, 1879 [4th Dept 2017]; *Matter of Kessler v Fancher*, 112 AD3d 1323, 1323 [4th Dept 2013]).

We agree with the AFC that the child received ineffective assistance of counsel. We therefore reverse the order insofar as appealed from, reinstate the petition, and remit the matter to Family Court for a new trial. Section 7.2 of the Rules of the Chief Judge provides that, in proceedings such as an article 6 custody proceeding where the child is the subject and an AFC has been appointed pursuant to Family Court Act § 249, the AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]). "[I]n ascertaining the child's position, the [AFC] must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and

have a thorough knowledge of the child's circumstances" (22 NYCRR 7.2 [d] [1]). "[I]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]). There are two exceptions, not relevant here, where the child lacks the capacity for knowing, voluntary and considered judgment, or following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child (*see* 22 NYCRR 7.2 [d] [3]). In those instances, the AFC is justified in advocating for a position that is contrary to the child's wishes (*see id.*).

Moreover, a child in an article 6 custody proceeding is entitled to effective assistance of counsel (*see Matter of Rivera v Fowler*, 112 AD3d 835, 837 [2d Dept 2013]; *Matter of Sharyn PP. v Richard QQ.*, 83 AD3d 1140, 1143 [3d Dept 2011]; *Matter of Ferguson v Skelly*, 80 AD3d 903, 906 [3d Dept 2011], *lv denied* 16 NY3d 710 [2011]), which requires the AFC to take an active role in the proceeding (*see Matter of Payne v Montano*, 166 AD3d 1342, 1343-1345 [3d Dept 2018]; *Rivera*, 112 AD3d at 837).

Here, the AFC at trial made his client's wish that there be a change in custody known to the court, but he did not "zealously advocate the child's position" (22 NYCRR 7.2 [d]; *see Payne*, 166 AD3d at 1345; *see also Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1147 [4th Dept 2016]). He did not cross-examine the mother, the police officers, or the school social worker called by the father, and we agree with the AFC on appeal that the trial AFC's cross-examination of the father was designed to elicit unfavorable testimony related to the father, thus undermining the child's position (*see Silverman v Silverman*, 186 AD3d 123, 127-128 [2d Dept 2020]; *Brian S.*, 141 AD3d at 1147-1148). His questioning also seemed designed to show that there was no change in circumstances since the entry of the last order. Further, he submitted an email to the court in response to the mother's motion to dismiss in which he stated his opinion that there had been no change in circumstances, which again went against his client's wishes (*see generally Brian S.*, 141 AD3d at 1147). While we conclude that the AFC's actions may have been the result of good intentions, we further conclude that he did not "zealously advocate the child's position" (22 NYCRR 7.2 [d]), and thus the child was denied effective assistance of counsel (*see Silverman*, 186 AD3d at 127-129; *Payne*, 166 AD3d at 1345; *cf. Rivera*, 112 AD3d at 837; *Matter of Venus v Brennan*, 103 AD3d 1115, 1116-1117 [4th Dept 2013]).

In light of our determination, we see no need to address the AFC's further contention on appeal that the father established a change in circumstances.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

749

CA 21-01817

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

BRADFORD GREEN, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

EVERGREEN FAMILY LIMITED PARTNERSHIP,
EVERGREEN II FAMILY LIMITED PARTNERSHIP,
EVERGREEN FAMILY LIMITED PARTNERSHIP,
DOING BUSINESS AS PRECISION WASH, AND
JAMES M. DONEGAN FAMILY TRUST,
DEFENDANTS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, SYRACUSE (AARON M. SCHIFFRIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MARTHA L. BERRY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered November 30, 2021. The order granted in part and denied in part the motion of defendants for summary judgment and the motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when he fell from an A-frame ladder while working on a 10-foot-high car wash overhead door. Defendants moved for summary judgment dismissing the amended complaint, and plaintiff moved for partial summary judgment on liability and for summary judgment dismissing, inter alia, defendants' 14th affirmative defense alleging that plaintiff was the sole proximate cause of his injuries. Defendants appeal and plaintiff cross-appeals from an order that, among other things, denied their motions with respect to the Labor Law § 240 (1) claim and granted plaintiff's motion with respect to the 14th affirmative defense. We affirm.

On their respective appeal and cross appeal, the parties contend that Supreme Court erred in denying their motions with respect to the Labor Law § 240 (1) claim because, according to defendants, plaintiff was not engaged in activity covered by the statute at the time of his accident and, according to plaintiff, he was. " '[I]t is well settled that the statute does not apply to routine maintenance in a

non-construction, non-renovation context' " (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1415 [4th Dept 2011]; *see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). "Whether a particular activity constitutes a 'repair' or routine maintenance must be decided on a case-by-case basis, depending on the context of the work" (*Dos Santos v Consolidated Edison of N.Y., Inc.*, 104 AD3d 606, 607 [1st Dept 2013]; *see Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728 [4th Dept 2010]). "Delin[e]ating between routine maintenance and repairs is frequently a close, fact-driven issue . . . , and [t]hat distinction depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work . . . , and whether the work involved the replacement of components damaged by normal wear and tear" (*Cullen v AT&T, Inc.*, 140 AD3d 1588, 1589 [4th Dept 2016] [internal quotation marks omitted]; *see Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1282 [4th Dept 2015]). Here, the evidence submitted in support of both the motions raises triable issues of fact whether plaintiff was engaged in the replacement of overhead door parts that occurred due to normal wear and tear (*see Esposito*, 1 NY3d at 528) or whether the work being performed by plaintiff at the time of the accident was necessary to restore the proper functioning of an otherwise inoperable overhead door (*see Brown v Concord Nurseries, Inc.*, 37 AD3d 1076, 1077 [4th Dept 2007]).

Defendants further contend on their appeal that the court erred in denying their motion with respect to the Labor Law § 240 (1) claim and in granting plaintiff's motion with respect to the 14th affirmative defense because they established as a matter of law that plaintiff was the sole proximate cause of his injuries. We reject that contention. In support of their motion, defendants submitted an affidavit from an expert who opined that plaintiff was the sole proximate cause of his accident because he improperly stood on the second to last step of the ladder at the time of his fall and shifted his weight, as well as plaintiff's deposition testimony wherein plaintiff admitted that he understood it to be unsafe to stand on the top two steps of the ladder. The expert offered no opinion, however, on whether the eight-foot A-frame ladder was adequate to allow plaintiff to safely complete his assigned task at the time of the accident without standing on the top two steps. In opposition to defendants' motion and in support of his motion, plaintiff offered an affidavit from his own expert, who opined that the eight-foot ladder provided to plaintiff was not an adequate safety device because it could not be positioned in the car wash bay so as to permit plaintiff to access the bearing and shaft on which he was working without standing on the top step of the ladder and reaching forward. Defendants never addressed the opinion of plaintiff's expert, but argued in their reply that plaintiff testified at his deposition that he had "selected his ladder for the project and confirmed it was appropriate for the work he was going to perform."

Initially, there is no dispute that the only safety devices available for plaintiff's use on the job site at the time of the accident were two eight-foot A-frame ladders. Thus, this is not a case where plaintiff exercised his judgment in using the top step of

the eight-foot A-frame ladder but "there were [more appropriate] ladders on the job site, . . . [plaintiff] knew where they were stored, and that he routinely helped himself to whatever tools he needed rather than requesting them from the foreman" (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554-555 [2006]; *see generally Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

Next, plaintiff testified at his deposition that he considered an eight-foot A-frame ladder to be appropriate, i.e., "safe or tall" enough, to complete work on a 10-foot overhead door generally and he thought that this ladder "probably might" be "sufficient" to perform the work on the car wash overhead door. Plaintiff, however, further testified that an eight-foot ladder would be chosen "if [the customer] did[not] want to pay for a platform lift," he did not choose the safety devices on the day of his accident, he could not recall having ever worked on the overhead doors at this particular job site before his accident, and the overhead door on which he was working at the time of the accident was not "a standard overhead door. It was a special type of door that was used in car washes." Plaintiff was not asked and offered no opinion during his deposition on the placement of the ladder or his ability to perform his assigned work in the car wash bay without utilizing the top two steps of the ladder. This is therefore also not a case where a plaintiff has offered a fact-based assessment of the adequacy of a safety device for the particular task in which the plaintiff was engaged at the time of the accident (*cf. Martin v Niagara Falls Bridge Commn.*, 162 AD3d 1604, 1605 [4th Dept 2018]; *Weitzel v State of New York*, 160 AD3d 1394, 1395 [4th Dept 2018]). Thus, there is no evidence in the record that contradicts the opinion of plaintiff's expert that the eight-foot A-frame ladder provided to plaintiff was inadequate because it could not have been placed so as to provide proper protection to plaintiff during his work on the bearing and shaft of the car wash overhead door at the time of the accident (*see generally* Labor Law § 240 [1]). Plaintiff therefore established his entitlement to judgment as a matter of law dismissing the sole proximate cause affirmative defense; any failure by plaintiff to refrain from standing on the top steps of the ladder amounts to no more than comparative negligence, which is not a defense under Labor Law § 240 (1) (*see Fronce v Port Byron Tel. Co., Inc.*, 134 AD3d 1405, 1407 [4th Dept 2015]; *Kazmierczak v Town of Clarence*, 286 AD2d 955, 955-956 [4th Dept 2001]; *see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289-290 [2003]). For the same reason, the court properly denied defendants' motion with respect to the Labor Law § 240 (1) claim insofar as it was based upon the ground that plaintiff was the sole proximate cause of his injuries.

All concur except PERADOTTO and NEMOYER, JJ., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part because, contrary to the majority's conclusion, plaintiff failed to meet his initial burden on his motion of establishing as a matter of law that he was not the sole proximate cause of the accident. We would therefore modify the order by denying plaintiff's motion insofar as it sought summary judgment dismissing the 14th affirmative defense and reinstating that defense.

"Where a 'plaintiff's actions [are] the sole proximate cause of his [or her] injuries, . . . liability under Labor Law § 240 (1) [does] not attach' " (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]). Instead, for liability to attach, "the owner or contractor must breach the statutory duty under section 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries" (*Robinson*, 6 NY3d at 554). "These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them" (*id.*). Additionally, "[o]n a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party . . . , and every available inference must be drawn in the [non-moving party's] favor" (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 496 [2019] [internal quotation marks omitted]). Here, although plaintiff submitted the affidavit of his expert, who averred that the eight-foot ladder was not an adequate safety device for the height of the job and that a scissor lift was the appropriate device to complete the work, plaintiff also submitted conflicting evidence in the form of his own deposition inasmuch as his testimony, viewed in the appropriate light, indicates that he considered and adjudged the eight-foot ladder adequate to safely perform the assigned work on the subject 10-foot overhead car wash door.

In particular, plaintiff testified that his supervisor would inform him that a service call involved a 10-foot overhead door and instruct him to take an appropriate ladder, which plaintiff understood to mean a ladder that was safe and tall enough to work on that overhead door. Plaintiff later testified, upon further questioning on the appropriate height of a ladder, that he would use an eight-foot A-frame ladder to perform work on a 10-foot overhead door and that, for the type of service call involving such a door, he would be instructed by his supervisor to take an eight-foot A-frame ladder. The favorable inference that must be drawn from that testimony, given our standard of review, is that plaintiff and his supervisor considered an eight-foot ladder to be safe and tall enough to complete work on a 10-foot overhead door. Plaintiff's testimony that he would use an eight-foot A-frame ladder on a 10-foot overhead car wash door was not, contrary to the majority's characterization, general testimony about a generic overhead door. In characterizing plaintiff's testimony in that manner, the majority improperly divorces plaintiff's answer from the context of the questioning. Rather, viewed in the appropriate light, plaintiff's answer was in response to the culmination of questioning on the topic whether using an eight-foot A-frame ladder would be adequate—i.e., safe and tall enough—to work upon an overhead car wash door, like the one at issue, with a height of 10 feet.

Moreover, plaintiff expressly testified that, in his judgment, he thought the work could be completed safely using the eight-foot A-frame ladder that he had been provided for this particular job. Admittedly, plaintiff also testified that, in situations where he

found the equipment provided to be unsafe for the job, he would call his supervisor to resolve the issue and that his supervisor would not have answered at the time in the evening that plaintiff was working on the subject car wash door. That hypothetical situation is, however, inapposite here because, according to plaintiff's own testimony, he adjudged that the work could be safely performed with the equipment provided. In addition, when asked whether the eight-foot A-frame ladders that had been provided to him and his coworker were "sufficient to do the work that [they] were doing in that particular [car wash] bay," plaintiff testified that, upon making an assessment, he thought that the ladders "probably might" be adequate to perform the work.

In sum, while plaintiff's expert stated definitively that the eight-foot ladder was not an adequate safety device for the height of the job, plaintiff himself contradicted that view inasmuch as his testimony, viewed in the light most favorable to defendants and with every available inference drawn in their favor, shows that plaintiff thought the provided eight-foot ladder was adequate to safely perform the assigned work on the subject 10-foot overhead car wash door. Such conflicting evidence presents a classic issue of fact with respect to whether an adequate safety device was provided.

With respect to causation, we conclude that, " '[u]nlike those situations in which a safety device fails for no apparent reason, thereby raising the presumption that the device did not provide proper protection within the meaning of Labor Law § 240 (1), here there is a question of fact [concerning] whether the injured plaintiff's fall [resulted from] his own misuse of the safety device and whether such conduct was the sole proximate cause of his injuries' " (*Thome v Benchmark Main Tr. Assoc., LLC*, 86 AD3d 938, 940 [4th Dept 2011]; *see Bahrman v Holtsville Fire Dist.*, 270 AD2d 438, 439 [2d Dept 2000]). In particular, plaintiff testified that, based on his safety training, it was never appropriate to stand on the second step from the top or the top cap of an A-frame ladder. Plaintiff further acknowledged that, if he was standing on the second step from the top, he would be going against his safety training. Plaintiff also testified that he would read the safety warning labels on ladders if such labels were not scratched or torn off, and photographs of the ladder that plaintiff was using at the time of the accident showed a label on the second step from the top that stated: "Do Not Stand at or above this level. YOU CAN LOSE YOUR BALANCE." Despite all of the warnings and safety training, plaintiff acknowledged during his deposition that the surveillance video depicted him standing on the second step from the top of the ladder just before the accident. Indeed, screenshots from the surveillance video submitted by plaintiff in support of his motion depict plaintiff improperly standing on the second step from the top before the ladder tips to the right as plaintiff loses his balance and falls toward the floor before landing on and denting the leg of the tipped ladder with his body.

Inasmuch as unnecessarily standing on the second step from the top of an A-frame ladder constitutes misuse of such a ladder, and plaintiff was depicted standing on the ladder in that manner just

before the fall, we conclude that plaintiff's submissions raised an issue of fact whether it was necessary for plaintiff to be on that step in order to perform his work on the 10-foot overhead door and, if not, whether plaintiff's own actions were the sole proximate cause of the accident (*cf. Kosinski v Brendan Moran Custom Carpentry, Inc.*, 138 AD3d 935, 936 [2d Dept 2016]; *Miller v Spall Dev. Corp.*, 45 AD3d 1297, 1298-1299 [4th Dept 2007]). Unlike other cases, there is evidence here that plaintiff knew at the time of the accident that his use of the second step from the top of the A-frame ladder was unsafe (*cf. Kin v State of New York*, 101 AD3d 1606, 1608 [4th Dept 2012]), and plaintiff's misuse of the ladder is not based on conjecture but rather on plaintiff's own testimony and surveillance video of the accident (*cf. Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582 [4th Dept 2011]; *Woods v Design Ctr., LLC*, 42 AD3d 876, 877 [4th Dept 2007]).

Taken all together, we conclude that "questions of fact exist as to whether 'the ladder failed to provide proper protection,' whether 'plaintiff should have been provided with additional safety devices,' and whether the ladder's purported inadequacy or the absence of additional safety devices was a proximate cause of plaintiff's accident" (*Cutaia v Board of Mgrs. of the 160/170 Varick St. Condominium*, 38 NY3d 1037, 1039 [2022]). Thus, contrary to the majority's conclusion, the court erred in granting plaintiff's motion insofar as it sought summary judgment dismissing defendants' sole proximate cause defense because, on this record, "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*, 1 NY3d at 289 n 8). Defendants should be able to litigate those issues before a trier of fact.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

778

KA 17-00567

PRESENT: LINDLEY, J.P., NEMOYER, WINSLOW, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY B. SOTO, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (CATHERINE A. MENIKOTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 3, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing those parts convicting defendant of criminal possession of a weapon in the second degree under counts one and two of the superseding indictment and as modified the judgment is affirmed and a new trial is granted on those counts.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of four counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) arising from defendant's alleged possession of two separate firearms. Contrary to defendant's contentions, we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and that the verdict, viewed in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We agree with defendant, however, that Supreme Court erred in failing to give a circumstantial evidence instruction. The evidence against defendant with respect to his possession of the .22 caliber revolver was entirely circumstantial, and the court's jury instructions "failed to convey to the jury in substance that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence" (*People v Burnett*, 41 AD3d 1201, 1202 [4th Dept 2007] [internal quotation marks omitted]; *see People v Sanchez*, 61 NY2d 1022, 1024 [1984]). Inasmuch as the proof of

defendant's guilt is not overwhelming, the inadequacy of the charge was prejudicial error requiring reversal of those parts of the judgment convicting defendant under counts one and two of the superseding indictment and a new trial with respect thereto, notwithstanding defendant's failure to request such a charge or to except to the charge as given (*see Burnett*, 41 AD3d at 1202; *People v Marsalis*, 189 AD2d 897, 897-898 [2d Dept 1993]; *People v Isidore*, 158 AD2d 933, 933-934 [4th Dept 1990]). We therefore modify the judgment accordingly.

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

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

780

TP 22-00825

PRESENT: LINDLEY, J.P., NEMOYER, WINSLOW, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF DAVID SELL, PETITIONER,

V MEMORANDUM AND ORDER

C. YEHL, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

LOU FOX, BROOKLYN, FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Paul Wojtaszek, J.], entered May 17, 2022) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated a disciplinary rule.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated inmate rule 113.31 (7 NYCRR 270.2 [B] [14] [xxi] [alcohol use]). We reject petitioner's contention that the determination is not supported by substantial evidence. Petitioner's differing version of events and his assertion that the officer's testimony was inconsistent "created credibility issues for the Hearing Officer to resolve" (*Matter of Sherman v Annucci*, 142 AD3d 1196, 1197 [3d Dept 2016]; *see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]).

Contrary to petitioner's contention, he "was not entitled to a copy of the instruction manual for the testing equipment" used to process his urine sample (*Matter of Matthews v Annucci*, 162 AD3d 1432, 1433 [3d Dept 2018]; *see Matter of Morrishill v Prack*, 120 AD3d 1474, 1474 [3d Dept 2014], *lv granted* 24 NY3d 914 [2015], *appeal withdrawn* 25 NY3d 948 [2015]; *Matter of Cureton v Goord*, 262 AD2d 1031, 1031 [4th Dept 1999]). Contrary to petitioner's further contention, the documents he requested from the independent testing laboratory "were either unavailable, irrelevant, or duplicative of other evidence in the record" (*Matter of Rincon v Selsky*, 28 AD3d 565, 566 [2d Dept 2006]), and thus "the record establishes that petitioner received all

the relevant and available documents to which he was entitled" (*Matter of Farrington v Annucci*, 148 AD3d 1810, 1811 [4th Dept 2017] [internal quotation marks omitted]).

We have reviewed petitioner's remaining contentions and conclude that none warrants a different result.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

789

CA 22-00105

PRESENT: LINDLEY, J.P., NEMOYER, WINSLOW, BANNISTER, AND MONTOUR, JJ.

JESSIE DAVIS, JR., CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

THE STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125370.)

THE DRATCH LAW FIRM, P.C., NEW YORK CITY (BRIAN M. DRATCH OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Judith A. Hard, J.), entered July 7, 2021. The judgment dismissed the claim.

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

Memorandum: Claimant commenced this action seeking damages for injuries he allegedly sustained while he was an inmate when he fell to the ground after the table he was directed to sit on collapsed. After a nonjury trial on the issue of proximate cause and damages, the Court of Claims dismissed the claim on the ground that claimant failed to prove that defendant's negligence was a proximate cause of claimant's injuries. Claimant appeals, and we affirm. Contrary to claimant's contention, we conclude that the court's determination is supported by a fair interpretation of the evidence (*see generally Reames v State of New York*, 191 AD3d 1304, 1305-1306 [4th Dept 2021], *affd* 37 NY3d 1152 [2022]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

797

KA 21-01561

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINA L. DEGROFF, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (SAMUEL L. MALEBRANCHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered September 27, 2021. The judgment convicted defendant upon a plea of guilty of assault in the second degree (two counts), reckless endangerment in the first degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of two counts of assault in the second degree (Penal Law § 120.05 [9]), one count of reckless endangerment in the first degree (§ 120.25), and two counts of endangering the welfare of a child (§ 260.10 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Crogan*, 181 AD3d 1212, 1212-1213 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]) and therefore does not preclude our review of her challenge to the severity of her sentence (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

814

KA 18-00863

PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY D. COLEY, DEFENDANT-APPELLANT.

ERIC TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 16, 2017. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (five 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 five counts of robbery in the second degree (Penal Law § 160.10 [2] [b]). Defendant's conviction stems from a string of armed robberies over a four-month period at two businesses located near each other. One of those businesses, a gas station, was robbed four times. The police supplied the gas station employees with a pack of money in which a GPS device was hidden. When the gas station was robbed the fourth time, the police used the GPS device to track the money to defendant's residence, which was located within a short distance of both businesses. A search of that residence uncovered not only the GPS device, but also a gun, ski masks, and clothing consistent with witnesses' descriptions of the gunman, who arrived and departed on foot from each robbery dressed entirely in black clothing, wore a ski mask that covered his face with holes for only his eyes and mouth, and brandished a "funny-looking" or rusty gun that he repeatedly cocked during commission of the crimes.

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]). Indeed, based upon our independent review of the evidence, we conclude, with respect to all counts, that a different verdict would have been unreasonable (*see generally Bleakley*, 69 NY2d

at 495; *People v Swinton*, 87 AD3d 491, 493-494 [1st Dept 2011], *lv denied* 18 NY3d 862 [2011]).

Defendant's contention that Supreme Court erred in ordering him to pay restitution without a hearing is not preserved for our review inasmuch as defendant "did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order during the sentencing proceeding" (*People v Horne*, 97 NY2d 404, 414 n 3 [2002]; *see People v Jones*, 108 AD3d 1206, 1207 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's further contention that defense counsel was ineffective in failing to challenge the restitution order " 'cannot be resolved without reference to matter outside the record' and must therefore be raised pursuant to CPL article 440" (*People v Briggs*, 169 AD3d 1369, 1370 [4th Dept 2019], *lv denied* 33 NY3d 974 [2019]; *see People v Posner*, 100 AD3d 805, 808 [2d Dept 2012]).

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

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

834

KA 18-00699

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOVELL M. WILLIAMS, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered December 21, 2017. The judgment convicted defendant upon his plea of guilty of attempted 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 his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]), defendant contends that County Court erred in failing to conduct the requisite minimal inquiry into his request for substitution of counsel. We reject that contention because even assuming, arguendo, that defendant's contention "is not foreclosed by his guilty plea because it implicates the voluntariness of the plea . . . ," we conclude that defendant "abandoned his request for new counsel when he decid[ed] . . . to plead guilty while still being represented by the same attorney" (*People v Clemons*, 201 AD3d 1355, 1355 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022] [internal quotation marks omitted]; *see People v Jeffords*, 185 AD3d 1417, 1418 [4th Dept 2020], *lv denied* 35 NY3d 1095 [2020]; *People v Harris*, 182 AD3d 992, 994 [4th Dept 2020], *lv denied* 35 NY3d 1066 [2020]). During the plea colloquy, defendant "expressed no concerns with [his] attorney and instead confirmed that he was satisfied with [his] attorney's advice and representation" (*People v Seymore*, 188 AD3d 1767, 1769 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *see People v Lewicki*, 118 AD3d 1328, 1328-1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

We reject defendant's further contention that he was denied effective assistance of counsel due to defense counsel's failure to seek suppression of statements that defendant made to law enforcement

personnel without the benefit of *Miranda* warnings while he was incarcerated on an unrelated parole violation. Defendant's contention does not survive his guilty plea because defendant has not "demonstrate[d] that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Jackson*, 202 AD3d 1447, 1449 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022] [internal quotation marks omitted]; *see People v Coleman*, 178 AD3d 1377, 1378 [4th Dept 2019], *lv denied* 35 NY3d 1026 [2020]). Defendant received an advantageous plea deal and there is no reasonable probability that, but for defense counsel's alleged error, defendant would not have pleaded guilty and would have insisted on going to trial (*see Coleman*, 178 AD3d at 1378).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

850

KA 20-00225

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE ROMAINE, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 18, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted criminal possession of a weapon 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: On appeal from a judgment convicting him, upon his plea of guilty, of one count of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]), 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 Lopez*, 196 AD3d 1157, 1157 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]), we conclude that the sentence is not unduly harsh or severe.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

852

KA 18-02402

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM J. HETTIG, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered October 11, 2018. 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 his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

The People, relying on *People v McGovern* (265 AD2d 881 [4th Dept 1999], *lv denied* 94 NY2d 882 [2000]), assert that, because defendant was sentenced in accordance with the plea agreement, he should be bound by its terms and "not later be heard to complain that he received what he bargained for" (*People v Dixon*, 38 AD3d 1242, 1242 [4th Dept 2007] [internal quotation marks omitted]). The fact that defendant "received the bargained-for sentence[, however,] does not preclude him from seeking our discretionary review of his sentence pursuant to CPL 470.15 (6) (b)" (*People v Garcia-Gual*, 67 AD3d 1356, 1356 [4th Dept 2009], *lv denied* 14 NY3d 771 [2010]; *see generally People v Pollenz*, 67 NY2d 264, 267-268 [1986]; *People v Thompson*, 60 NY2d 513, 519-520 [1983]). We stated in *Garcia-Gual* that *McGovern* and other prior decisions of this Court "are not to be followed" to the extent that "they suggest a rule to the contrary" (*Garcia-Gual*, 67 AD3d at 1356). Nevertheless, we conclude that the sentence is not

unduly harsh or severe.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

853

KA 17-00743

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAMRON J. CAMPBELL, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (HELEN A. SYME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 12, 2016. The judgment convicted defendant upon his plea of guilty of murder in the second degree, attempted robbery in the first degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of one count each of murder in the second degree (Penal Law § 125.25 [3]) and attempted robbery in the first degree (§§ 110.00, 160.15 [2]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We affirm.

Defendant contends that Supreme Court did not make an appropriate inquiry into his request for substitution of counsel. "Assuming, arguendo, that [defendant's] contention is not foreclosed by his guilty plea" (*People v Jeffords*, 185 AD3d 1417, 1418 [4th Dept 2020], *lv denied* 35 NY3d 1095 [2020]), we conclude that defendant "abandoned his request for new counsel when he decid[ed] . . . to plead guilty while still being represented by the same attorney" (*People v Clemons*, 201 AD3d 1355, 1355 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022] [internal quotation marks omitted]; *see People v Dolison*, 200 AD3d 1632, 1633 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022]; *People v Lewicki*, 118 AD3d 1328, 1328-1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

Defendant further contends that his plea was coerced by statements made by the court. As defendant correctly concedes, he did not move to withdraw his plea or to vacate the judgment of conviction and thereby failed to preserve that contention for our review (*see*

People v Williams, 198 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 1149 [2021]; *People v Love*, 179 AD3d 1541, 1542 [4th Dept 2020], *lv denied* 35 NY3d 994 [2020]; *People v Juarbe*, 162 AD3d 1625, 1625-1626 [4th Dept 2018]). 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]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

858

KA 20-00155

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NOAH J. HOLMES, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER, MORGAN, LEWIS & BOCKIUS LLP, NEW YORK CITY (JANNA JOASSAINTE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered January 7, 2020. The judgment convicted defendant upon a jury verdict of assault 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 jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that Supreme Court erred in refusing to suppress certain evidence. Defendant initially contends that he was unlawfully arrested in the rooming house in which he resided without a warrant, and therefore any evidence obtained as a result of that arrest must be suppressed. We reject that contention.

"Courts have long recognized that the Fourth Amendment is not violated every time police enter a private premises without a warrant. Indeed, though warrantless entries into a home are 'presumptively unreasonable' . . . , '[t]he touchstone of the Fourth Amendment is reasonableness'—not the warrant requirement" (*People v Molnar*, 98 NY2d 328, 331 [2002]). Among the factors to be used in determining whether an entry was reasonable are " '(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause . . . to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry' " (*People v McBride*, 14 NY3d 440, 446 [2010], *cert denied* 562 US 931 [2010]). Ultimately, a suppression court must ascertain " 'whether in

light of all the facts of the particular case there was an urgent need that justifies a warrantless entry' " (*id.*). Applying those factors here, we conclude that, contrary to defendant's contention, the court properly determined that exigent circumstances existed to permit the warrantless entry into defendant's room. The police observed the stab wounds that the victim sustained and had not accounted for the knife that was used to inflict them, the victim knew defendant as another resident of the rooming house in which they both lived and identified him by his nickname, and defendant's room was locked from the inside. Thus, in light of all the facts, we agree with the court that "there was an urgent need that justifie[d] a warrantless entry" (*id.* [internal quotation marks omitted]; *see People v Crippen*, 156 AD3d 946, 949 [3d Dept 2017]; *People v Stevens*, 57 AD3d 1515, 1515-1516 [4th Dept 2008], *lv denied* 12 NY3d 822 [2009]; *see also People v Junious*, 145 AD3d 1606, 1608 [4th Dept 2016], *lv denied* 29 NY3d 1033 [2017], *reconsideration denied* 29 NY3d 1129 [2017]).

Defendant further contends that the court erred in refusing to suppress the in-court identification testimony of the victim based on the allegedly suggestive nature of the photo array from which the victim had previously identified him. We reject that contention as well. "The composition and presentation of the photo array were such that there was no reasonable possibility that the attention of the witness would be drawn to defendant as the suspect chosen by the police" (*People v Sylvester*, 32 AD3d 1226, 1227 [4th Dept 2006], *lv denied* 7 NY3d 929 [2006]; *see People v Peterkin*, 153 AD3d 1568, 1569 [4th Dept 2017]; *People v Smiley*, 49 AD3d 1299, 1300 [4th Dept 2008], *lv denied* 10 NY3d 870 [2008]).

We also reject defendant's contention that the court erred in refusing to suppress, as involuntarily made, a statement that he made to the police after he was taken into custody. Where, as here, a defendant contends that he could not validly waive his rights due to his mental state, "the inquiry is whether defendant could understand the *Miranda* warnings and make a knowing, voluntary and intelligent waiver of his rights" (*People v Stoffel*, 17 AD3d 992, 993 [4th Dept 2005], *lv denied* 5 NY3d 795 [2005]; *see People v Capela*, 97 AD3d 760, 761 [2d Dept 2012], *lv denied* 19 NY3d 1024 [2012]; *see generally People v Williams*, 62 NY2d 285, 289-290 [1984]). Here, the record supports the court's determination that defendant knowingly, voluntarily and intelligently waived his rights. In any event, any error in refusing to suppress the disputed statements is harmless beyond a reasonable doubt (*see People v McDonald*, 173 AD3d 1633, 1635 [4th Dept 2019], *lv denied* 34 NY3d 934 [2019]; *see generally People v Smith*, 97 NY2d 324, 330 [2002]; *People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant failed to object to the majority of the allegedly improper comments made by the prosecutor during voir dire and on summation, and thus failed to preserve for our review his contention that he was denied a fair trial by those comments (*see* CPL 470.05 [2]; *People v Williams*, 163 AD3d 1422, 1423 [4th Dept 2018]; *People v Maxey*, 129 AD3d 1664, 1666 [4th Dept 2015], *lv denied* 27 NY3d 1002

[2016], *reconsideration denied* 28 NY3d 933 [2016]). In any event, we reject defendant's contentions with respect to both the preserved and unpreserved challenges. Contrary to defendant's contentions regarding voir dire, we conclude that the prosecutor's remarks did not diminish the People's burden of proof (*see People v Townsend*, 171 AD3d 1479, 1480-1481 [4th Dept 2019], *lv denied* 33 NY3d 1109 [2019]; *see generally People v Williams*, 43 AD3d 1336, 1337 [4th Dept 2007]). Furthermore, the prosecutor's statements during summation were "fair comment on the evidence and did not exceed the broad bounds of rhetorical comment permissible in closing argument" (*People v Davis*, 38 AD3d 1170, 1172 [4th Dept 2007], *lv denied* 9 NY3d 842 [2007], *cert denied* 552 US 1065 [2007] [internal quotation marks omitted]). Even assuming, arguendo, that any of the prosecutor's comments were improper, we conclude that any improprieties "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]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

859

KA 19-00086

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KNOWLEDGE COUSER, DEFENDANT-APPELLANT.

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

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (CATHERINE A. MENIKOTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered October 18, 2018. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]). We affirm.

Initially, as defendant contends and the People correctly concede, the "purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant 'understood the nature of the appellate rights being waived' " (*People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], quoting *People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Here, "[t]he written waiver of the right to appeal signed by defendant [at the time of the plea] and the verbal waiver colloquy conducted by [County Court] together improperly characterized the waiver as 'an absolute bar to the taking of a direct appeal and the loss of attendant rights to counsel and poor person relief' " (*People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020], quoting *Thomas*, 34 NY3d at 565; *see People v Harlee*, 187 AD3d 1586, 1587 [4th Dept 2020], *lv denied* 36 NY3d 929 [2020]).

We reject defendant's contention that the court erred in failing to address his request to proceed pro se. The record establishes that defendant "did not make that request clearly and unequivocally in his letter to the court or at any other time," and we thus conclude that the court "did not err in failing to address that alleged request"

(*People v Russell*, 55 AD3d 1314, 1315 [4th Dept 2008], *lv denied* 11 NY3d 930 [2009] [internal quotation marks omitted]). Indeed, defendant's letter " 'd[id] not reflect a definitive commitment to self-representation' that would trigger a searching inquiry by the trial court" (*People v Duarte*, 37 NY3d 1218, 1219 [2022], *cert denied* — US — [Oct. 3, 2022], quoting *People v LaValle*, 3 NY3d 88, 106 [2004]); rather, defendant's alleged request to proceed pro se " 'was made in the context of a claim expressing his dissatisfaction with his attorney,' " and defendant further expressed, equivocally, an openness to proceeding with a new attorney from a different area (*People v White*, 114 AD3d 1256, 1257 [4th Dept 2014], *lv denied* 23 NY3d 1026 [2014]; *see Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 387 [2011]; *People v Gillian*, 8 NY3d 85, 88 [2006]; *LaValle*, 3 NY3d at 106-107). In any event, defendant abandoned any request to proceed pro se inasmuch as he "acquiesced to continued representation by counsel at subsequent proceedings," including the appointment of his third assigned counsel, following which defendant acted in a manner indicating his satisfaction with counsel (*People v Berrian*, 154 AD3d 486, 487 [1st Dept 2017], *lv denied* 30 NY3d 1103 [2018]; *see People v Alexander*, 109 AD3d 1083, 1084 [4th Dept 2013]; *People v Ramsey*, 201 AD2d 915, 915 [4th Dept 1994], *lv denied* 83 NY2d 875 [1994]). We conclude on this record that, "[u]pon the appointment of his third assigned counsel, '[t]he issue of self-representation was closed,' with defendant seemingly satisfied with that appointment" (*Gillian*, 8 NY3d at 88, quoting *LaValle*, 3 NY3d at 107).

Defendant next contends that his plea was not knowingly, voluntarily, and intelligently entered because, during the plea colloquy, the court failed to advise him of all the rights he would be forfeiting upon pleading guilty, including his right against self-incrimination (*see generally Boykin v Alabama*, 395 US 238, 243 [1969]; *People v Tyrell*, 22 NY3d 359, 361 [2013]). Defendant's contention is not preserved for our review (*see People v Barnes*, 206 AD3d 1713, 1714-1715 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]; *People v Hampton*, 142 AD3d 1305, 1306 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]; *see generally People v Conceicao*, 26 NY3d 375, 381-382 [2015]), and the narrow exception to the preservation rule does not apply under the circumstances of this case (*see People v Gause*, 133 AD3d 1367, 1367 [4th Dept 2015], *lv denied* 27 NY3d 997 [2016]; *cf. Conceicao*, 26 NY3d at 382; *Tyrell*, 22 NY3d at 364). In any event, defendant's contention lacks merit (*see Conceicao*, 26 NY3d at 383-384; *Barnes*, 206 AD3d at 1715).

Finally, contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

866

CA 22-00246

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

GARRETT J. WAGNER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CASSIE C. WAGNER, DEFENDANT-RESPONDENT.

LAW OFFICE OF DAVID TENNANT PLLC, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Edward C. Gangarosa, R.), entered January 6, 2022. The order denied plaintiff's motion for a reconstruction hearing.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In this matrimonial action, plaintiff appeals from an order denying his motion for a reconstruction hearing. Initially, contrary to the parties' contentions, we conclude that, despite some inartful phrasing, plaintiff's motion sought only a reconstruction hearing to reconstruct portions of the testimony of plaintiff and defendant that could not be transcribed due to malfunctions of the audio recording system. We agree with plaintiff that Supreme Court abused its discretion in denying the motion.

"Parties to an appeal are entitled to have that record show the facts as they really happened at trial, and should not be prejudiced by an error or omission of the stenographer" or the audio recording device (*People v Bethune*, 29 NY3d 539, 541 [2017]; *see People v Henderson*, 140 AD3d 1761, 1761 [4th Dept 2016]; *Matter of Jordal v Jordal*, 193 AD2d 1102, 1102 [4th Dept 1993]). Here, contrary to the court's determination, the record establishes that significant portions of the testimony of plaintiff and defendant, including testimony related to child custody and certain other issues, could not be transcribed due to malfunctions of the audio recording system, which would preclude meaningful appellate review of those issues (*see Matter of Trejo v Pavon*, 184 AD3d 760, 761 [2d Dept 2020]; *Henderson*, 140 AD3d at 1761; *Matter of Naquan L.G. [Carolyn C.]*, 119 AD3d 567, 568 [2d Dept 2014]). To the extent that they are properly before us, we have considered and rejected the parties' remaining contentions. We therefore reverse the order, grant the motion, and remit the matter

to Supreme Court to hold a reconstruction hearing with the parties and any witnesses or evidence the court deems helpful in reconstructing, if possible, those portions of the testimony of plaintiff and defendant that could not be transcribed (*see Bethune*, 29 NY3d at 541; *Trejo*, 184 AD3d at 761; *Henderson*, 140 AD3d at 1761; *see generally* CPLR 5525; *Monaco v New York City Tr. Auth.*, 153 AD3d 705, 706-707 [2d Dept 2017]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

870

KA 19-02268

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TREVON JOHNSON, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered April 15, 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: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). As an initial matter, we agree with defendant that he did not validly waive his right to appeal because Supreme Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of the waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Clark*, 191 AD3d 1471, 1472 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]). However, his further contention that he was denied effective assistance of counsel survives his plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Miller*, 161 AD3d 1579, 1580 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018] [internal quotation marks omitted]). To the extent that defendant's contention involves matters outside of the record on appeal, including the frequency and content of his conversations with his attorney, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Graham*, 171 AD3d 1559, 1560 [4th Dept 2019], *lv denied* 33 NY3d 1069 [2019]; *People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019], *lv denied* 37 NY3d 974 [2021]). To the extent that defendant's contention is reviewable on direct appeal,

we conclude that it is without merit (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Kosmetatos*, 178 AD3d 1433, 1434 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]). Indeed, defense counsel secured an advantageous plea offer on defendant's behalf, and nothing in the record before us casts doubt on defense counsel's performance (*see People v Goodwin*, 159 AD3d 1433, 1435 [4th Dept 2018]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

871

KA 21-00373

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KELLY M. RADOS, DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sanford A. Church, J.), rendered February 24, 2021. The judgment convicted defendant upon a plea of guilty of criminal possession of a forged instrument in the third degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of criminal possession of a forged instrument in the third degree (Penal Law § 170.20), defendant contends that County Court erred in denying without an evidentiary hearing her pro se motion to withdraw her guilty plea. We reject that contention.

"When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry 'rest[s] largely in the discretion of the Judge to whom the motion is made' " (*People v Brown*, 14 NY3d 113, 116 [2010], quoting *People v Tinsley*, 35 NY2d 926, 927 [1974]; *see People v Manor*, 27 NY3d 1012, 1013-1014 [2016]). "Only in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present his [or her] contentions and the court should be enabled to make an informed determination" (*Tinsley*, 35 NY2d at 927).

Here, the record establishes that defendant was afforded such an opportunity and that the court was able to make an informed determination of the motion (*see People v Weems*, 203 AD3d 1684, 1684 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]; *People v Soriano*, 178 AD3d 1376, 1377 [4th Dept 2019], *lv denied* 34 NY3d 1163 [2020]; *People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]). Further, the court did not abuse its discretion in denying

the motion. Although defendant claimed innocence and coercion at sentencing, she "admitted each element of the offense during [her] plea allocution and did not claim either that [she] was innocent or that [she] had been coerced by defense counsel at that time" (*Sparcino*, 78 AD3d at 1509; *see People v Steele*, 167 AD3d 1514, 1515 [4th Dept 2018], *lv denied* 33 NY3d 954 [2019]; *People v Newsome*, 140 AD3d 1695, 1695 [4th Dept 2016]). To the extent that defendant suggested that she was pressured into accepting the plea by defense counsel, that suggestion was "belied by [her] statements during the plea proceeding[]" and, in addition, defendant's "conclusory and unsubstantiated claim[s] of innocence [were] belied by [her] admissions during the plea colloquy" (*People v Garner*, 86 AD3d 955, 955 [4th Dept 2011]; *see People v Haffiz*, 19 NY3d 883, 884-885 [2012]; *Sparcino*, 78 AD3d at 1509).

We have considered defendant's remaining contention and conclude that it does not warrant any relief.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

874

KA 19-02106

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK SCHLIFKE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 22, 2019. The judgment convicted defendant, upon his plea of guilty, of unauthorized use of a vehicle in the second degree, grand larceny in the fourth degree (six counts) and petit larceny.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of one count of unauthorized use of a vehicle in the second degree (Penal Law § 165.06), six counts of grand larceny in the fourth degree (§ 155.30 [4], [7]), and one count of petit larceny (§ 155.25) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of one count each of criminal possession of a forged instrument in the second degree (§ 170.25) and criminal possession of stolen property in the fourth degree (§ 165.45 [2]). As defendant contends and the People correctly concede in each appeal, defendant did not validly waive his right to appeal. Although no “particular litany” is required for a waiver of the right to appeal to be valid (*People v Lopez*, 6 NY3d 248, 256 [2006]), defendant’s waivers of the right to appeal were invalid because Supreme Court’s oral colloquies mischaracterized the waivers as absolute bars to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Davis*, 188 AD3d 1731, 1731 [4th Dept 2020], *lv denied* 37 NY3d 991 [2021]). Although the record establishes that defendant executed a written waiver of the right to appeal in each appeal, the written waivers did not cure the deficient oral colloquies because the court did not inquire of defendant whether he understood the written waivers or whether he had read the waivers before signing them (*see People v*

Sanford, 138 AD3d 1435, 1436 [4th Dept 2016]).

Defendant contends in both appeals that he was denied due process at sentencing by the court's consideration of an email from a police detective who had prior dealings with defendant (*see generally People v Naranjo*, 89 NY2d 1047, 1049 [1997]). That contention is not preserved for our review because defendant made no objection at sentencing (*see People v Houston*, 142 AD3d 1397, 1399 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]; *People v Colome-Rodriguez*, 120 AD3d 1525, 1525-1526 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Contrary to defendant's further contention in both appeals, the sentences are not unduly harsh or severe. We note with respect to appeal No. 1, however, that the certificate of conviction contains several errors regarding the counts in the superior court information to which defendant pleaded guilty, and the certificate of conviction must therefore be amended to reflect that, under count four, defendant pleaded guilty to grand larceny in the fourth degree in violation of Penal Law § 155.30 (7); under count seven, he pleaded guilty to petit larceny; and under count eight, he pleaded guilty to grand larceny in the fourth degree in violation of section 155.30 (4) (*see generally People v Morrow*, 167 AD3d 1516, 1518 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]; *People v Kowal*, 159 AD3d 1346, 1347 [4th Dept 2018]; *People v Roots*, 48 AD3d 1031, 1032 [4th Dept 2008]). Finally, with respect to appeal No. 2, we note that the certificate of conviction does not reflect defendant's status as a second felony offender, and it must be amended accordingly (*see People v Southard*, 163 AD3d 1461, 1462 [4th Dept 2018]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

875

KA 19-02107

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK SCHLIFKE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 22, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree and criminal possession of stolen property in the fourth degree.

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

Same memorandum as in *People v Schlifke* ([appeal No. 1] — AD3d — [Nov. 18, 2022] [4th Dept 2022]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

876

KA 17-00459

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAHLIL J. NELSON, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (HELEN A. SYME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 14, 2016. The judgment convicted defendant upon a plea of guilty of murder 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 murder in the second degree (Penal Law § 125.25 [3]), defendant contends that Supreme Court erred in failing sua sponte to order a competency examination pursuant to CPL 730.30 (1). "It is well settled that the decision to order a competency examination under CPL 730.30 (1) lies within the sound discretion of the trial court" (*People v Williams*, 35 AD3d 1273, 1274 [4th Dept 2006], *lv denied* 8 NY3d 928 [2007]; *see People v Morgan*, 87 NY2d 878, 879-880 [1995]). "A defendant is presumed competent . . . , and the court is under no obligation to issue an order of examination . . . unless it has 'reasonable ground . . . to believe that the defendant was an incapacitated person' " (*Morgan*, 87 NY2d at 880). Based on the record before us, we conclude that the court did not abuse its discretion in failing sua sponte to order a competency examination (*see id.* at 879-880).

Defendant's further contention that his plea was not entered knowingly and voluntarily is not preserved for our review because he did not move to withdraw his plea or to vacate the judgment of conviction on that ground, and this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665-666 [1988]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

877

CAF 21-01684

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF JENNIFER A. BUKOWSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GENE FLORENTINO, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

MARGARET A. MURPHY, P.C., HAMBURG (MARGARET A. MURPHY OF COUNSEL), FOR PETITIONER-APPELLANT.

THE LAW OFFICE OF RACHEL K. MARRERO, ESQ., BUFFALO (RACHEL K. MARRERO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 9, 2020 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 these proceedings pursuant to Family Court Act article 6, petitioner-respondent grandmother appeals, in appeal Nos. 1 and 2, from two orders granting the motions of respondent-petitioner parents, made at the close of the grandmother's proof at a hearing, to dismiss the grandmother's petitions, which had sought to modify a prior stipulated order of visitation with respect to the subject child. In appeal No. 3, the grandmother appeals from an order granting the cross petitions of the parents seeking termination of the grandmother's visitation. We affirm in each appeal.

As a preliminary matter, we reject the contention of the parents and the Attorney for the Child that appeal Nos. 1 and 2 should be dismissed as untimely, and the contention of the parents that appeal No. 3 should be dismissed as untimely. Inasmuch as the orders in appeal Nos. 1 and 2 indicate that the grandmother may have been served the orders by the court via email only, which is not a method of service provided for in Family Court Act § 1113, and the record does not otherwise demonstrate that she was served by any of the methods authorized by the statute, we cannot determine on this record when, if ever, the time to take the appeals began to run, and thus it cannot be

said that the grandmother's appeals in appeal Nos. 1 and 2 are untimely (*see Matter of Grayson S. [Thomas S.]*, — AD3d —, —, 2022 NY Slip Op 05649, *1-2 [4th Dept 2022]; *Matter of Batts v Muhammad*, 198 AD3d 750, 751 [2d Dept 2021]; *Matter of Tynell S.*, 43 AD3d 1171, 1172 [2d Dept 2007]). Similarly, it cannot be said that the grandmother's appeal in appeal No. 3 is untimely inasmuch as "[t]here is no evidence in the record that the [grandmother] was served with the order . . . by a party or the child's attorney, that [she] received the order in court, or that the Family Court mailed the order to the [grandmother]" (*Batts*, 198 AD3d at 751; *see* Family Ct Act § 1113; *Grayson S.*, — AD3d at —, 2022 NY Slip Op 05649, *2; *Tynell S.*, 43 AD3d at 1172).

Contrary to the grandmother's contention in appeal Nos. 1 and 2, we conclude that the court properly granted the parents' motions to dismiss, made at the close of the grandmother's proof at the hearing, upon determining that the grandmother failed to establish a change in circumstances sufficient to warrant an inquiry into whether modifying the prior stipulated order by increasing her visitation would be in the child's best interests (*see Matter of Kashif II. v Lataya KK.*, 99 AD3d 1075, 1077 [3d Dept 2012]; *Matter of Gridley v Syrko*, 50 AD3d 1560, 1561 [4th Dept 2008]; *Matter of Schwitzer v Plank*, 8 AD3d 1077, 1078 [4th Dept 2004]). Contrary to the grandmother's contention in appeal No. 3, we conclude that the court properly granted the parents' cross petitions inasmuch as the record supports the court's determination that the parents presented evidence establishing that a change in circumstances had occurred and that it was in the best interests of the child to terminate the grandmother's visitation (*see Matter of Wilson v McGlinchey*, 2 NY3d 375, 382 [2004]; *Matter of Macri v Brown*, 133 AD3d 1333, 1333-1334 [4th Dept 2015]; *Matter of Ordona v Campbell*, 132 AD3d 1246, 1247-1248 [4th Dept 2015]). The grandmother's "important interest in having a relationship with the child 'must yield . . . where[, as here,] the circumstances of the child's family—including the worsening relations between the litigants and the strenuous objection to grandparent visitation by both parents—render the continuation of visitation with the grandparent[] not in the child's best interest[s]' " (*Macri*, 133 AD3d at 1334, quoting *Wilson*, 2 NY3d at 382).

We have considered the grandmother's remaining contentions in these appeals and conclude that none warrants reversal or modification of the orders.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

878

CAF 21-01686

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF JENNIFER A. BUKOWSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BECKY FLORENTINO, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

MARGARET A. MURPHY, P.C., HAMBURG (MARGARET A. MURPHY OF COUNSEL), FOR PETITIONER-APPELLANT.

THE LAW OFFICE OF RACHEL K. MARRERO, ESQ., BUFFALO (RACHEL K. MARRERO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 9, 2020 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.

Same memorandum as in *Matter of Bukowski v Florentino* ([appeal No. 1] — AD3d — [Nov. 18, 2022] [4th Dept 2022]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

879

CAF 21-01687

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF GENE FLORENTINO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER BUKOWSKI, RESPONDENT-APPELLANT.

IN THE MATTER OF BECKY FLORENTINO,
PETITIONER-RESPONDENT,

V

JENNIFER BUKOWSKI, RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

MARGARET A. MURPHY, P.C., HAMBURG (MARGARET A. MURPHY OF COUNSEL), FOR RESPONDENT-APPELLANT.

THE LAW OFFICE OF RACHEL K. MARRERO, ESQ., BUFFALO (RACHEL K. MARRERO OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered April 8, 2021 in a proceeding pursuant to Family Court Act article 6. The order terminated respondent's visitation with the subject child.

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

Same memorandum as in *Matter of Bukowski v Florentino* ([appeal No. 1] — AD3d — [Nov. 18, 2022] [4th Dept 2022]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

882

CAF 21-01086

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF JASON N. MANIOCI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RACHEL E. SCHREIBER, RESPONDENT-APPELLANT.

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

BRIDGET L. FIELD, ROCHESTER, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered June 29, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary residential custody of the subject child to petitioner.

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

Memorandum: In this Family Court Act article 6 proceeding, respondent mother appeals from an order that, inter alia, granted after a hearing the petition of petitioner father seeking, in effect, to modify a prior custody order by awarding him primary residential custody of the parties' child, with visitation to the mother.

Initially, we note that the mother does not dispute that there was a sufficient 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 child would be served by a change in custody (*see Matter of Clark v Clark*, 199 AD3d 1455, 1455 [4th Dept 2021]). Although the mother correctly contends that the court did not specify the factors that it relied upon in conducting its best interests analysis (*see Matter of Howell v Lovell*, 103 AD3d 1229, 1231 [4th Dept 2013]), "[o]ur authority in determinations of custody is as broad as that of Family Court . . . and where, as here, the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450 [4th Dept 2007]; *see Howell*, 103 AD3d at 1231; *see also Matter of Belcher v Morgado*, 147 AD3d 1335, 1336 [4th Dept 2017]).

Here, after reviewing the appropriate factors (*see generally Fox*

v Fox, 177 AD2d 209, 210-211 [4th Dept 1992]), we conclude that the totality of the circumstances supports the determination that the subject child's best interests are served by awarding the father primary residential custody. The record establishes, inter alia, that the father has been the primary custodial parent since the time he filed his petition in 2020, and the continuity and stability of the living situation weighs in favor of the father. In addition, the mother was still undergoing treatment for her drug addiction at the time of the hearing, and she had missed a number of visitations with the child, including one scheduled visit that she missed because she had been arrested. Thus, the record establishes that the father is better able to provide for the child's emotional and intellectual development (*see generally Matter of Caughill v Caughill*, 124 AD3d 1345, 1347 [4th Dept 2015]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

883

CA 22-00013

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF FORECLOSURE OF TAX LIENS
BY PROCEEDING IN REM PURSUANT TO ARTICLE 11
OF THE REAL PROPERTY TAX LAW BY COUNTY OF
ONTARIO, PETITIONER-APPELLANT,

V ORDER

JEFFREY D. GIBBS, RESPONDENT-RESPONDENT.

JASON S. DIPONZIO, ROCHESTER, FOR PETITIONER-APPELLANT.

LAW FIRM OF AARON M. GAVENDA, ROCHESTER (AARON M. GAVENDA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Charles A. Schiano, Jr., J.), entered May 27, 2021. The order, inter alia, vacated a default judgment of foreclosure.

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

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

884

CA 22-00147

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS
BY PROCEEDING IN REM PURSUANT TO ARTICLE 11
OF THE REAL PROPERTY TAX LAW BY THE COUNTY OF
ONTARIO, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN MESSERVEY, RESPONDENT-RESPONDENT.

JASON S. DIPONZIO, ROCHESTER, FOR PETITIONER-APPELLANT.

WHITCOMB LAW FIRM, P.C., CANANDAIGUA (DAVID J. WHITCOMB OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Charles A. Schiano, Jr., J.), entered July 16, 2021. The order, among other things, granted the motion of respondent to vacate a default judgment of foreclosure.

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

Memorandum: In this in rem tax foreclosure proceeding pursuant to RPTL article 11, petitioner appeals from an order that, following a hearing, granted the motion of respondent by, among other things, vacating the default judgment of foreclosure against respondent's residential property. Contrary to petitioner's contention, we conclude that Supreme Court did not abuse its discretion in vacating the default judgment of foreclosure "for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *see Matter of County of Genesee [Butlak]*, 124 AD3d 1330, 1331 [4th Dept 2015], *lv denied* 25 NY3d 904 [2015]; *see also Matter of County of Ontario [Lundquist 1996 Living Trust]*, 155 AD3d 1567, 1567-1568 [4th Dept 2017], *lv denied* 30 NY3d 912 [2018]; *Matter of County of Ontario [Middlebrook]*, 59 AD3d 1065, 1065 [4th Dept 2009]). We have considered petitioner's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

888

CA 21-01322

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

MEAGAN R., INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF K.R., DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AHMED MANSOUR, M.D., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ADAM P. CAREY OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE FITZGERALD LAW FIRM, PC, YONKERS (MITCHELL GITTIN OF COUNSEL), AND LAW OFFICE OF JOHN M. DALY, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered August 17, 2021. The order, among other things, denied the motion of defendant Ahmed Mansour, M.D. to dismiss the complaint against him.

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

Memorandum: Plaintiff, individually and as administrator of decedent's estate, commenced this action seeking to recover damages arising from the alleged negligence of defendants in managing plaintiff's pregnancy, labor, and delivery. Ahmed Mansour, M.D. (defendant) appeals from an order that denied his motion to dismiss the complaint against him for lack of proper service and granted plaintiff's cross motion insofar as it sought an order extending the time in which to serve defendant and authorizing an alternative method of service. We affirm.

"On a motion to dismiss based on lack of proper service, the court may, upon good cause shown or in the interest of justice, extend the time for service" (*Pierce v Village of Horseheads Police Dept.*, 107 AD3d 1354, 1356 [3d Dept 2013] [internal quotation marks omitted]). "It is well settled that the determination to grant [a]n extension of time for service is a matter within the court's discretion" (*Moss v Bathurst*, 87 AD3d 1373, 1374 [4th Dept 2011] [internal quotation marks omitted]; *see generally Matter of Delaware Operations Assoc. LLC v New York State Dept. of Health*, 187 AD3d 1560, 1561 [4th Dept 2020]; *Bradley v Rexcoat*, 187 AD3d 1576, 1576 [4th Dept 2020]). After weighing the relevant factors, including the

"expiration of the [s]tatute of [l]imitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of . . . plaintiff's request for the extension of time, and prejudice to defendant" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]), and noting that "no one factor is more important than the others" (*Moss*, 87 AD3d at 1374), we reject defendant's contention that Supreme Court abused its discretion in denying his motion and granting plaintiff's cross motion insofar as it sought an extension of time to serve defendant (*see generally id.*).

We similarly reject defendant's contention that the court abused its discretion in granting plaintiff's cross motion insofar as it sought authorization for an alternative method of service. "CPLR 308 (5) vests a court with the discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308 (1), (2), and (4) are 'impracticable' " (*Astrologo v Serra*, 240 AD2d 606, 606 [2d Dept 1997]; *see Safadjou v Mohammadi* [appeal No. 3], 105 AD3d 1423, 1424 [4th Dept 2013]). "Although the impracticability standard is not capable of easy definition . . . , [a] showing of impracticability under CPLR 308 (5) does not require proof of actual prior attempts to serve a party under the methods outlined pursuant to subdivisions (1), (2) or (4)" (*Safadjou*, 105 AD3d at 1424 [internal quotation marks omitted]; *see Richards v Hedman Resources Ltd.*, 204 AD3d 1407, 1409 [4th Dept 2022], *appeal dismissed* — NY3d — [Oct. 20, 2022]; *David v Total Identity Corp.*, 50 AD3d 1484, 1485 [4th Dept 2008]). Here, we conclude that plaintiff established that service upon defendant pursuant to CPLR 308 (1), (2), or (4) would be impracticable (*see Safadjou*, 105 AD3d at 1424; *State St. Bank & Trust Co. v Coakley*, 16 AD3d 403, 403 [2d Dept 2005], *lv dismissed* 5 NY3d 746 [2005]). Specifically, plaintiff established that defendant had left the United States and declared his intention to remain in Saudi Arabia, where he worked for the Saudi Arabian government (*see Safadjou*, 105 AD3d at 1424; *Astrologo*, 240 AD2d at 606-607). Further, plaintiff established that Saudi Arabia is not a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361, TIAS No. 6638 [1965]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

889

TP 22-00512

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF WILLIAM I. MILLER AND BLIND FAITH W-C, INC., PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENT-PETITIONER, AND DEIRDRE CHESSON, RESPONDENT.

CAROLINE J. DOWNEY, GENERAL COUNSEL, STATE DIVISION OF HUMAN RIGHTS, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR RESPONDENT-PETITIONER.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Henry J. Nowak, J.], entered October 13, 2021) to enforce a determination of the New York State Division of Human Rights. The determination, among other things, found petitioners in violation of the Human Rights Law.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the cross petition is granted, and petitioners-respondents are directed to pay respondent Deirdre Chesson the sum of $7,000 as compensatory damages with interest at the rate of 9% per annum commencing March 29, 2021, and to pay the Comptroller of the State of New York the sum of $3,000 for a civil fine and penalty with interest at the rate of 9% per annum commencing March 29, 2021.

Memorandum: Respondent-petitioner New York State Division of Human Rights (SDHR), as relevant to this proceeding, filed a cross petition pursuant to Executive Law § 298 seeking to enforce the final order of its Commissioner, which in turn substantially adopted the "recommended findings of fact, opinion and decision, and order" of an Administrative Law Judge (ALJ). The ALJ concluded, following a public hearing, that petitioners-respondents (petitioners) had engaged in an unlawful racial discriminatory practice relating to a public accommodation and awarded respondent Deirdre Chesson $7,000 in compensatory damages for mental anguish and humiliation, and imposed a $3,000 civil fine and penalty on petitioners.

We conclude that the determination of the Commissioner is supported by substantial evidence (*see Matter of Wal-Mart Stores E., L.P. v New York State Div. of Human Rights*, 71 AD3d 1452, 1453 [4th Dept 2010]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-181 [1978]). We further conclude that

the award of compensatory damages to Chesson is "reasonably related to the wrongdoing, supported by substantial evidence, and comparable to other awards for similar injuries" (*Matter of State Div. of Human Rights v Lucky Joy Rest., Inc.*, 131 AD3d 536, 538 [2d Dept 2015]; *see Matter of New York State Div. of Human Rights v Caprarella*, 82 AD3d 773, 775 [2d Dept 2011]; *see e.g. Wal-Mart Stores E., L.P.*, 71 AD3d at 1452), and that SDHR properly imposed the civil fine and penalty upon its determination that petitioners "committed an unlawful discriminatory act" (Executive Law § 297 [4] [c] [vi]; *see generally Matter of New York State Div. of Human Rights v Hawk*, 195 AD3d 1395, 1397-1398 [4th Dept 2021]). Finally, because the unopposed cross petition for enforcement demonstrates that petitioners have failed to comply with the order, enforcement is granted (*see generally* Executive Law § 298).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

891

KA 20-01385

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SYAF ISMAEL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 11, 2019. The judgment convicted defendant, upon a jury verdict, of aggravated harassment in the second degree and criminal contempt in the first degree.

It is hereby ORDERED that said 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 after a jury trial of aggravated harassment in the second degree (Penal Law § 240.30 [1] [a]) and criminal contempt in the first degree (§ 215.51 [b] [iii]). The conviction stemmed from two sets of threatening text messages defendant sent to his estranged wife while they were engaged in a Family Court matter. Viewing the evidence in the light most favorable to the People (*see People v Williams*, 84 NY2d 925, 926 [1994]), we reject defendant's contention that there is legally insufficient evidence to support the conviction with respect to the issue of identity, i.e., that defendant was the person who had sent the text messages (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant failed to preserve for review his remaining contentions regarding the legal sufficiency of the evidence (*see People v Harper*, 132 AD3d 1230, 1230-1231 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]), which, in any event, lack merit. Further, viewing the evidence in light of the elements of the crimes as charged to the jury, we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant next contends that Supreme Court erred in allowing a witness to testify at trial that defendant's wife, who did not testify at trial, said shortly after receiving the first set of text messages that "they're from [defendant]." The wife's statement was admitted

over objection under the excited utterance exception to the rule against hearsay.

We agree with defendant that, under the circumstances, the court erred in admitting the wife's statement as an excited utterance. That exception applies to a " 'spontaneous declaration or excited utterance—made contemporaneously or immediately after a startling event—which asserts the circumstances of that occasion *as observed by the declarant*' " (*People v Cummings*, 31 NY3d 204, 209 [2018] [emphasis added]; *see People v Thelismond*, 180 AD3d 1076, 1077-1078 [2d Dept 2020], *lv denied* 35 NY3d 1029 [2020]). It applies to statements "made as a direct result of sensory perception" that express "the true belief of the declarant as to the facts observed" (*People v Edwards*, 47 NY2d 493, 497 [1979]; *see People v Dunaway*, 207 AD3d 742, 743-744 [2d Dept 2022]). Assuming, arguendo, that the wife experienced the requisite startling event, we note that the disputed statement did not reflect a fact or circumstance personally observed by the wife, but rather her inferential conclusion as to the author of the messages. It is undisputed that the text messages came from a number not identified as belonging to defendant, and defendant did not identify himself by name as the sender in the messages. Thus, the wife's identification of defendant as the sender was "not a report of [her] contemporaneous *observation*, but rather [her] *surmise*" (*Brown v Keane*, 355 F3d 82, 89 [2d Cir 2004]).

Nonetheless, we conclude that the error in admitting the statement was harmless inasmuch as the proof of defendant's guilt is overwhelming and there is no significant probability that the jury would have acquitted defendant had the error not occurred (*see generally People v Kello*, 96 NY2d 740, 744 [2001]; *People v Mountzouros*, 206 AD3d 1706, 1708 [4th Dept 2022]). Notably, the text messages themselves were written from defendant's perspective, referenced in the first person events and occurrences that happened to defendant, and in context only made sense if written by defendant (*see generally People v Mencel*, 206 AD3d 1550, 1552 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]; *People v Green*, 107 AD3d 915, 916 [2d Dept 2013], *lv denied* 22 NY3d 1088 [2014]). Further, after receiving the first three messages in the first set, defendant's wife responded "Syaf?" i.e., defendant's name, and thus the wife's belief that defendant sent the messages was independently demonstrated even without the disputed portion of the hearsay statement.

Inasmuch as defendant "has completed serving the sentence imposed, his contention that the sentence is unduly harsh and severe has been rendered moot" (*People v Anderson*, 66 AD3d 1431, 1431 [4th Dept 2009], *lv denied* 13 NY3d 905 [2009] [internal quotation marks omitted]). Even assuming, arguendo, that defendant's contention is not moot, we would decline to reduce the sentence in the interest of justice (*see id.*).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

892

KA 18-01790

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK Y. FLOYD, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered July 19, 2018. The judgment convicted defendant, upon a plea of guilty, of grand larceny in the fourth 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 grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that County Court erred in summarily denying his request to withdraw his guilty plea. Preliminarily, because that contention would survive even a valid waiver of the right to appeal, we need not consider defendant's challenge to the validity of the waiver (*see People v Thomas*, 34 NY3d 545, 558 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Roots*, 201 AD3d 1364, 1365 [4th Dept 2022]; *People v Gizowski*, 182 AD3d 989, 989 [4th Dept 2020], *lv denied* 35 NY3d 1027 [2020]).

Although defendant preserved his contention for our review by seeking to withdraw his plea on essentially the same grounds as those advanced on appeal (*see People v Johnson*, 23 NY3d 973, 975 [2014]; *People v Bovio*, 206 AD3d 1568, 1568-1569 [4th Dept 2022]), we reject it on the merits. "[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 discretion unless there is some evidence of innocence, fraud, or mistake in inducing a plea" (*People v Alexander*, 203 AD3d 1569, 1570 [4th Dept 2022], *lv denied* 38 NY3d 1031 [2022] [internal quotation marks omitted]). Furthermore, " '[o]nly in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity

to present his [or her] contentions and the court should be enabled to make an informed determination' " (*People v Harris*, 206 AD3d 1711, 1711-1712 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022], quoting *People v Tinsley*, 35 NY2d 926, 927 [1974]; *see People v Weems*, 203 AD3d 1684, 1684 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]). "[W]hen a motion to withdraw a plea is patently insufficient on its face, a court may simply deny the motion" (*People v Mitchell*, 21 NY3d 964, 967 [2013]; *see People v Brooks*, 187 AD3d 1587, 1589 [4th Dept 2020], *lv denied* 36 NY3d 1049 [2021]). 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 Fox*, 204 AD3d 1452, 1453 [4th Dept 2022] [internal quotation marks omitted]; *see Alexander*, 203 AD3d at 1570).

Here, defendant was provided with a reasonable opportunity to present his contentions in support of his request to withdraw the plea. However, defendant's conclusory and unsubstantiated assertions that he was innocent, under duress, and dissatisfied with defense counsel's representation were belied by the statements that he made during the plea colloquy, and therefore his request was patently without merit (*see Fox*, 204 AD3d at 1453; *People v Riley*, 182 AD3d 998, 998-999 [4th Dept 2020], *lv denied* 35 NY3d 1069 [2020], *reconsideration denied* 36 NY3d 931 [2020]; *People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]). We therefore perceive no abuse of discretion in the court's summary denial of defendant's request to withdraw his plea (*see Alexander*, 203 AD3d at 1570; *Gizowski*, 182 AD3d at 989-990).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

893

KA 17-02230

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEONARD E. HAHN, IV, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (FARES A. RUMI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO, NEW YORK PROSECUTORS TRAINING INSTITUTE, INC., ALBANY (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered May 15, 2017. The judgment convicted defendant upon his plea of guilty of rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [3]), defendant contends that County Court erred in failing to determine on the record whether he should be afforded youthful offender status. We reject that contention. Pursuant to CPL 720.10 (2) (a) (iii), a youth who is convicted of, inter alia, rape in the first degree is ineligible for a youthful offender adjudication unless the court concludes that there are "mitigating circumstances that bear directly upon the manner in which the crime was committed" or, "where defendant was not the sole participant in the crime, [that] the defendant's participation was relatively minor" (CPL 720.10 [3]). Contrary to defendant's contention, the record establishes that the court properly recognized that defendant, who was 17 years old at the time of the commission of the crime, was eligible for youthful offender treatment if he met "either or both of the criteria provided in CPL 720.10 (3)" (*People v Middlebrooks*, 25 NY3d 516, 526 [2015]). The court offered defense counsel and defendant an opportunity to set forth any mitigating factors, but both declined (*see People v Pulvino*, 115 AD3d 1220, 1223 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014]). The court then properly placed its determination on the record that defendant was not eligible for youthful offender status because he was the sole participant in the crime and there were no mitigating factors bearing directly on the manner in which the crime was committed (*cf. People v Williams*, 185 AD3d 1456, 1457 [4th Dept 2020]; *see generally*

Middlebrooks, 25 NY3d at 526-527; *People v Carlson*, 184 AD3d 1139, 1143 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

896

KA 18-00337

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE G. ROOTS, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIE G. ROOTS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered January 10, 2017. The judgment convicted defendant upon a 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 Monroe County Court 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]). As defendant contends in his main and pro se supplemental briefs, and as the People correctly concede, he did not validly waive his right to appeal because County Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of that waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v McLaughlin*, 193 AD3d 1338, 1339 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]).

Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, and thus he failed to preserve for our review his further contention in his main and pro se supplemental briefs that his plea was coerced by the court (*see People v Williams*, 198 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 1149 [2021]; *People v Pitcher*, 126 AD3d 1471, 1472 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]). We decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends in his main and pro se supplemental briefs that he received ineffective assistance of counsel based on multiple alleged shortcomings. Specifically, defendant contends in those briefs that defense counsel was ineffective in failing to challenge certain show-up identification procedures utilized after his arrest and contends in his pro se supplemental brief that defense counsel was ineffective in failing to take certain action related to the grand jury proceedings and in failing to seek severance of certain counts. Those contentions do not survive defendant's guilty plea because he failed to demonstrate that " 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney[']s allegedly poor performance' " (*People v Grandin*, 63 AD3d 1604, 1604 [4th Dept 2009], *lv denied* 13 NY3d 744 [2009]).

Defendant also contends in his main and pro se supplemental briefs, however, that defense counsel was ineffective by failing to move to suppress evidence against him on the ground that the police unlawfully seized him without reasonable suspicion (*see generally People v De Bour*, 40 NY2d 210, 223 [1976]). We agree.

To prevail on his claim of ineffective assistance of counsel, defendant "must demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's failure to pursue colorable claims," and "[o]nly in the rare case will it be possible, based on the trial record alone, to deem [defense] counsel ineffective for failure to pursue a suppression motion" (*People v Carver*, 27 NY3d 418, 420 [2016] [internal quotation marks omitted]). Initially, we conclude that the record establishes that defense counsel could have presented a colorable argument that defendant's detention was illegal and thus that any evidence obtained as a result thereof should have been suppressed as the fruit of the poisonous tree. One of the officers who initially detained defendant testified at a *Huntley/Wade* hearing that, prior to defendant's arrest, one of the victims of a home invasion had described the suspects as two black men in their twenties, one of whom was wearing a hoodie "with some kind of emblem on the front." About a half-hour later, the officer heard a broadcast of a tip from an unidentified retired police officer. The tip, as testified to at the hearing, reported "two [black] males [in their twenties] inside [a] corner store that possibly looked suspicious" with one that "might" have had "a handgun on his side" and another that was wearing a "teddy bear type hoodie," which was later described as a hoodie with a teddy bear on the front. Based on that tip, officers responded to the corner store, entered with weapons drawn, and immediately ordered the two men, one of whom was defendant, to raise their hands. The officer testified, however, that the men were not acting suspiciously nor did she observe a weapon when she and her partner entered the store. While handcuffing defendant, the officer for the first time observed a handgun in defendant's waistband, saw blood on defendant's hoodie, and obtained statements from defendant. Defendant was thereafter taken for show-up identifications, during which the victims of the prior home invasion identified him as one of the men involved in that incident.

Given those facts, it cannot be said that a motion seeking suppression on the ground that defendant was unlawfully detained would have had "little or no chance of success" (*People v Clark*, 191 AD3d 1471, 1473 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]; *see generally People v Carter*, 142 AD3d 1342, 1343 [4th Dept 2016]), and instead those facts demonstrate that defense counsel failed to pursue a "colorable claim[]" that could have led to suppression (*Carver*, 27 NY3d at 420 [internal quotation marks omitted]). The vague description of the perpetrators of the home invasion obtained from one of the victims of that incident matched defendant only as to his general age and skin color. The victim's description of the clothing of one of the perpetrators—a hoodie with an emblem—did not on its face match the description provided by the unidentified tipster of the clothing worn by one of the people observed in the corner store—a "teddy bear type hoodie" (*see generally People v Thorne*, 207 AD3d 73, 77-78 [1st Dept 2022]; *People v Noah*, 107 AD3d 1411, 1412-1413 [4th Dept 2013]; *People v Ross*, 251 AD2d 1020, 1021 [4th Dept 1998], *lv denied* 92 NY2d 882 [1998]). The report from the unidentified tipster likewise did not provide the officers with reasonable suspicion inasmuch as it merely reported "possibl[e]" activity that the men "might" have been engaged in, and the officers did not observe any suspicious, much less criminal, activity before detaining defendant at gunpoint (*see generally People v Moore*, 6 NY3d 496, 499-500 [2006]).

Based on the record before us, we further conclude that defense counsel's failure to move to suppress evidence on the basis of defendant's allegedly unlawful detention was not part of a legitimate pretrial strategy. The record demonstrates that defense counsel prepared such a motion to suppress evidence on that basis, indicated an intent to make that motion, and simply failed to file the motion despite having been twice informed by the court of the need to do so given the People's refusal to consent to a hearing regarding the legality of the detention without such a motion. Further, because the court held a more limited suppression hearing, i.e., the *Huntley/Wade* hearing, there is no discernable reason why the scope of that hearing, and the court's resulting decision, could not have been expanded had defense counsel properly filed the prepared motion papers. Thus, this is not a case where defense counsel opted to pursue a more favorable plea deal in lieu of pretrial motions and hearings (*cf. People v Davis*, 119 AD3d 1383, 1383-1384 [4th Dept 2014], *lv denied* 24 NY3d 960 [2014]).

We further conclude that defendant's contention survives his guilty plea inasmuch as the error in failing to seek suppression on that basis infected the plea bargaining process because suppression of the challenged evidence would have resulted in dismissal of at least some of the indictment (*see Carter*, 142 AD3d at 1343).

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

remaining contentions raised in his pro se supplemental brief.

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

902

CA 22-00495

PRESENT: PERADOTTO, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF UNDINE BISTANY, RUTHELLEN BUNIS, EDWARD HANDMAN, GERMAIN HARNDEN, ANDREE LIPPES, JOEL LIPPES, ANNE MURPHY, DANIEL SACK, WILLIAM WISNIEWSKI, PETITIONERS-PLAINTIFFS-APPELLANTS, ET AL., PETITIONER-PLAINTIFF,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, COMMON COUNCIL OF CITY OF BUFFALO, BUFFALO CITY CLERK, CITY OF BUFFALO PLANNING BOARD, AND ELMWOOD CROSSING, LLC, RESPONDENTS-DEFENDANTS-RESPONDENTS.

THE LAW OFFICE OF STEPHANIE ADAMS, PLLC, BUFFALO (STEPHANIE A. ADAMS OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

CARIN S. GORDON, CORPORATION COUNSEL, BUFFALO, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS CITY OF BUFFALO, COMMON COUNCIL OF CITY OF BUFFALO, BUFFALO CITY CLERK, AND CITY OF BUFFALO PLANNING BOARD.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT ELMWOOD CROSSING, LLC.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Daniel Furlong, J.), entered August 16, 2021 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment denied and dismissed the petition-complaint.

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

> It is ADJUDGED and DECLARED that the Planned Unit Development is valid,

and as modified the judgment is affirmed without costs.

Memorandum: In 2019, respondent-defendant Elmwood Crossing, LLC filed an application for a Planned Unit Development (PUD), a type of mixed-use zone, within respondent-defendant City of Buffalo (City) at the site of the former Women and Children’s Hospital of Buffalo. Respondent-defendant Common Council of the City of Buffalo (Common

Council) voted to send the PUD application to respondent-defendant City of Buffalo Planning Board (Planning Board), which in turn considered it at a subsequent meeting and ultimately recommended that it be approved. The Common Council then considered the proposed zoning amendments required for the PUD, conducted a public hearing, and approved the PUD. Two days later, however, the Common Council reconsidered the PUD at a special session in order to approve the PUD with certain amendments that had not been considered at its prior session.

Petitioners-plaintiffs, who own property near the project, thereafter commenced this hybrid CPLR article 78 proceeding and declaratory judgment action. As relevant, petitioners alleged that the Common Council illegally adopted the PUD with amendments because it was inconsistent with the City's Comprehensive Plan and that the adoption of the PUD with amendments was improper because the amended PUD was not reviewed by the Planning Board. Supreme Court denied and dismissed the petition-complaint. Petitioners-plaintiffs-appellants (petitioners) appeal.

As an initial matter, and contrary to the assertion of certain respondents-defendants, we conclude that petitioners established their standing to bring the instant claims (*see Matter of O'Donnell v Town of Schoharie*, 291 AD2d 739, 740-741 [3d Dept 2002]; *see also Matter of West 58th St. Coalition, Inc. v City of New York*, 188 AD3d 1, 7-8 [1st Dept 2020], *mod on other grounds* 37 NY3d 949 [2021]; *Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Planning Commn. of City of N.Y.*, 259 AD2d 26, 31-32 [1st Dept 1999]). Contrary to petitioners' contention, however, they failed to meet their burden of establishing that the PUD was inconsistent with the City's Comprehensive Plan (*see generally Restuccio v City of Oswego*, 114 AD3d 1191, 1191-1192 [4th Dept 2014]; *Matter of VTR FV, LLC v Town of Guilderland*, 101 AD3d 1532, 1534 [3d Dept 2012]; *Matter of Ferraro v Town Bd. of Town of Amherst*, 79 AD3d 1691, 1694 [4th Dept 2010], *lv denied* 16 NY3d 711 [2011]). We likewise reject petitioners' contention that the procedure used to adopt the PUD was unlawful on the ground that certain amendments were not considered by the Planning Board. Here, the Planning Board properly reviewed the PUD, recommended that it be approved, and the Common Council lawfully exercised its discretion to "waive, modify, or supplement the standards of the underlying zone" (City of Buffalo Unified Development Ordinance § 11.3.8.E). Thus, this is not a case where the Common Council failed to first refer the matter to the Planning Board (*see generally Matter of Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1495 [4th Dept 2018]).

To the extent that petitioners further contend that the court's decision lacked sufficient detail, we reject that contention (*see generally* CPLR 2219 [a]). We agree with petitioners, however, that the court erred in dismissing that part of the petition-complaint seeking a declaration rather than declaring the rights of the parties (*see Matter of Kester v Nolan*, 48 AD3d 1113, 1115 [4th Dept 2008]), and we modify the judgment accordingly.

In light of the above, as petitioners acknowledge, their remaining contention is moot.

Entered: November 18, 2022

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 21-01743

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, ERIE COUNTY UNIT
OF ERIE COUNTY LOCAL 815,
PETITIONER-RESPONDENT-APPELLANT,

AND MEMORANDUM AND ORDER

COUNTY OF ERIE, RESPONDENT-PETITIONER-RESPONDENT.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (JENNIFER C. ZEGARELLI OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (ARIANNA KWIATKOWSKI OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 13, 2021 in a proceeding pursuant to CPLR article 75. The order, among other things, 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.

Memorandum: Petitioner-respondent (petitioner) commenced this proceeding pursuant to CPLR article 75 seeking to vacate an arbitration opinion and award determining that the termination of one of its members was in accordance with the parties' collective bargaining agreement (CBA). On appeal from an order denying the petition and granting the cross petition of respondent-petitioner seeking to confirm the opinion and award, petitioner contends that Supreme Court erred in its determination inasmuch as the opinion and award was irrational and the arbitrator exceeded his authority.

"An arbitration award may be vacated on three narrow grounds: 'it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003], quoting *Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]). We reject petitioner's contention that the opinion and award was irrational. " 'An award is irrational if there is no proof whatever to justify the

award' " (*Matter of Town of Greece Guardians' Club, Local 1170, Communication Workers of Am. [Town of Greece]*, 167 AD3d 1452, 1455 [4th Dept 2018]), and here the arbitrator's award was justified by the language of the CBA, the CBA's reference to the rules for the Classified Civil Service of the County of Erie, and the parties' past practices. Contrary to petitioner's contention, *Matter of County of Greene (Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO, Greene County Unit 7000, Greene County Local 820)* (129 AD3d 1181 [3d Dept 2015], *lv denied* 26 NY3d 908 [2015]) does not require a different conclusion.

Contrary to petitioner's further contention, the arbitrator did not exceed his authority by effectively rewriting the CBA or ignoring its terms, and instead interpreted the existing terms of the CBA after finding the language of the CBA to be ambiguous (*see generally Matter of Niagara Frontier Transp. Auth. [NFTA Police Benevolent Assn.]*, 192 AD3d 1551, 1551-1552 [4th Dept 2021], *lv denied* 37 NY3d 914 [2021]).

Entered: November 18, 2022

Ann Dillon Flynn
Clerk of the Court