SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 9, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED JUNE 9, 2023

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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1008

CA 21-01512

PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, AND MONTOUR, JJ.

FIELDS ENTERPRISES INC. AND BRISTOL HARBOUR MARINA, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BRISTOL HARBOUR VILLAGE ASSOCIATION, INC., AND SOUTH BRISTOL RESORTS LLC, DEFENDANTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM, BUFFALO (MATTHEW C. LENAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT BRISTOL HARBOUR VILLAGE ASSOCIATION, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered September 10, 2021. The judgment, inter alia, denied the motion of plaintiffs for partial summary judgment and granted in part the cross-motion of defendant Bristol Harbour Village Association, Inc., for partial summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the cross-motion insofar as it sought a declaration that defendant Bristol Harbour Village Association, Inc. has standing to enforce the 1990 Stipulation, vacating the third and fourth decretal paragraphs, granting the motion in part and granting judgment in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that defendant Bristol Harbour Village Association, Inc. does not have standing to enforce the 1990 Stipulation,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs, Fields Enterprises Inc. (FEI) and Bristol Harbour Marina, LLC (BHM), commenced this action for a declaratory judgment and other relief relating to, among other things, the use of an elevator owned by defendant Bristol Harbour Village Association, Inc. (BHVA) that provides access to a marina owned by FEI and operated by BHM. Plaintiffs appeal from a judgment that, inter alia, denied their motion for partial summary judgment seeking certain declarations relating to the use of the elevator and access to the marina and granted in part BHVA's cross-motion for partial summary

judgment seeking certain declarations in its favor relating to the use of the elevator and access to the marina.

BHVA is a homeowners' association (HOA) that has managed a residential community, nonparty Bristol Harbour Village (Village), on the west shore of Canandaigua Lake since 1971. During the development of the Village, nonparty Bristol Harbour Realty Associates (BHRA) submitted an application to undertake Phase I of a project consisting of the construction of a golf clubhouse and 118 residential units in the Village. Neighboring landowners, concerned that the additional development of the Village would increase vehicle and boat traffic, formed an unincorporated association, nonparty Concerned Citizens of Canandaigua Lake (CCCL), which is now defunct, for the purpose of opposing BHRA's development of the Village and the authorizing permits that BHRA was seeking for construction. In 1990, after extensive negotiations, BHRA, CCCL's officers and members of its steering committee, and certain neighboring landowners entered into a stipulation regarding the use of the boat slips at the marina (1990 Stipulation). As relevant here, the 1990 Stipulation provided that the boat slips located on the lakefront and shoreline of the Village "shall be further developed only for the use and benefit of owner occupied or owner leased residential units." At the time the 1990 Stipulation was signed, there were 128 boat slips at the marina. Nine of the slips were reserved for use by BHRA. "Of the remaining 119 boat slips, some [were] rented or available for rent to persons other than [Village] Residential Owners." The 1990 Stipulation provided that, "[a]s demand increases, those slips are eventually to be reserved only for [Village] Residential Owners." It further provided that, once the existing 128 slips were utilized solely by the Village residents and BHRA, BHRA could "construct up to 97 additional boat slips or moorings for a maximum of 225," and CCCL would not object to that construction. However, the 1990 Stipulation also provided that the "additional slips or moorings shall also be for the exclusive use only of [Village] Residential Owners." BHRA "agree[d] that the maximum number of slips and moorings at the [Village] shall never exceed 280 and that any and all additional slips shall be constructed solely for the use of [Village] Residential Owners." The 1990 Stipulation further explained that "[w]aterfront, beach and docking facilities [were] intended to be used primarily by [Village] Residential Owners and not by members of the general public." In return, CCCL agreed that it would "not actively seek to require that draft or final environmental impact statements be prepared before the undertaking of Phase I and [would] not . . . initiate [CPLR a]rticle 78 or other judicial proceedings objecting to the undertaking of Phase I." The 1990 Stipulation provided that it "shall be fully operative and binding upon [BHRA], its successors, heirs, assignees, and transferees. To the maximum extent possible the terms and conditions herein contained shall run with the land and be fully operative not only upon [BHRA], but also upon any persons or legal entity with whom [BHRA] may be affiliated in undertaking development at [the Village], and their successors."

FEI purchased the marina in 2016 from a holding company that was a successor in interest to, inter alia, BHRA. The marina is currently

accessible only through parcels of land owned by BHVA and by use of the elevator in question. In May 2020, BHVA's Board of Directors informed plaintiffs that, "[d]ue to the C[OVID-]19 pandemic," BHVA would "be implementing strict regulations over the use of [its] elevator" and that, "initially," only residents of the Village would be permitted to use it. Plaintiffs thereafter commenced this action seeking, inter alia, a judgment declaring that they and their invitees, including non-Village residents, had a right to use the elevator. Subsequently, Supreme Court denied plaintiffs' motion and granted BHVA's cross-motion in part by declaring that BHVA is both an intended third-party beneficiary of the 1990 Stipulation and an inured successor to the 1990 Stipulation and, therefore, has standing to enforce the 1990 Stipulation, and that BHVA has the authority to reasonably regulate and manage its own land, including but not limited to parcels of land it owns that are needed to access the marina, pursuant to its governing documents.

We agree with plaintiffs that the court should have granted their motion in part inasmuch as BHVA does not have standing to enforce the 1990 Stipulation as either a third-party beneficiary or an inured successor. "[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018] [internal quotation marks omitted]; *see Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 79 [4th Dept 1980]). Thus, "[p]arties asserting third-party beneficiary rights under a contract must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost" (*Matter of Coalition for Cobbs Hill v City of Rochester*, 194 AD3d 1428, 1436 [4th Dept 2021] [internal quotation marks omitted]; *see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006]). "One is an intended beneficiary if one's right to performance is appropriate to effectuate the intention of the parties to the contract *and* either the performance will satisfy a money debt obligation of the promisee to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance" (*Cole v Metropolitan Life Ins. Co.*, 273 AD2d 832, 833 [4th Dept 2000] [internal quotation marks omitted]; *see generally Salzman v Holiday Inns*, 48 AD2d 258, 261 [4th Dept 1975], *mod on other grounds* 40 NY2d 919 [1976]).

Here, plaintiffs established on their motion that BHVA does not have standing to enforce the 1990 Stipulation as a third-party beneficiary (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). It is undisputed that there was a valid contract between BHRA, which owned the marina and other portions of the Village, CCCL's officers and members of its steering committee, and the individual adjoining landowners. BHRA intended to give CCCL and the adjacent landowners the benefit of the promised performance by limiting the

future number of people using the marina to only those who were Village residents. There is no indication in the 1990 Stipulation that BHRA also intended to give Village residents the benefit of the promised performance or assumed a duty to make reparations to BHVA, or the Village residents, if the alleged benefit was lost. Indeed, in the 1990 Stipulation, BHRA agreed to limit the rights of Village residents for the benefit of CCCL and the adjacent landowners. Thus, plaintiffs established that BHVA is at best merely "an incidental beneficiary . . . who may derive [a] benefit from the performance of a contract though [it] is neither the promisee nor the one to whom performance is to be rendered" (*Cole*, 273 AD2d at 833).

We further agree with plaintiffs that they established that BHVA may not seek enforcement of the 1990 Stipulation as an inured successor (*see generally Alvarez*, 68 NY2d at 324). Restrictive covenants "restrain servient landowners from making otherwise lawful uses of their property . . . However, the law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them" (*Witter v Taggart*, 78 NY2d 234, 237 [1991]). "Where . . . a covenant runs with the land, the covenant will be enforceable against any subsequent purchaser of the land" (*National Urban Ventures, Inc. v City of Niagara Falls*, 78 AD3d 1529, 1529-1530 [4th Dept 2010]). "In determining who can enforce covenants which run with the land, the courts have recognized three classes of covenants . . . The first are those entered into with the design to carry out a general scheme for the improvement or development of real property, which are enforceable by any grantee . . . The second class are those created by the grantor, presumptively or actually, for the benefit and protection of contiguous or neighboring lands retained by the grantor . . . The grantor and [their] assigns of the property benefited by the second type of covenant may enforce it . . . , and there is no need to show a common scheme or plan . . . The third class of restrictive covenants concerns mutual covenants between owners of adjoining lands" (*Haldeman v Teicholz*, 197 AD2d 223, 224-225 [3d Dept 1994]). "A successor in interest is [o]ne who follows another in ownership or control of property and retains the same rights as the original owner, with no change in substance" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 482 n 12 [2006], *cert dismissed* 548 US 940 [2006] [internal quotation marks omitted]). "One of the elements of a restrictive covenant that runs with the land is that the parties *intended* its burden to attach to the servient parcel and its benefit to run with the dominant estate" (*Haldeman*, 197 AD2d at 225).

Here, BHVA "is not the owner of [the] dominant estate which was intended to benefit from the restrictive covenants [limiting the number of slips and to whom they may be rented] in the [1990 Stipulation]" (*id.* at 226). Further, as a nonparty to the 1990 Stipulation, BHVA's "standing to enforce the covenants is dependent upon a showing of 'the clear intent to establish the restriction *for the benefit of the party suing or [their] grantor'* " (*Thomas v June*, 194 AD2d 842, 845 [3d Dept 1993], quoting *Equitable Life Assur. Socy. of U.S. v Brennan*, 148 NY 661, 672 [1896] [emphasis added]). Indeed, the restriction at issue—i.e., the number of slips in the marina and

to whom they may be rented—did not benefit BHVA's predecessor in interest, BHRA. Rather, it was a concession made by BHRA for the benefit of CCCL and the adjoining landowners. Thus, BHVA cannot show that it "held property descendant from the promisee which *benefited* from the covenant" (*Orange & Rockland Util. v Philwold Estates*, 52 NY2d 253, 263 [1981] [emphasis added]).

In opposition to plaintiffs' motion, BHVA failed to raise an issue of fact whether plaintiffs are entitled to a declaration that BHVA does not have standing to enforce the 1990 Stipulation and, for the same reasons, we conclude that BHVA is not entitled on its cross-motion to a declaration that it has standing to enforce the 1990 Stipulation (*see generally Alvarez*, 68 NY2d at 324). We therefore modify the judgment accordingly. To the extent that plaintiffs contend that they are entitled to any additional declarations in connection with their motion, we reject that contention. In light of our determination, the remainder of plaintiffs' contentions with respect to the 1990 Stipulation are academic.

Finally, we reject plaintiffs' contention that the court erred in granting BHVA's cross-motion to the extent that it sought a declaration with respect to its authority to reasonably regulate and manage its own land, including the parcels that it owns that are needed to access the marina, pursuant to its governing documents. "In reviewing the reasonableness of [an HOA's] exercise of its rule-making authority, absent claims of fraud, self-dealing, unconscionability or other misconduct, the court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the [HOA]" (*LoRusso v Brookside Homeowner's Assn., Inc.*, 17 AD3d 323, 324-325 [2d Dept 2005], *lv dismissed* 5 NY3d 783 [2005] [internal quotation marks omitted]; *see Matter of Levandusky v One Fifth Ave. Apt. Co.*, 75 NY2d 530, 533 [1990]). "Stated somewhat differently, unless a resident challenging the [HOA's] action is able to demonstrate a breach of [the HOA's] duty, judicial review is not available" (*Levandusky*, 75 NY2d at 538). "The business judgment rule protects the [HOA's] business decisions and managerial authority from indiscriminate attack. At the same time, it permits review of improper decisions, as when the challenger demonstrates that the [HOA's] action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the [HOA's] authority" (*id.* at 540). Here, BHVA's governing documents grant it the authority to impose reasonable limitations on the use of the land that it owns, including with respect to access to its elevator.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

1021

KA 18-01847

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HU SIN, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (CHRISTY L. COOPER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered July 11, 2018. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, sexual abuse in the first degree and rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the first degree (Penal Law § 130.35 [1]), sexual abuse in the first degree (§ 130.65 [1]), and rape in the third degree (§ 130.25 [3]). The conviction arose from an incident between defendant and the victim, who was defendant's sister-in-law, in which defendant slammed the victim's head into a wall and forced himself upon her after she refused his sexual advances.

We reject defendant's contention that he was deprived of a fair trial by County Court's *Molineux* ruling. We conclude that the testimony about defendant's prior uncharged acts of abuse against other family members, i.e., two of the victim's sisters, was properly admissible in evidence "for the purpose of completing the narrative and providing relevant background information of the family dynamic" (*People v Elmore*, 175 AD3d 1003, 1004 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]; *see People v Washington*, 122 AD3d 1406, 1408 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]). The record does not support the dissent's conclusions that the testimony of the victim's two sisters "provided no additional insights into the parties' relationship" and "gave no context to explain defendant's conduct." Rather, as the dissent acknowledges, the victim and her two sisters "have a specific ethnic background whose culture affords men significant power and respect," and we therefore conclude that the testimony of the victim's two sisters was probative insofar as it

helped explain the victim's conduct in the aftermath of the rape as well as why defendant would make such an overt and brazen sexual advance on the victim while her son was present. Moreover, we further conclude that the testimony "was relevant to the element of forcible compulsion" with respect to the charges of rape in the first degree and sexual abuse in the first degree (*Elmore*, 175 AD3d at 1004; *see People v Feliciano*, 196 AD3d 1030, 1031 [4th Dept 2021], *lv denied* 37 NY3d 1059 [2021]). It was defendant's theory at trial to suggest that defendant and the victim were engaged in rough but consensual sexual acts. Thus, the testimony of the victim's sisters was relevant to establish defendant's use of force, a necessary element of rape in the first degree (Penal Law § 130.35 [1]) and sexual abuse in the first degree (§ 130.65 [1]). Indeed, the dissent does not argue otherwise.

For the reasons discussed above, we conclude that the challenged *Molineux* evidence was highly probative and that the probative value of that evidence was not outweighed by its potential for prejudice (*see Elmore*, 175 AD3d at 1004; *see generally People v Alvino*, 71 NY2d 233, 242 [1987]). Moreover, any possible prejudice to defendant was mitigated by the court's limiting instruction, which was given before the victim's sisters testified and again during the jury charge. The court explicitly instructed the jurors that they were not to consider the sisters' testimony "for the purpose of proving that the defendant had a propensity or predisposition to commit the crime charged in this case." Defendant's claim of prejudice, which is accepted by the dissent, necessarily relies on the assumption that the jury ignored the court's limiting instruction, and "the law does not permit such an assumption" (*People v Cutaia*, 167 AD3d 1534, 1535 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]; *cf. People v Presha*, 83 AD3d 1406, 1407-1408 [4th Dept 2011]; *see generally People v Stone*, 29 NY3d 166, 171-172 [2017]). Based upon the foregoing, we conclude that the court's *Molineux* ruling does not constitute an abuse of discretion (*see Elmore*, 175 AD3d at 1003-1004).

Viewing the evidence in light 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]). Finally, we conclude that the sentence is not unduly harsh or severe.

All concur except OGDEN, J., who dissents and votes to reverse in accordance with the following memorandum: I agree with the majority that the verdict is not against the weight of the evidence and that the sentence is not unduly harsh or severe. I respectfully dissent, however, from the majority's conclusion that County Court did not abuse its discretion in allowing the People to introduce *Molineux* evidence at defendant's criminal trial. In my view, the prejudicial value of the proffered *Molineux* evidence outweighed its probative value and adversely affected defendant's ability to have a fair trial. I would therefore reverse the judgment and grant defendant a new trial.

The longstanding *Molineux* rule states that "evidence of a defendant's uncharged crimes or prior misconduct is not admissible if

it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged" (*People v Cass*, 18 NY3d 553, 559 [2012]). If the evidence is probative of a legally relevant and material issue before the court, "admissibility turns on the discretionary balancing of the probative value and the need for the evidence against the potential . . . for prejudice" (*People v Alvino*, 71 NY2d 233, 242 [1987]).

"[E]vidence may not be admitted to show that a defendant has a propensity to commit a *certain type* of crime, as such evidence has no legitimate basis for admission" (*People v Leonard*, 29 NY3d 1, 7 [2017] [emphasis added]). "When we limit *Molineux* or other propensity evidence, we do so for policy reasons, due to fear of the jury's 'human tendency' to more readily 'believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime' " (*People v Brewer*, 28 NY3d 271, 276 [2016], quoting *People v Ventimiglia*, 52 NY2d 350, 359 [1981]). Thus, where the evidence "is actually of slight value when compared to the possible prejudice to the accused, it should not be admitted, even though it might technically relate to some fact to be proven" (*People v Allweiss*, 48 NY2d 40, 47 [1979]; *see Cass*, 18 NY3d at 559).

Here, I conclude that the evidence is not relevant to a specific material issue in the case. In my view, the testimony concerning defendant's alleged uncharged crimes was not necessary to complete the narrative or provide background information (*see Leonard*, 29 NY3d at 7-8). The testimony provided no additional insights into the parties' relationship, gave no context to explain defendant's conduct, and did not corroborate any particular details of the victim's testimony (*cf. Brewer*, 28 NY3d at 276-277; *People v Swift*, 195 AD3d 1496, 1499 [4th Dept 2021], *lv denied* 37 NY3d 1030 [2021]).

Moreover, I disagree with the People's argument and the determination of the court that defendant's alleged prior misconduct is sufficiently unique to constitute a common scheme or plan (*see People v Buskey*, 45 AD3d 1170, 1173 [3d Dept 2007]). Although the other alleged complainants are sisters of the victim and although all of the involved parties share a specific ethnic background whose culture is perceived to afford men significant power and respect, the probative value of defendant's attempted sexual assaults of the sisters is nothing more than evidence of defendant's propensity to commit sex crimes. It neither served as context to explain defendant's conduct nor established that his actions were part of a common scheme or plan and not the product of accident or mistake. The shared characteristics of defendant's alleged prior crimes simply demonstrate "a repetitive pattern" (*id.*). The testimony thus implies only that, "because defendant had engaged in sexual misconduct with [the victim's sisters], he was likely to have committed the acts charged" (*id.* at 1174 [internal quotation marks omitted]; *see People v Saxe*, 174 AD3d 958, 960-961 [3d Dept 2019]).

Even assuming, arguendo, that the evidence was properly admitted for any of the foregoing purposes, or for the additional purposes

raised by the People, I conclude that the court abused its discretion in determining that the probative value of the evidence outweighed its prejudicial effect, even with the benefit of a limiting instruction. "*Molineux* evidence will not be admitted if it 'is actually of slight value when compared to the possible prejudice to the accused' " (*Leonard*, 29 NY3d at 7). "Prejudice involves both the nature of the [uncharged] crime, for the more heinous the uncharged crime, the more likely that jurors will be swayed by it, and the difficulty faced by the defendant in seeking to rebut the inference . . . the uncharged crime evidence brings into play" (*People v Drake*, 94 AD3d 1506, 1508 [4th Dept 2012], *lv denied* 20 NY3d 1010 [2013] [internal quotation marks omitted]). Here, the probative value of the proposed *Molineux* evidence does not outweigh the prejudice to defendant (*see People v Ward*, 141 AD3d 853, 858-860 [3d Dept 2016]), and "the evidence's limited probative value when compared to its potential for prejudice and the unacceptable danger that the jury might condemn defendant because of his past criminal behavior and associations and not because he is guilty of the offense charged makes this evidence inadmissible" (*People v Gillyard*, 13 NY3d 351, 356 [2009] [internal quotation marks omitted]). This is particularly so inasmuch as there is sufficient evidence to convict defendant without introducing the challenged testimony.

Finally, I conclude that the error in the admission of the *Molineux* evidence is not harmless (*see generally Gillyard*, 13 NY3d at 356; *People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Given that there was no forensic evidence of sexual assault and no sign of struggle or a physical altercation in the bedroom where the rape allegedly occurred and given the inability of the victim's young son, who was the only witness besides the victim and defendant, to identify defendant by his name, I cannot conclude that the evidence of defendant's guilt is overwhelming (*see Ward*, 141 AD3d at 861; *see generally Crimmins*, 36 NY2d at 241).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1028

CA 21-01372

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

MARY BETH LEWIS, INDIVIDUALLY AND AS COURT-
APPOINTED GUARDIAN OF THE PERSON AND PROPERTY
OF KRISTINA MARIE LEWIS, PURSUANT TO ARTICLE 81
OF THE NEW YORK STATE MENTAL HYGIENE LAW,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROSALIND SULAIMAN, M.D., ET AL., DEFENDANTS,
AND CHRISTOPHER M. OCCHINO, M.D., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE TARANTINO LAW FIRM, LLP, BUFFALO (MARYLOU K. ROSHIA OF COUNSEL),
FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (PETER C. PAPAYANAKOS OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 25, 2021. The order denied the motion of defendant Christopher M. Occhino, M.D. for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries sustained by her daughter, Kristina Marie Lewis, who was admitted to the emergency department at defendant Mercy Hospital of Buffalo (Mercy Hospital) after she suddenly went into cardiac arrest at plaintiff's home. At the emergency department, Lewis was treated by, among others, defendant Christopher M. Occhino, M.D., an independent contractor with privileges at Mercy Hospital. During the course of her treatment, Lewis was repeatedly defibrillated and remained in an obtunded or comatose state. Ultimately, as a result of the cardiac arrest, Lewis suffered a catastrophic brain injury due to lack of blood flow, causing her to remain in a permanent vegetative state that will require her to have 24-hour-a-day medical care for the rest of her life. As relevant on appeal, plaintiff alleges that Occhino was negligent in failing to treat Lewis with hypothermic therapy to cool her body and thereby prevent the lack of blood flow from causing damage. In appeal No. 1, Occhino appeals from an order that denied his motion for summary judgment dismissing the amended complaint against him. In appeal No. 2, Mercy Hospital and

defendant Catholic Health System, Inc. (collectively, Mercy defendants) appeal from a separate order that, inter alia, denied that part of their motion seeking summary judgment dismissing plaintiff's claim that they are vicariously liable for Occhino's allegedly negligent conduct.

In appeal No. 1, Occhino contends that he did not depart from the applicable standard of care and that Supreme Court thus erred in denying his motion. On a motion for summary judgment in a medical malpractice action, a defendant has "the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017] [internal quotation marks omitted]; *see Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521 [4th Dept 2019]). Once a defendant meets the initial burden, "[t]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact . . . only as to the elements on which the defendant met the prima facie burden" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Bristol v Bunn*, 189 AD3d 2114, 2116 [4th Dept 2020]).

We agree with Occhino that he satisfied his initial burden of demonstrating his compliance with the accepted standard of care by presenting factual evidence, including his own detailed affidavit, with accompanying medical records, that "address[ed] each of the specific factual claims of negligence raised in plaintiff's [amended] bill of particulars . . . and was detailed, specific and factual in nature" (*Pasek v Catholic Health Sys., Inc.*, 186 AD3d 1035, 1036 [4th Dept 2020] [internal quotation marks omitted]; *see Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]; *Larsen v Banwar*, 70 AD3d 1337, 1338 [4th Dept 2010]). In particular, Occhino opined that hypothermic therapy can be initiated only when the patient is hemodynamically stable. According to Occhino, Lewis never reached hemodynamic stability during the relevant time period because her cardiac status remained unstable and required multiple interventions, specifically in the form of shocks and defibrillations. Occhino thus concluded that hypothermic therapy was unwarranted and, in fact, was contraindicated.

We further conclude, however, that plaintiff raised a triable question of material fact with respect to Occhino's deviation from the standard of care by submitting the affidavits of experts in neurology and emergency medicine (*see generally Clark v Rachfal*, 207 AD3d 1173, 1175 [4th Dept 2022]; *Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]), both of whom averred that Lewis was an appropriate candidate for hypothermic therapy because, while being treated by Occhino, she reached the necessary hemodynamic stability at a time when hypothermic therapy could be commenced. Contrary to Occhino's contention, this is not a case in which plaintiff's experts "misstate[d] the facts in the record," nor are their affidavits " 'vague, conclusory, speculative, [or] unsupported by the medical evidence in the record' " (*Occhino*, 151 AD3d at 1871; *see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Instead, on the question whether hypothermic

therapy was contraindicated for Lewis while she was being treated by Occhino, this case presents "a classic battle of the experts that is properly left to a jury for resolution" (*Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018] [internal quotation marks omitted]; *see Mason*, 159 AD3d at 1439). We have considered Occhino's remaining contention and conclude that it does not warrant modification or reversal of the order in appeal No. 1.

In appeal No. 2, the Mercy defendants contend that the court erred in denying their motion insofar as it sought summary judgment dismissing plaintiff's claim that the Mercy defendants may be held vicariously liable for Occhino's conduct. We reject that contention. Although a hospital generally " 'may not be held vicariously liable for the malpractice of a private attending physician who is not an employee' " (*Lorenzo v Kahn*, 74 AD3d 1711, 1712 [4th Dept 2010]; *see Pasek v Catholic Health Sys., Inc.*, 195 AD3d 1381, 1381 [4th Dept 2021]; *Wulbrecht v Jehle*, 92 AD3d 1213, 1214 [4th Dept 2012]), "where a patient presents himself [or herself] at an emergency room, seeking treatment from the hospital and not from a particular physician of the patient's choosing, the hospital may be held vicariously liable for the malpractice of a physician who is an independent contractor" (*Litwak v Our Lady of Victory Hosp. of Lackawanna*, 238 AD2d 881, 881 [4th Dept 1997]; *see Goffredo v St. Luke's Cornwall Hosp.*, 194 AD3d 699, 700 [2d Dept 2021]; *see generally Mduba v Benedictine Hosp.*, 52 AD2d 450, 452 [3d Dept 1976]).

Here, the Mercy defendants did not meet their initial burden on the motion because the record does not establish that Lewis presented at the emergency room seeking treatment from Occhino specifically, rather than Mercy Hospital in general. The Mercy defendants' own submissions establish that at the time Lewis arrived at the emergency room, she was unconscious, suffering from cardiac arrest, and had been transported to Mercy Hospital by ambulance. Indeed, plaintiff testified that, although she asked the ambulance personnel to take Lewis to another hospital, they told her that they were required to take her to Mercy Hospital. Thus, as the Mercy defendants' own submissions establish, it was impossible for Lewis to have specifically sought treatment from Occhino rather than the hospital in general. Therefore there remain triable issues of fact whether the Mercy defendants could be held vicariously liable for Occhino's actions, and the court properly denied the Mercy defendants' motion with respect to plaintiff's vicarious liability claim (*see generally Goffredo*, 194 AD3d at 700; *Litwak*, 238 AD2d at 881). We also reject the Mercy defendants' contention that plaintiff's general knowledge of the relationship between hospitals and the doctors they employ established her actual knowledge that Occhino was not an agent of Mercy Hospital for purposes of the Mercy defendants' motion. Inasmuch as the Mercy defendants failed to establish that plaintiff had knowledge of Occhino's specific relationship to Mercy Hospital, a question of fact remains whether plaintiff reasonably could have believed that Occhino was acting on Mercy Hospital's behalf and whether she reasonably relied on that belief when accepting services from Mercy Hospital to treat Lewis (*see generally Brink v Muller*, 86

AD3d 894, 897 [3d Dept 2011]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

1029

CA 21-01515

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

MARY BETH LEWIS, INDIVIDUALLY AND AS COURT-APPOINTED GUARDIAN OF THE PERSON AND PROPERTY OF KRISTINA MARIE LEWIS, PURSUANT TO ARTICLE 81 OF THE NEW YORK STATE MENTAL HYGIENE LAW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROSALIND SULAIMAN, M.D., CHRISTOPHER M. OCCHINO, M.D., DEFENDANTS, MERCY HOSPITAL OF BUFFALO AND CATHOLIC HEALTH SYSTEM, INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

BARGNESI BRITT PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (PETER C. PAPAYANAKOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 23, 2021. The order, among other things, denied in part the motion of defendants Mercy Hospital of Buffalo and Catholic Health System, Inc. for summary judgment.

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

Same memorandum as in *Lewis v Sulaiman* ([appeal No. 1] — AD3d — [June 9, 2023] [4th Dept 2023]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1034

CA 22-00098

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

CYCAN, LLC, PLAINTIFF,

V MEMORANDUM AND ORDER

PALLADIAN HEALTH, LLC, DEFENDANT.

PALLADIAN HEALTH, LLC, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

PAUL J. CANDINO, THIRD-PARTY DEFENDANT-APPELLANT.
(ACTION NO. 1.)

PAUL J. CANDINO, PLAINTIFF-APPELLANT,

V

PALLADIAN HEALTH, LLC, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

PAUL J. CANDINO, PLAINTIFF-APPELLANT, ET AL., PLAINTIFF,

V

KEVIN CICHOCKI, MARK ZYGAJ, BRIAN T. D'AMICO, SSC II PRISM HOLDINGS, INC., SSC NYS II PRISM HOLDINGS, INC., AND PDN LIQUIDATION, LLC, FORMERLY KNOWN AS PALLADIAN HEALTH, LLC, DEFENDANTS-RESPONDENTS.
(ACTION NO. 5.)

BOND, SCHOENECK & KING, PLLC, BUFFALO (TIMOTHY N. MCMAHON OF COUNSEL), FOR PLAINTIFF-APPELLANT AND THIRD-PARTY DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (JAMES P. DOMAGALSKI OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT AND DEFENDANTS-RESPONDENTS BRIAN T. D'AMICO, SSC II PRISM HOLDINGS, INC., SSC NYS II PRISM HOLDINGS, INC., AND PDN LIQUIDATION, LLC, FORMERLY KNOWN AS PALLADIAN HEALTH, LLC.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered December 20, 2021. The order, insofar as appealed from, in action No. 1 denied those parts of third-party defendant Paul Candino's motion seeking summary judgment dismissing the first and fourth causes of action in the third-party complaint, and in action No. 2 denied those parts of plaintiff Paul Candino's motion seeking summary judgment dismissing the first through fifth counterclaims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion in action No. 1 and dismissing the first and fourth causes of action in the third-party complaint, granting that part of the motion in action No. 2 with respect to the fourth counterclaim and dismissing that counterclaim, and granting that part of the motion in action No. 2 with respect to the fifth counterclaim to the extent it is based on self-dealing related to the lease agreements and dismissing that counterclaim to that extent, and as modified the order is affirmed without costs.

Memorandum: Palladian Health, LLC, now known as PDN Liquidation, LLC (Palladian), defendant-third-party plaintiff in action No. 1 and a defendant in action Nos. 2 and 5, provides speciality health managed care services on behalf of insurance companies. SSC II Prism Holdings, Inc. and SSC NYS II Prism Holdings, Inc. (collectively, Summer Street), defendants in action No. 5, invested in Palladian in exchange for a minority equity interest. The majority equity interest in Palladian was owned by Paul J. Candino, third-party defendant in action No. 1 and a plaintiff in action Nos. 1 and 5, and two others (collectively, Founders) through their company, Prism Holdings, Inc. Candino is also one of the owners of both CyCan, LLC (CyCan), plaintiff in action No. 1, and CyCaz, LLC, each of which entered into lease agreements with Palladian to lease Palladian office space (lease agreements). Starting in 2011, the Founders and Summer Street became embroiled in various litigation, which ultimately led Palladian, Summer Street, and the Founders, among others, to enter into a Settlement Agreement on June 18, 2014 that resolved all pending litigation. The Settlement Agreement included a mutual release of claims (Release). Also pursuant to the Settlement Agreement, Summer Street assumed control of Palladian as of April 1, 2015. Prior to that date, Palladian had been controlled by Candino and one other founder.

Thereafter, CyCan commenced an action against Palladian (action No. 1) alleging breach of its lease agreements with Palladian (CyCan leases), and Palladian commenced a third-party action against Candino alleging causes of action for, inter alia, breach of fiduciary duty (first cause of action) and unjust enrichment (fourth cause of action). With respect to the first and fourth causes of action, Palladian alleged that the CyCan leases were the result of Candino's self-dealing while he controlled Palladian. Candino then commenced an action against Palladian (action No. 2) for breach of a Termination and Consulting Agreement that had been entered into as part of the Settlement Agreement. Palladian answered and asserted eight counterclaims against Candino, including for breach of fiduciary duty

(first, second and fourth counterclaims), fraud (third counterclaim), and breach of contract/breach of covenant of good faith and fair dealing (fifth counterclaim). The fourth and fifth counterclaims were based on allegations of Candino's self-dealing with respect to the lease agreements. The first, second, third, and fifth counterclaims were based on allegations that Candino failed to disclose a scheme by which a consultant was paid by Palladian to inappropriately influence a third party in pending legal actions for the benefit of Candino (bribery scheme).

In action No. 1, Candino moved for summary judgment dismissing the third-party complaint and, in action No. 2, he moved for summary judgment dismissing all but the sixth counterclaim. As relevant here, Candino argued that most of the causes of action and counterclaims should be dismissed on the basis of the Release. Palladian, among others, opposed the motions and argued that Candino was precluded from relying upon the Release because of his wrongful conduct of self-dealing with respect to the lease agreements and hiding the bribery scheme. Supreme Court, inter alia, denied Candino's motion in action No. 1 and granted in part and denied in part Candino's motion in action No. 2 by dismissing only the seventh and eighth counterclaims. As limited by his brief, Candino appeals from the order to the extent that it denied the motion in action No. 1 with respect to the first and fourth causes of action in the third-party complaint, and the motion in action No. 2 with respect to the first through fifth counterclaims, on the ground of release. Candino has abandoned any contentions with respect to action No. 5 (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We now modify.

"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 upon 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]; *see Armenta v Preston*, 196 AD3d 1197, 1197 [4th Dept 2021]). "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' " (*Centro Empresarial Cempresa S.A.*, 17 NY3d at 276, quoting *Mangini v McClurg*, 24 NY2d 556, 563 [1969]). "A release may be invalidated, however, for any of 'the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake' " (*id.*; *see Armenta*, 196 AD3d at 1197; *Phillips v Savage*, 159 AD3d 1581, 1581 [4th Dept 2018]).

We agree with Candino that he met his initial burden on the motions of establishing that the Release encompassed the causes of action and counterclaims at issue on this appeal (*see Dolcimascolo v 701 7th Prop. Owner, LLC*, 205 AD3d 412, 412 [1st Dept 2022]; *see generally Centro Empresarial Cempresa S.A.*, 17 NY3d at 276; *Armenta*, 196 AD3d at 1197). The broadly worded Release here released the parties from "every action, suit, claim, . . . and cause of action, of every nature and description whatsoever" that the parties "had or now

have as against" each other. It is undisputed that Candino's conduct with respect to the self-dealing allegations and the bribery scheme occurred at or before the time of the Settlement Agreement, although Palladian did not discover that conduct until after the Release was executed. "[A] release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made' " (*Centro Empresarial Cempresa S.A.*, 17 NY3d at 276). Here, the Release encompassed all claims, "whether known or unknown," and it therefore encompassed all the causes of action and counterclaims at issue on this appeal.

Inasmuch as Candino met his initial burden, the burden shifted to Palladian to set forth a defense sufficient to void the Release (*see generally id.*; *Armenta*, 196 AD3d at 1197). On appeal, Palladian asserts fraudulent inducement as an alternative ground for affirmance and thus argues that the Release should not be enforced. We reject Candino's contention that Palladian is raising that issue for the first time on appeal. Palladian made the same arguments of fraudulent conduct by Candino in opposition to the motions when it argued that the doctrine of equitable estoppel applied (*cf. Kavanaugh v Kavanaugh*, 200 AD3d 1568, 1575-1576 [4th Dept 2021]).

"A [party] seeking to invalidate a release due to fraudulent inducement must 'establish the basic elements of fraud' " (*Centro Empresarial Cempresa S.A.*, 17 NY3d at 276; *see Armenta*, 196 AD3d at 1198), i.e., "a misrepresentation or a material omission of fact which was false and known to be false by [the party making it], made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). "[A] party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release . . . Were this not the case, no party could ever settle a fraud claim with any finality" (*Centro Empresarial Cempresa S.A.*, 17 NY3d at 276).

We also agree with Candino that Palladian did not raise a triable issue of fact whether the Release was void with respect to the causes of action and counterclaims that are based on the self-dealing related to the lease agreements due to fraudulent inducement (*see HSBC Bank USA, N.A. v Prime, L.L.C.*, 125 AD3d 1307, 1308-1309 [4th Dept 2015]). The litigation that resulted in the Settlement Agreement included similar allegations of self-dealing by the Founders, and the self-dealing allegations with respect to the lease agreements did not constitute a separate fraud (*see Arfa v Zamir*, 17 NY3d 737, 739 [2011]). Moreover, Palladian did not establish that it justifiably relied on a misrepresentation or material omission of Candino with respect to the lease agreements. Contrary to Palladian's assertion, advanced as an alternative ground for affirmance, it did not establish that additional discovery would produce evidence sufficient to defeat the motions on that issue (*see One Flint St., LLC v ExxonMobil Corp.*, 175 AD3d 1012, 1015-1016 [4th Dept 2019]; *Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1493 [4th Dept 2019]). We therefore modify the order by granting in part the motion in action No. 1 and dismissing the

first and fourth causes of action in the third-party complaint and by granting that part of the motion in action No. 2 with respect to the fourth counterclaim and dismissing that counterclaim, and granting that part of the motion in action No. 2 with respect to the fifth counterclaim to the extent it is based on the self-dealing related to the lease agreements and dismissing that counterclaim to that extent.

Contrary to Candino's contention, however, Palladian raised a triable issue of fact whether the Release is void with respect to the counterclaims that are based on the bribery scheme due to fraudulent inducement (*see Litvinov v Hodson*, 74 AD3d 1884, 1885 [4th Dept 2010]). The bribery scheme constituted a separate fraud, and Palladian's submissions in opposition to the motion in action No. 2 were sufficient to establish that the Release was induced by that fraud (*cf. Centro Empresarial Cempresa* S.A., 17 NY3d at 280; *see also Armenta*, 196 AD3d at 1198).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

14

CA 22-01408

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

LEE FANG, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST AND AMHERST HIGHWAY DEPARTMENT,
DEFENDANTS-RESPONDENTS.

LEE FANG, PLAINTIFF-APPELLANT PRO SE.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 14, 2022. The order, among other things, granted defendants' cross-motion for summary judgment dismissing the amended complaint.

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

Memorandum: In this negligence action, plaintiff appeals from an order that denied his pro se motion for leave to amend the amended complaint, granted defendants' cross-motion for summary judgment dismissing the amended complaint without prejudice on the ground that plaintiff failed to comply with defendants' demand for an oral examination pursuant to General Municipal Law § 50-h (1), and denied plaintiff's cross-motion for summary judgment on the amended complaint. We affirm.

"Wherever a notice of claim is filed against a . . . town, . . . the . . . town . . . shall have the right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made, which examination shall be upon oral questions unless the parties otherwise stipulate" (General Municipal Law § 50-h [1]). The demand for such an examination "shall be in writing and shall be served personally or by registered or certified mail upon the claimant unless the claimant is represented by an attorney, when it shall be served personally or by mail upon his attorney" (§ 50-h [2]). "It is well settled that a plaintiff who has not complied with . . . [section] 50-h (1) is precluded from maintaining an action against a municipality" (*McDaniel v City of Buffalo*, 291 AD2d 826, 826 [4th Dept 2002]; *see* § 50-h [5]; *Kluczynski v Zwack*, 170 AD3d 1656, 1656-1657 [4th Dept 2019]).

Contrary to plaintiff's contention, Supreme Court properly granted defendants' cross-motion inasmuch as defendants met their initial burden of establishing that defendant Town of Amherst (Town) timely served plaintiff with a demand for examination by certified mail as required under General Municipal Law § 50-h (2) (*cf. Bednoski v County of Suffolk*, 67 AD3d 616, 616-617 [2d Dept 2009]). Further, plaintiff does not dispute that he timely received actual notice of the Town's demand for an examination or that the requested examination was adjourned several times at plaintiff's request. In his last correspondence with the Town prior to filing suit, plaintiff did not request another adjournment, but instead refused to participate in any hearing, arguing incorrectly that the Town had waived its right to such because it failed to timely serve the notice. Additionally, "[a]lthough compliance with General Municipal Law § 50-h (1) may be excused in 'exceptional circumstances' " (*McDaniel*, 291 AD2d at 826), here the court granted the cross-motion for summary judgment dismissing the amended complaint without prejudice and only after securing from defendants' counsel concessions that plaintiff's refiling would not be precluded by the statute of limitations and that accommodations would be offered to hold the hearing in a manner that addressed plaintiff's pandemic-related concerns. We note that defendant Amherst Highway Department has no separate legal existence from the Town (*see Primeau v Town of Amherst*, 303 AD2d 1035, 1037 [4th Dept 2003]). We therefore conclude that there is no basis to disturb the court's determination (*cf. Twitty v City of New York*, 195 AD2d 354, 356 [1st Dept 1993]). In light of our conclusion, plaintiff's remaining contentions are academic.

All concur except Ogden, J., who dissents and votes to modify in accordance with the following memorandum: In my view, plaintiff's evidence submitted in opposition to defendants' cross-motion for summary judgment dismissing the amended complaint raised a question of fact whether exceptional circumstances existed excusing his failure to attend an examination pursuant to General Municipal Law § 50-h (*see generally McDaniel v City of Buffalo*, 291 AD2d 826, 826 [4th Dept 2002]). While I understand the conclusion the majority reached, I do not agree. It does not appear on this record that plaintiff was trying to avoid the examination itself. According to plaintiff's evidence, he offered alternatives to an in-person examination to defendant Town of Amherst (Town) given his concerns regarding the ongoing COVID-19 pandemic, including an inspection of his property and a stipulation of facts surrounding the claim. Additionally, plaintiff's evidence demonstrated that he was unable to adjourn the section 50-h examination because the Town repeatedly told him no further adjournments would be granted and, although he suggested alternatives to an in-person examination, the Town extended no other option despite the risks arising out of the ongoing pandemic (*cf. Gravius v County of Erie*, 85 AD3d 1545, 1546 [4th Dept 2011], *appeal dismissed* 17 NY3d 896 [2011]). Inasmuch as "there was no fraud or deliberate misleading on the part of plaintiff . . . in order to avoid a General Municipal Law § 50-h hearing" (*Twitty v City of New York*, 195 AD2d 354, 356 [1st Dept 1993]) and there were health risks associated with an in-person appearance during the COVID-19 pandemic, I would conclude that plaintiff's evidence raised a triable issue of

fact whether his noncompliance is excusable. I therefore disagree with the majority that his failure to appear for the scheduled examination warranted the grant of defendants' cross-motion for summary judgment dismissing the amended complaint (*see generally* § 50-h [5]; *Kane v New York City Hous. Auth.*, 276 AD2d 671, 671 [1st Dept 2000]), and I would therefore modify the order accordingly.

Entered: June 9, 2023

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 21-01527

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

KENNETH HEINRICH, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID ALAN HEINRICH, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KELLEY A. SERENS, N.P., LAUREN PIPAS, M.D., AMY PATEL, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR DEFENDANT-APPELLANT AMY PATEL, M.D.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS KELLEY A. SERENS, N.P., AND LAUREN PIPAS, M.D.

SIDNEY P. COMINSKY, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered September 3, 2021. The order, insofar as appealed from, denied in part the motion of defendants Kelley A. Serens, N.P., and Lauren Pipas, M.D., for summary judgment and denied the motion of defendant Amy Patel, M.D., among others, insofar as it sought summary judgment dismissing the amended complaint against Patel.

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

Memorandum: Plaintiff, individually and as administrator of the estate of David Alan Heinrich (decedent), commenced this medical malpractice action against defendants, alleging, inter alia, that decedent's death was caused by their negligent care and treatment of decedent while he was a patient at Upstate University Hospital (Upstate), i.e., their failure to diagnose and treat decedent's gastrointestinal bleeding, which led to decedent's untimely death from internal hemorrhaging. As relevant here, plaintiff alleged that defendants Kelley A. Serens, N.P. and Lauren Pipas, M.D. were negligent during their treatment of decedent in the emergency department, that Pipas was also negligent in failing to properly supervise Serens, that defendant Amy Patel, M.D. was negligent in her capacity as a first-year resident and admitting intern to the medical

floor, and that defendant Vivian Chan, M.D. was negligent in her capacity as a second-year resident and leader of the rapid response team (RRT). Serens and Pipas moved for summary judgment dismissing the amended complaint and all cross-claims against them, and Patel and Chan, among others, moved for summary judgment dismissing the amended complaint against them. Supreme Court denied the motion of Serens and Pipas with respect to the claims against them based upon decedent's admission to Upstate on March 9, 2017 (March 9 claims). The court also denied the motion of Patel and Chan, among others, with respect to Patel, but granted that motion with respect to Chan. In appeal No. 1, Serens, Pipas, and Patel appeal from the ensuing order. In appeal No. 2, Chan appeals from an order that, inter alia, granted plaintiff's motion for leave to reargue his opposition to the motion of Patel and Chan, among others, insofar as it sought summary judgment dismissing the amended complaint against Chan and, upon reargument, denied the motion to that extent.

In appeal No. 1, we reject the contention of Serens and Pipas that the court erred in denying their motion with respect to the March 9 claims against them. Preliminarily, there is no dispute that Serens and Pipas met their initial burden on that part of their motion by submitting, inter alia, the expert affirmation of an emergency medicine practitioner, who addressed each of the factual allegations of negligence with respect to Serens and Pipas raised in the bill of particulars and established that they each complied with the applicable standard of care and that their "alleged departures from good and accepted medical practice [in the emergency department] were not the proximate cause" of decedent's death (*Humbolt v Parmeter*, 196 AD3d 1185, 1188 [4th Dept 2021]; *see Dziwulski v Tollini-Reichert*, 181 AD3d 1165, 1165-1166 [4th Dept 2020], *lv denied* 37 NY3d 901 [2021]; *see also Bubar v Brodman*, 177 AD3d 1358, 1359-1360 [4th Dept 2019]). The expert further opined that Pipas did not fail to adequately supervise Serens or any other hospital employee who treated decedent in the emergency department and that no alleged failure to supervise contributed to his death.

Contrary to the contentions of Serens and Pipas, however, we conclude that plaintiff raised triable issues of fact sufficient to defeat their motion with respect to the March 9 claims against them by submitting, inter alia, an expert affirmation from an emergency medicine practitioner establishing both that Serens and Pipas "deviated from the applicable standard of care and that such deviation was a proximate cause of [decedent's death]" (*Leberman v Glick*, 207 AD3d 1203, 1205 [4th Dept 2022] [internal quotation marks omitted]). Plaintiff's expert explained that decedent presented to the emergency department with signs that he was suffering from gastrointestinal bleeding. The signs included blood work showing a 10% drop in decedent's hemoglobin and hematocrit levels together with doubling of decedent's blood urea nitrogen level over a period of three days, the fact that decedent had been using drugs to treat preexisting conditions that were known to cause gastrointestinal bleeding, and the fact that decedent had presented to the emergency department after experiencing syncope, i.e., passing out, earlier that day.

Plaintiff's expert opined that both Serens and Pipas breached the standard of care in failing to recognize the significance of those symptoms and in failing to order appropriate testing or an appropriate consult with a specialist to rule out gastrointestinal bleeding, which in turn delayed diagnosis and treatment and "diminished [decedent's] chance of a better outcome" (*Clune v Moore*, 142 AD3d 1330, 1331 [4th Dept 2016] [internal quotation marks omitted]; *see Leberman*, 207 AD3d at 1206; *Jeannette S. v Williot*, 179 AD3d 1479, 1481 [4th Dept 2020]). Thus, the conflicting expert opinions submitted by plaintiff and Serens and Pipas "presented a 'classic battle of the experts' precluding summary judgment" in favor of Serens and Pipas with respect to the March 9 claims against them (*Jeannette S.*, 179 AD3d at 1481; *see Leberman*, 207 AD3d at 1206; *Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1471 [4th Dept 2020]).

We have reviewed Pipas's remaining contention and conclude that it does not warrant reversal or modification of the order.

In appeal No. 1, Patel contends that the court erred in denying the motion of her and Chan, among others, with respect to Patel because she did not exercise any independent medical judgment in her capacity as the medical admitting intern and thus was not liable for decedent's death. Patel met her initial burden on that part of the motion by submitting, inter alia, the affidavit of an expert who opined that Patel's participation in decedent's care and treatment was limited to performing a physical examination of decedent, reviewing decedent's medical history, and presenting decedent's case telephonically to her attending physician, defendant Lynn Marie Cleary, M.D., in order for Cleary to determine whether to admit decedent to the medical floor and for Cleary to authorize a treatment plan upon his admission. The expert concluded that, in that limited role, Patel made no independent medical decisions (*see Wulbrecht v Jehle*, 92 AD3d 1213, 1214 [4th Dept 2012]; *see generally Hatch v St. Joseph's Hosp. Health Ctr.*, 174 AD3d 1404, 1405 [4th Dept 2019]).

We reject Patel's contention that plaintiff failed to raise a question of fact in opposition. Plaintiff's experts, an internal medicine physician and a general surgeon, opined that Patel failed to recognize the signs of, inter alia, decedent's gastrointestinal bleed, failed to properly interpret the decrease in decedent's hematocrit and hemoglobin levels, failed to monitor decedent's blood work and order appropriate testing and, after improperly exercising her own medical judgment concerning the significance of decedent's symptoms and test results, failed to seek appropriate guidance from and timely consult with Cleary. Plaintiff's experts further opined that the foregoing failures delayed diagnosis and treatment of decedent's internal hemorrhaging, thereby decreasing decedent's likelihood of recovery and increasing his risk of death. The experts' opinions are supported by deposition testimony raising an issue of fact whether Patel was able to, and in fact did, exercise independent medical judgment by placing orders for certain testing and treatment without prior approval from or appropriate supervision by Cleary (*see Burnett-Joseph v McGrath*, 158 AD3d 526, 527 [1st Dept 2018]; *cf. Bieger v Kaleida Health Sys.,*

Inc., 195 AD3d 1473, 1474-1475 [4th Dept 2021]; *see also Karen D. v Hoon Choi*, 179 AD3d 1448, 1448-1449 [4th Dept 2020]). The opinions of plaintiff's experts "squarely oppose[]" the opinion of Patel's expert, and the issue of Patel's alleged negligence "is properly left to a [factfinder] for resolution" (*Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018]; *see Leberman*, 207 AD3d at 1206; *Jeannette S.*, 179 AD3d at 1481).

In appeal No. 2, we conclude that Chan met her initial burden with respect to claims arising out of her treatment of decedent during the RRT response by submitting an expert affidavit establishing that she did not depart from good and accepted medical practice (*see Allen v Grimm*, 208 AD3d 1589, 1590 [4th Dept 2022]). Chan failed to establish that any alleged deviation was not a proximate cause of decedent's death, however, inasmuch as her expert's opinion was conclusory as to that issue (*see Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020]; *see also Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]). Thus, the burden shifted to plaintiff to raise a question of fact on the issue of deviation only (*see Allen*, 208 AD3d at 1590; *see generally Bubar*, 177 AD3d at 1359).

We reject Chan's contention that plaintiff failed to meet that burden. Plaintiff's experts opined that the administration of certain medication to stabilize decedent's blood pressure without taking additional measures was, in light of decedent's symptoms, a breach of the applicable standard of care. Plaintiff's experts noted that Chan had testified at her deposition that she alone, in her capacity as the leader of the RRT, made the decision to administer that medication, thereby raising an issue of fact whether Chan exercised independent medical judgment for which she could be held liable despite her status as a resident physician (*see generally Karen D.*, 179 AD3d at 1448-1449). We thus conclude that plaintiff raised an issue of fact in opposition to the motion of Patel and Chan, among others, with respect to Chan (*see generally Leberman*, 207 AD3d at 1206; *Stradtman*, 179 AD3d at 1471; *Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00912

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

KENNETH HEINRICH, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID ALAN HEINRICH, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KELLEY A. SERENS, NP, ET AL., DEFENDANTS, AND VIVIAN CHAN, M.D., DEFENDANT-APPELLANT. (APPEAL NO. 2.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SIDNEY P. COMINSKY, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered March 9, 2022. The order, inter alia, granted the motion of plaintiff seeking leave to reargue and, upon reargument, denied the motion of defendant Vivian Chan, M.D., among others, insofar as it sought summary judgment dismissing the amended complaint against Chan.

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

Same memorandum as in *Heinrich v Serens* ([appeal No. 1] — AD3d — [June 9, 2023] [4th Dept 2023]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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OP 22-01275

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

IN THE MATTER OF HUNTLEY POWER, LLC, PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, RESPONDENT.
(PROCEEDING NO. 1.)

BARCLAY DAMON LLP, ROCHESTER (MARK R. MCNAMARA OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to Eminent Domain Procedure Law § 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to review the determination of respondent. The determination approved the condemnation of certain real property.

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

Same memorandum as in *Matter of Huntley Power, LLC v Town of Tonawanda* ([proceeding No. 2] — AD3d — [June 9, 2023] [4th Dept 2023]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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OP 22-01460

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

IN THE MATTER OF HUNTLEY POWER, LLC, PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, RESPONDENT.
(PROCEEDING NO. 2.)

BARCLAY DAMON LLP, ROCHESTER (MARK R. MCNAMARA OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to Eminent Domain Procedure Law § 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to review the determination of respondent. The determination approved the condemnation of certain real property.

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

Memorandum: Petitioner commenced these original proceedings pursuant to EDPL 207 seeking a judgment and order rejecting the determination of respondent, Town of Tonawanda (Town), which authorized the condemnation of property owned by petitioner. The property, situated along the Niagara River, includes a coal-fired electric generating station that was decommissioned in 2016 and water intake structures. The Town held a public hearing on April 25, 2022 and, on July 11, 2022, it adopted its resolution authorizing the acquisition of the property by condemnation. Petitioner commenced proceeding No. 1 on August 12, 2022, asserting that the Town failed to publish a brief synopsis of its determination and findings as required by EDPL 204 (A) and asserting various other grounds for relief. The Town published its determination and findings pursuant to EDPL 204 (A) on August 25 and 26, 2022. Thereafter, petitioner commenced proceeding No. 2 on September 14, 2022, asserting that the Town's publication of its determination and findings was untimely under EDPL 204 (A) and otherwise asserting the same grounds for relief.

As a preliminary matter, we dismiss proceeding No. 1 inasmuch as that part of the petition asserting that the Town failed to publish its determination and findings pursuant to EDPL 204 (A) has been rendered moot by the subsequent publication of that information (*see Matter of Hynes v City of Buffalo*, 52 AD3d 1216, 1217 [4th Dept 2008];

see generally Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715 [1980]) and the remaining grounds for relief asserted in the petition in proceeding No. 1 are duplicative of grounds for relief asserted in the petition in proceeding No. 2 (*see Matter of Dudley Rd. Assn. v Adirondack Park Agency*, 214 AD2d 274, 278-279 [3d Dept 1995], *lv dismissed in part & denied in part* 87 NY2d 952 [1996]).

With respect to the merits in proceeding No. 2, petitioner contends that the Town's failure to publish a synopsis of its determination and findings within 90 days of the public hearing violated EDPL 204 (A), requiring this Court to reject the Town's determination. EDPL 204 (A) provides that the condemnor, "within [90] days after the conclusion of the public hearings held pursuant to this article, shall make its determination and findings concerning the proposed public project and shall publish a brief synopsis of such determination and findings in at least two successive issues of an official newspaper if there is one designated in the locality where the project will be situated and in at least two successive issues of a newspaper of general circulation in such locality." We agree with petitioner that the Town's publication of the synopsis was untimely because it was not made within 90 days following the hearing (*cf. Matter of Wechsler v New York State Dept. of Envtl. Conservation*, 76 NY2d 923, 927 [1990]; *Matter of Ranauro v Town of Owasco*, 289 AD2d 1089, 1090 [4th Dept 2001]; *Matter of Legal Aid Socy. of Schenectady County v City of Schenectady*, 78 AD2d 933, 933-934 [3d Dept 1980]), but we agree with the Town that petitioner was not prejudiced by the delay, and petitioner does not contend otherwise. Under the circumstances, we conclude that the error does not require this Court to reject the determination (*see Matter of River St. Realty Corp. v City of New Rochelle*, 181 AD3d 676, 677-678 [2d Dept 2020]; *Matter of Tadasky Corp. v Village of Ellenville*, 45 AD3d 1131, 1132 [3d Dept 2007]; *see also Green v Oneida-Madison Elec. Coop.*, 134 AD2d 897, 898 [4th Dept 1987]).

We reject petitioner's contention that the condemnation will not serve a public use, benefit, or purpose (*see* EDPL 207 [C] [4]). "What qualifies as a public purpose or public use is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage" (*Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed & lv denied* 14 NY3d 924 [2010] [internal quotation marks omitted]). Here, the Town's condemnation of the property serves the public uses of, inter alia, revitalizing and redeveloping the former industrial property, which was a blight on the Town, and maintaining the critical raw water supply to significant industrial employers in the Town (*see Matter of Court St. Dev. Project, LLC v Utica Urban Renewal Agency*, 188 AD3d 1601, 1602-1603 [4th Dept 2020]; *Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency*, 112 AD3d 1351, 1351-1352 [4th Dept 2013], *appeal dismissed* 22 NY3d 1165 [2014], *lv denied* 23 NY3d 905 [2014]; *cf. Matter of HBC Victor LLC v Town of Victor*, 212 AD3d 121, 123-125 [4th Dept 2022]). We therefore conclude that the Town's determination to exercise its eminent domain power "is rationally related to a conceivable public purpose" (*Matter*

of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 425 [1986] [internal quotation marks omitted]; *see Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 303 [4th Dept 2002], *lv denied* 99 NY2d 508 [2003]).

We reject petitioner's further contention that the condemnation was excessive. "[T]he condemnor has broad discretion in deciding what land is necessary to fulfill [its] purpose" (*Matter of Eisenhauer v County of Jefferson*, 122 AD3d 1312, 1313 [4th Dept 2014] [internal quotation marks omitted]). We perceive no abuse or improvident exercise of discretion by the Town in determining the scope of the taking (*see Matter of United Ref. Co. of Pa. v Town of Amherst*, 173 AD3d 1810, 1811-1812 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]).

Petitioner also contends that the Town failed to comply with the requirements of the State Environmental Quality Review Act (SEQRA) (*see* EDPL 207 [C] [3]). Our review of the Town's SEQRA determination "is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Akpan v Koch*, 75 NY2d 561, 570 [1990] [internal quotation marks omitted]). We reject petitioner's contention that the Town improperly segmented its SEQRA review. "Segmentation occurs when the environmental review of a single action is broken down into smaller stages or activities, addressed as though they are independent and unrelated, . . . [which is prohibited in order to] prevent[ ] a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review" (*Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 204 AD2d 548, 550 [2d Dept 1994], *lv dismissed in part & denied in part* 85 NY2d 854 [1995]; *see Sun Co. v City of Syracuse Indus. Dev. Agency*, 209 AD2d 34, 47 [4th Dept 1995], *appeal dismissed* 86 NY2d 776 [1995]). Here, the Town determined that acquiring the property would not have any significant adverse environmental impacts and further stated its understanding that any future development or construction at the property would be subject to separate environmental review. There was no improper segmentation inasmuch as the Town "was not required to consider the environmental impact of anything beyond the acquisition" (*Court St. Dev. Project, LLC*, 188 AD3d at 1603; *see GM Components Holdings, LLC*, 112 AD3d at 1353).

Petitioner also contends that the Town's stated purpose for acquiring the property manifests an intent to engage in constitutionally-prohibited private enterprise because the Town intends to sell the property to a private developer. We reject that contention inasmuch as the "[t]aking of substandard real estate by a municipality for redevelopment by private corporations has long been recognized as a species of public use" (*Cannata v City of New York*, 11 NY2d 210, 215 [1962], *appeal dismissed* 371 US 4 [1962]).

We have considered petitioner's remaining contentions and conclude that they do not require that this Court reject the

determination.

All concur except LINDLEY, J., who dissents in part and votes to modify in accordance with the following memorandum: I agree with the majority that proceeding No. 1 is moot and should therefore be dismissed. I also agree with the majority's resolution of all but one of the contentions advanced by petitioner in proceeding No. 2. With respect to the majority's conclusion in the second proceeding that the condemnation serves a public use, benefit, or purpose, as required by EDPL 204 (B), however, I respectfully dissent in part. In my view, there is no underlying public use, benefit, or purpose to the proposed taking by respondent, Town of Tonawanda (Town), of petitioner's raw water intake structures. I therefore conclude that the taking of those structures, as opposed to the taking of the remainder of the condemned property, is unlawful under EDPL 204 (B) and violative of both the Fifth Amendment to the Federal Constitution, as applied to the states through the Fourteenth Amendment, and article 1, section 7 of the State Constitution. I would modify the determination accordingly.

As the Town correctly concedes, its condemnation of petitioner's property may be considered two separate and distinct takings, each of which should be evaluated on its own merits. The first taking is of approximately 65 acres of land and improvements on property where the former Huntley Generating Station operated as a coal-fueled power plant for approximately 100 years. The property, which includes approximately 3,300 linear feet of waterfront along the Niagara River, has sat dormant since the power plant was decommissioned seven years ago. Petitioner has been attempting to sell the property since 2018, to no avail, and now the Town proposes to take the underutilized property through eminent domain.

I agree with the majority that petitioner has failed to meet its burden of establishing that the taking of this land does not serve a public use, benefit, or purpose (*see* EDPL 207 [C] [4]), notwithstanding that a detailed, specific plan for redevelopment has not been finalized by the Town (*see Matter of Court St. Dev.* Project, *LLC v Utica Urban Renewal Agency*, 188 AD3d 1601, 1603 [4th Dept 2020]; *Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency*, 112 AD3d 1351, 1352 [4th Dept 2013], *appeal dismissed* 22 NY3d 1165 [2014], *lv denied* 23 NY3d 905 [2014]). The taking will benefit the public by removing the blighted conditions arising from the decommissioned power plant, thereby allowing for the redevelopment of the waterfront, and will connect the Riverwalk, which extends along the waterfront in the Town until it reaches the condemned property, with Aqua Lane Park, a public marina located on the other side of the property. That taking is distinguishable from the taking in *Matter of HBC Victor, LLC v Town of Victor* (212 AD3d 121, 123 [4th Dept 2022]), where the Town admittedly had no idea what it intended to do with the condemned property.

The second taking encompassed in the Town's condemnation relates to petitioner's raw water intake structures, which consist of large concrete tunnels and bays along the Niagara River. The majority finds

that second taking to be lawful, but I do not.

Prior to the closure of its power plant, petitioner used the intake system to withdraw millions of gallons of untreated water to provide cooling for its generating units. Since closure of the plant, petitioner has allowed local businesses—specifically, Evonik LLC, Sumitomo Rubber Corporation, USA, LLC, and 3M Company—to obtain water for industrial uses from the river through its intake bays and screening facilities. Petitioner has granted easements and licenses to Evonik and Sumitomo to maintain pump houses and water lines on its property to facilitate the withdrawal and distribution of raw water, which is far less expensive than the treated water that the businesses would otherwise have to purchase for their manufacturing processes.

The Town proposes to take petitioner's water intake structures for the purpose of ensuring that local manufacturers have access to inexpensive raw water. Without that access, the Town asserts, there is a danger that the businesses will relocate out of the area, resulting in a loss of local jobs and tax revenue. But the Town's proposed use of the water intake structures is no different than the existing use by petitioner, and there is no indication in the record that petitioner will refuse to continue providing water access to local businesses. Indeed, the money paid by the local manufacturers for the licenses and easements is the only revenue petitioner realizes from the property.

In any event, the result should not change even if petitioner wished for some reason to terminate the licenses and easements. Petitioner has the right to do what it wishes with its property, provided, of course, that the use or non-use complies with the applicable zoning laws. Although termination of the licenses and easements would adversely affect local manufacturers, petitioner's property is not the only place on the Niagara River from which raw water may be obtained for industrial use. In fact, before deciding to condemn petitioner's property, the Town considered updating its Water Treatment Plant by installing a water intake system and pumping station to provide water to local manufacturers, including Evonik and Sumitomo. The Town estimated that the project would cost $27.2 million and take approximately three years to complete. Instead of proceeding with the proposed project, the Town decided to take petitioner's water intake system through eminent domain.

In my view, the takings clauses of the Federal and State Constitutions do not permit the government to take land through eminent domain and use it for the exact same purpose for which the landowner is already using it. Moreover, although providing raw water for businesses no doubt reduces manufacturing costs for the private entities receiving the water, it does not serve a legitimate public use. A governmental entity cannot take property from one party for the purpose of providing an economic benefit to other parties merely because the public will incidently benefit from the taking in the form of jobs created or maintained and tax revenue generated therefrom. As we stated in *Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp*. (71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed & lv*

denied 14 NY3d 924 [2010]), "a merely incidental public benefit coupled with a dominant private purpose will invalidate a condemnor's determination."

If the Town wishes to ensure that local businesses have continued access to inexpensive water from the Niagara River, it can build its own intake system or it can seek to buy petitioner's intake system at a mutually agreeable price. But the Town cannot take petitioner's intake system under the guise of eminent domain in the absence of a dominant public purpose, which has not been demonstrated or even alleged in this proceeding.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 22-00006

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

LURLINE BAKER, AS EXECUTOR OF THE ESTATE OF ANNA CAPEN, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EASTERN NIAGARA HOSPITAL, INC., INTER-COMMUNITY MEMORIAL HOSPITAL (NOW KNOWN AS EASTERN NIAGARA HOSPITAL, INC.), LOCKPORT MEMORIAL HOSPITAL (NOW KNOWN AS EASTERN NIAGARA HOSPITAL, INC.), PRAYOON PRABHARASUTH, M.D., JUAN DEROSAS, M.D., AND ROBERT HODGE, M.D., DEFENDANTS-RESPONDENTS.

BOTTAR LAW, PLLC, SYRACUSE (SAMANTHA C. RIGGI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS EASTERN NIAGARA HOSPITAL, INC., INTER-COMMUNITY MEMORIAL HOSPITAL (NOW KNOWN AS EASTERN NIAGARA HOSPITAL, INC.), AND LOCKPORT MEMORIAL HOSPITAL (NOW KNOWN AS EASTERN NIAGARA HOSPITAL, INC.).

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS PRAYOON PRABHARASUTH, M.D., JUAN DEROSAS, M.D., AND ROBERT HODGE, M.D.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered December 22, 2021. The order granted the motions of defendants to dismiss the complaint and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions are denied and the complaint and cross-claims are reinstated.

Memorandum: Plaintiff's decedent commenced this action seeking damages for injuries she sustained as a result of defendants' alleged medical malpractice in failing to remove a foreign object consisting of a surgical sponge from decedent's pelvis upon the completion of surgery. Defendants Prayoon Prabharasuth, M.D., Juan DeRosas, M.D., and Robert Hodge, M.D. moved pursuant to CPLR 3211 (a) (5) to dismiss the complaint and any cross-claims against them as time-barred. Defendants Eastern Niagara Hospital, Inc., Inter-Community Memorial Hospital (now known as Eastern Niagara Hospital, Inc.), and Lockport Memorial Hospital (now known as Eastern Niagara Hospital, Inc.) also

moved to dismiss the complaint and any cross-claims against them as time-barred. Defendants asserted in their respective motions that the results of a barium enema ordered by decedent's primary care physician (PCP) included an "incidental note" of what appeared to be a foreign object in decedent's pelvis and that, at a follow-up visit that took place more than one year before this action was commenced, the PCP discussed with decedent the need for surgical intervention to remove the foreign object. In support of their assertions, defendants relied on a note contained in the PCP's records, which purportedly referenced the finding of a foreign object, and the affidavit of the PCP, in which he stated that it was his "custom and practice to discuss the findings from [a] procedure/test with the patient at the next visit or sooner." Supreme Court granted both motions, concluding that decedent was made aware of the presence of the foreign object no later than the date of the follow-up visit and that the action was thus untimely. Plaintiff now appeals, and we reverse.

"On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired" (*Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1561-1562 [4th Dept 2021]). "In order to make a prima facie showing, the defendant must establish, inter alia, when the plaintiff's cause of action accrued" (*Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2d Dept 2006]; *see Chaplin v Tompkins*, 173 AD3d 1661, 1662 [4th Dept 2019]). Once a defendant meets that initial burden, the burden shifts "to plaintiff to aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*Rider*, 192 AD3d at 1562 [internal quotation marks omitted]).

We agree with plaintiff that the court erred in granting the motions inasmuch as defendants failed to meet their initial burdens of establishing that the action is time-barred. Where, as here, a malpractice "action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier" (CPLR 214-a [a]).

Plaintiff contends that the court erred in relying on evidence of the PCP's custom and practice to establish that he actually informed decedent of the possible presence of a foreign object. We agree. "[E]vidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions because one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again" (*Rivera v Anilesh*, 8 NY3d 627, 633-634 [2007] [internal quotation marks omitted]). "The applicability of this doctrine is limited to cases where the proof demonstrates a deliberate and repetitive practice by a person in complete control of the circumstances . . . as opposed to conduct however frequent yet likely to vary from time to time depending upon the surrounding

circumstances" (*id.* at 634 [internal quotation marks omitted]; *see Guido v Fielding*, 190 AD3d 49, 53 [1st Dept 2020]).

In order to establish the admissibility of the PCP's habit evidence, defendants were required to establish that the PCP engaged in a routine practice of informing patients of the results of their diagnostic procedures and that his practice did not vary from patient to patient (*see Guido*, 190 AD3d at 53-54; *see generally Rivera*, 8 NY3d at 633-634; *Biesiada v Suresh*, 309 AD2d 1245, 1245 [4th Dept 2003]). We conclude that defendants failed to do so. The affidavit of decedent's PCP, submitted in support of the motions, explicitly concedes that the manner in which he informs patients of the results of diagnostic procedures varies. Decedent's PCP would inform patients of those results either "at the next visit *or* sooner, if indicated by the circumstances" (emphasis added). Further, the presence "of what appears to be two surgical sponges in [decedent's] pelvis" was noted only in an "Incidental Note" in the report of the results of decedent's barium enema, which also suggested that the finding should be confirmed by a CT scan of decedent's pelvis. The affidavit of the PCP did not, however, provide any evidence that it was the PCP's habit to discuss incidental notes with patients, and none of the other "assessments" noted in the PCP's records refers to the presence of the foreign body or the need for a confirmatory CT scan of decedent's pelvis. Thus, the affidavit failed to lay an adequate foundation for consideration of the PCP's practices as habit evidence (*see Guido*, 190 AD3d at 54; *see also Chavis v Syracuse Community Health Ctr., Inc.*, 96 AD3d 1489, 1490 [4th Dept 2012]). We further agree with plaintiff that decedent's medical records and plaintiff's deposition testimony, also submitted by defendants, do not establish that decedent was aware of the foreign body more than one year before she commenced this action.

Defendants also failed to establish that, more than one year prior to commencing this action, decedent had discovered facts that "would reasonably lead" to the discovery of the foreign object (CPLR 214-a [a]). Defendants' reliance on decedent's failure to discover the presence of the foreign body based on the gastrointestinal symptoms that she suffered for approximately three years between 2013 and 2016 is without merit. The medical records establish that decedent "made timely and persistent inquiries to medical . . . professionals with respect to [her symptoms] following the surger[ies]" (*Chavis*, 96 AD3d at 1490; *see Wiegand v Berger*, 151 AD2d 343, 344-345 [1st Dept 1989]; *cf. Cooper v Edinbergh,* 75 AD2d 757, 759 [1st Dept 1980]).

Inasmuch as defendants failed to establish that decedent was or should have been aware of the presence of the foreign body more than one year prior to commencing this action, the burden never shifted to plaintiff to aver evidentiary facts establishing that the limitations period had not expired, that it was tolled, or that an exception to the statute of limitations applied (*see generally Matter of Covington v Fischer*, 125 AD3d 1320, 1320 [4th Dept 2015]; *Lazic v Currier*, 69

AD3d 1213, 1214 [3d Dept 2010]; *Matter of Edwards v Coughlin*, 191 AD2d 1044, 1044-1045 [4th Dept 1993]).

Entered: June 9, 2023

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 21-01552

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

BRITTANI L. SADLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICAH S. JAMES AND LJ CONSTRUCTION WNY, LLC,
DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE P.C., BUFFALO (DANIEL J. CERCONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

VANDETTE LAW PLLC, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered September 29, 2021. The order, insofar as appealed from, granted in part the motion of plaintiff for partial summary judgment and denied the cross-motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiff's motion with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d), and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly sustained in a motor vehicle accident in 2019 when her vehicle was struck from behind by a vehicle operated by Micah S. James (defendant) and owned by LJ Construction WNY, LLC (collectively, defendants). Plaintiff alleged that, as a result of the motor vehicle accident, she suffered serious injuries within the meaning of Insurance Law § 5102 (d) under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. Plaintiff moved for summary judgment on the issues of defendant's negligence and serious injury. Defendants opposed the motion and cross-moved for summary judgment dismissing the complaint. Supreme Court granted plaintiff's motion in part with respect to negligence and the 90/180-day category of serious injury. The court otherwise denied plaintiff's motion, and denied defendants' cross-motion.

Initially, we note that, inasmuch as defendants do not challenge that part of the order granting plaintiff's motion with respect to the issue of negligence, they have abandoned any contention with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept

1994]).

Defendants contend that the court erred in granting that part of plaintiff's motion seeking summary judgment on the 90/180-day category of serious injury, and further erred in denying their cross-motion, because plaintiff did not sustain a serious injury that was causally related to the accident. It is undisputed that plaintiff was involved in a previous motor vehicle accident in November 2015, resulting in injuries to her neck, lower back and right arm, including a disc herniation and several disc bulges in her cervical and thoracic spine. As a result of that accident, plaintiff was out of work for at least one year, and received treatment for her injuries through March 2017, at which time she still complained of "pain located in her neck, mid-back and low back." Thus, citing plaintiff's 2015 accident and years of treatment, defendants contend that plaintiff's alleged injuries were preexisting conditions and that plaintiff did not sustain any serious injury as a result of the 2019 accident.

Even assuming, arguendo, that plaintiff met her initial burden on her motion with respect to the 90/180-day category of serious injury, we conclude that defendants raised a triable issue of fact with respect thereto. Although plaintiff submitted an affirmation of her treating physician and an affidavit of her chiropractor establishing that she sustained serious injuries to her neck, back and left shoulder as a result of the 2019 accident, defendants submitted a report from their expert physician, who conducted an examination of plaintiff and concluded that plaintiff did not sustain *any* serious injury as a result of that accident. "It is well established that conflicting expert opinions may not be resolved on a motion for summary judgment" (*Fonseca v Cronk*, 104 AD3d 1154, 1155 [4th Dept 2013] [internal quotation marks omitted]; *see Savilo v Denner*, 170 AD3d 1570, 1571 [4th Dept 2019]).

Although defendants' expert did not examine plaintiff until over one year after the accident, which would call into question his ability to opine on any limitations that plaintiff had during the initial 180-day period following the accident (*see Colavito v Steyer*, 65 AD3d 735, 736 [3d Dept 2009]; *see also Hawramee v Serena*, 192 AD3d 1592, 1593 [4th Dept 2021]; *see generally Ames v Paquin*, 40 AD3d 1379, 1380 [3d Dept 2007]), the basis of his opinion is that plaintiff did not sustain any significant injury as a result of the 2019 accident, and we conclude that his report raises a triable issue of fact regarding causation sufficient to defeat plaintiff's motion with respect to the 90/180-day category of serious injury. We therefore modify the order accordingly.

Finally, we reject defendants' contention that the court erred in denying their cross-motion. We conclude that denial of the cross-motion was required in light of the conflicting expert opinions with respect to whether plaintiff sustained a serious injury under each of the relevant categories as a result of the accident (*see Mays v Green*,

165 AD3d 1619, 1621 [4th Dept 2018]).

Entered: June 9, 2023

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 21-01727

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

DONNA RENZI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS RENZI, DEFENDANT-APPELLANT.

JENNIFER M. LORENZ, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered November 12, 2021. The judgment, inter alia, directed defendant to pay maintenance to plaintiff of $5,700 per month until defendant reaches the age of 67.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as defendant challenges the maintenance award, the judgment is modified on the law by vacating the second decretal paragraph, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant husband appeals from a judgment of divorce that, inter alia, directed him to pay plaintiff wife $5,700 per month in maintenance until the husband reaches the age of 67. Although the judgment was entered upon the husband's default and no appeal lies from a judgment entered on default, the appeal nevertheless "brings up for our review matters which were the subject of contest before the court," i.e., the maintenance award (*Matter of King v King*, 145 AD3d 1613, 1614 [4th Dept 2016] [internal quotation marks omitted]; *see Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]; *see generally James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]).

On appeal, the husband contends that Supreme Court erred in awarding the wife maintenance above the presumptive amount under Domestic Relations Law § 236 (B) (6) without following the requirements of that statute. We agree and further conclude that the court erred in awarding maintenance for a period of time in excess of the recommendation set forth in the advisory schedule in Domestic Relations Law § 236 (B) (6) (f) (1) without adequately demonstrating its reliance on the relevant statutory factors enumerated in section 236 (B) (6) (e) (*see* § 236 [B] [6] [f] [2]).

"[I]n any matrimonial action, the court, upon application by a party, shall make its award for post-divorce maintenance pursuant to the provisions" set forth in the statute (Domestic Relations Law § 236 [B] [6] [a]; *see Hughes v Hughes*, 198 AD3d 1170, 1173 [3d Dept 2021]). In setting the amount of the award, the provisions of Domestic Relations Law § 236 (B) (6) require that the court first determine the presumptive amount of maintenance pursuant to the statutory formulas in paragraph (c) and, second, determine whether other factors under paragraphs (d) and (e) support deviating from the presumptive amount (*see Mahoney v Mahoney*, 197 AD3d 638, 639 [2d Dept 2021]; *Iannazzo v Iannazzo* [appeal No. 2], 197 AD3d 959, 961-962 [4th Dept 2021]). Where there is a deviation from the presumptive amount reached by application of the relevant formula, the court should explain the reasons for that deviation (*see generally Severny v Severny*, 210 AD3d 419, 419 [1st Dept 2022]). "[T]he court need not analyze and apply each and every factor set forth in the statute," but it "must provide a reasoned analysis of the factors it ultimately relies upon in awarding maintenance" (*Gordon-Medley v Medley*, 160 AD3d 1146, 1147 [3d Dept 2018]; *see Gutierrez v Gutierrez*, 193 AD3d 1363, 1364 [4th Dept 2021]; *Johnston v Johnston*, 156 AD3d 1181, 1184 [3d Dept 2017], *appeal dismissed* 31 NY3d 1126 [2018], *lv denied* 32 NY3d 1053 [2018]).

Here, there is no dispute that the court awarded maintenance above the presumptive amount under the statute. The court, however, did not state what it found the wife's income to be or set out the presumptive amount of maintenance owed under the statutory formula. Further, it failed to "set forth the factors it considered and the reasons for its decision in writing or on the record" (Domestic Relations Law § 236 [B] [6] [d] [3]), and therefore "failed to show that it considered any of the factors enumerated in section 236 (B) (6) (e) (1) in making its determination of both the amount and duration of the maintenance award" (*Gutierrez*, 193 AD3d at 1364; *see generally Barrett v Barrett*, 175 AD3d 1067, 1068 [4th Dept 2019]).

Because we are unable to determine whether "the amount and duration of the maintenance awarded reflects an appropriate balancing of [the wife's] needs and [the husband's] ability to pay" (*Myers v Myers*, 87 AD3d 1393, 1394 [4th Dept 2011] [internal quotation marks omitted]), we modify the judgment by vacating the second decretal paragraph, and we remit the matter to Supreme Court to determine the amount and duration of maintenance, if any, after setting forth all relevant factors that it considered in making its decision (Domestic Relations Law § 236 [B] [6] [e] [1], [2]; [f] [2]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 21-00580

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IBRAHIM AMIN, DEFENDANT-APPELLANT.

TEODORO SIGUENZA, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 1, 2019. The judgment convicted defendant upon his plea of guilty of sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for resentencing.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [1]), defendant contends, inter alia, that he was denied effective assistance of counsel and that Supreme Court misconstrued the sentencing parameters.

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Shaffer*, 210 AD3d 1452, 1452-1453 [4th Dept 2022]; *People v Rivera*, 195 AD3d 1591, 1591 [4th Dept 2021], *lv denied* 37 NY3d 995 [2021]), his contention that he was denied effective assistance of counsel "does not survive his plea of guilty inasmuch as '[t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney[s'] allegedly poor performance' " (*People v Jackson*, 99 AD3d 1240, 1240 [4th Dept 2012], *lv denied* 20 NY3d 987 [2012]; *see People v Burke*, 256 AD2d 1244, 1244 [4th Dept 1998], *lv denied* 93 NY2d 851 [1999]; *see generally People v Ford*, 86 NY2d 397, 404 [1995]).

Defendant further contends that his plea was not knowing, voluntary, and intelligent. Defendant's contention is unpreserved (*see People v Brown*, 204 AD3d 1519, 1519-1520 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *People v Newsome*, 198 AD3d 1357, 1357-1358 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]; *People v Romanowski*,

196 AD3d 1081, 1081-1082 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]) and does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). To the extent that defendant contends that his plea was not knowing, voluntary, and intelligent because the court inaccurately described its sentencing discretion, preservation is not required (*see generally People v Garcia-Cruz*, 138 AD3d 1414, 1415 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *People v Brooks*, 128 AD3d 1467, 1468 [4th Dept 2015]), but we conclude that this part of defendant's contention is without merit (*see generally Garcia-Cruz*, 138 AD3d at 1415; *People v Halsey*, 108 AD3d 1123, 1124 [4th Dept 2013]; *People v Morrison*, 78 AD3d 1615, 1616 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]).

Defendant additionally contends that he was denied due process at sentencing based on the failure of the court to sua sponte appoint an interpreter. That contention is without merit. There is no indication in this record that defendant "lacked a sufficient understanding of English" (*People v Rodriguez*, 123 AD3d 495, 495 [1st Dept 2014]; *see People v Rosario*, 93 AD3d 605, 605-606 [1st Dept 2012], *lv denied* 19 NY3d 867 [2012], *reconsideration denied* 20 NY3d 935 [2012]; *see generally People v Ceravolo*, 162 AD2d 979, 979 [4th Dept 1990], *lv denied* 76 NY2d 892 [1990]). The court thus had no obligation to provide defendant with an interpreter (*see People v Ramos*, 26 NY2d 272, 275 [1970]; *People v Adamez*, 177 AD2d 980, 980 [4th Dept 1991], *lv denied* 79 NY2d 852 [1992]).

We agree with defendant, however, that he was deprived of "the right to be sentenced as provided by law" inasmuch as the court failed to apprehend the extent of its sentencing discretion (*People v Hager*, 213 AD2d 1008, 1008 [4th Dept 1995]; *see People v Long*, 188 AD3d 1663, 1664 [4th Dept 2020]; *People v Davis*, 115 AD3d 1239, 1239-1240 [4th Dept 2014]). That contention would survive even a valid waiver of the right to appeal and does not require preservation (*see Long*, 188 AD3d at 1664; *People v Pearson*, 166 AD3d 1586, 1586-1587 [4th Dept 2018]). On the merits, we agree with defendant that the court failed to apprehend its sentencing discretion. Prior to the plea colloquy, the court indicated that a sentence other than a determinate term of imprisonment followed by postrelease supervision could be considered only upon a showing of "mitigating circumstances." That was error because, upon a conviction of sexual abuse in the first degree, a class D violent felony offense, a determinate term of imprisonment is not mandatory (*see* Penal Law §§ 70.02 [2] [b]; 70.80 [4] [b], [c]; *see generally People v Endresz*, 1 AD3d 888, 888-889 [4th Dept 2003]; *People v Housman*, 291 AD2d 665, 666 [3d Dept 2002], *lv denied* 98 NY2d 638 [2002]) unless a defendant pleads guilty to that crime in satisfaction of an indictment charging the defendant with an armed felony (*see* § 70.02 [4]), which was not the case here. We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for resentencing. In light of our determination, we

do not consider defendant’s remaining contention.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00606

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

CODY RAY GERNATT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL W. GREGOIRE, DEFENDANT-RESPONDENT.

SHAW & SHAW, P.C., HAMBURG (BLAKE ZACCAGNINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered April 13, 2022. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries he sustained in a motor vehicle accident. At the time of the incident, defendant was responding to a radio dispatch of a "possible burglar alarm" when his police vehicle, traveling in the northbound lane of travel, collided with plaintiff's vehicle as that vehicle was making a left turn from the southbound lane. Defendant moved for summary judgment dismissing the complaint on the ground, inter alia, that at the time of the accident defendant was operating the police vehicle while involved in an emergency operation and that his operation of the police vehicle was not reckless as a matter of law. Supreme Court granted the motion, and plaintiff now appeals. We reverse.

Initially, we note that there is no dispute that defendant was operating an "authorized emergency vehicle" (Vehicle and Traffic Law § 101) and was " 'engage[d] in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b),' " i.e., exceeding the maximum speed limit (*Torres-Cummings v Niagara Falls Police Dept.*, 193 AD3d 1372, 1374 [4th Dept 2021], quoting *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]; *see* § 1104 [b] [3]). Contrary to plaintiff's contention, we conclude that defendant met his initial burden on the motion of establishing that defendant was involved in an emergency operation as contemplated by Vehicle and Traffic Law § 114-b (*see Lacey v City of Syracuse*, 144 AD3d 1665, 1666

[4th Dept 2016], *lv denied* 32 NY3d 913 [2019]; *see also Criscione v City of New York*, 97 NY2d 152, 157-158 [2001]; *Allen v Town of Amherst*, 8 AD3d 996, 997 [4th Dept 2004]). Plaintiff does not dispute that defendant established that he was responding to a dispatch call but instead contends that defendant failed to establish that the call was an emergency and that defendant's response thereto constituted emergency operation. We reject that contention. "Given the legislative determination that a police dispatch call is an 'emergency operation,' it is irrelevant whether the officer[] believed that the [dispatch] call was an emergency or how [the relevant department] categorized this type of call" (*Criscione*, 97 NY2d at 158; *see Coston v City of Buffalo*, 162 AD3d 1492, 1493 [4th Dept 2018]; *Lacey*, 144 AD3d at 1666). Based on the above, we conclude that defendant's conduct is governed by the reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e), rather than the ordinary negligence standard of care (*see Lacey*, 144 AD3d at 1666; *see* § 1104 [a], [b], [e]).

Nonetheless, we agree with plaintiff that defendant failed to meet his initial burden of establishing as a matter of law that his actions did not rise to the level of reckless disregard for the safety of others. The Court of Appeals has stated, as the dissent recognizes, that the "reckless disregard standard demands more than a showing of a lack of due care under the circumstances–the showing typically associated with ordinary negligence claims . . . Rather, for liability to be predicated upon a violation of Vehicle and Traffic Law § 1104, there must be evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*Frezzell v City of New York*, 24 NY3d 213, 217 [2014] [internal quotation marks omitted]). While we certainly recognize that the reckless disregard standard is a heightened standard from ordinary negligence, the reckless disregard standard still "retains and recognizes the potential for liability as a protection for the general public against disproportionate, overreactive conduct" (*Campbell v City of Elmira*, 84 NY2d 505, 513 [1994]).

Although, as noted above, "the nature of the underlying police call or the officer's perception of its urgency is irrelevant for purposes of ascertaining whether the officer was engaged in an emergency operation pursuant to Vehicle and Traffic Law § 114-b, the nature of the call nevertheless is relevant in determining whether a responding officer's conduct was in reckless disregard for the safety of others" (*O'Banner v County of Sullivan*, 16 AD3d 950, 952 [3d Dept 2005] [internal quotation marks omitted]; *see Allen*, 8 AD3d at 997). Moreover, other factors that are relevant in determining whether an officer's conduct amounted to reckless disregard include the nature of the road, traffic and weather conditions, the time of day, the speed of the officer's vehicle, and whether the officer followed departmental guidelines (*see* PJI 2:79A; *see e.g. Portis v Yates*, 207 AD3d 1137, 1138 [4th Dept 2022]; *Coston*, 162 AD3d at 1492; *Connelly v City of Syracuse*, 103 AD3d 1242, 1242-1243 [4th Dept 2013]).

Here, defendant submitted the deposition testimony of plaintiff, who testified that as plaintiff approached the intersection from the two-lane, hilly, wet road, he did not see any other vehicles when he activated his left turn signal. Plaintiff testified that he began his left turn and was already in the process thereof when he first noticed defendant's vehicle approaching his vehicle. Contrary to the dissent's position, plaintiff maintains that defendant failed to yield to plaintiff's right-of-way and did not concede the issue. Plaintiff further testified that defendant's vehicle was coming toward his vehicle at a "high rate of speed" and did not have on any headlights, siren or flashing lights. While there was evidence that defendant attempted to brake before colliding with plaintiff's vehicle, there was undisputed evidence that defendant's vehicle was traveling 70 miles per hour in a 55 mile per hour zone just prior to the collision and that defendant was still traveling 47 miles per hour at the time of impact with plaintiff's vehicle. Defendant submitted his own deposition testimony which established that at the time of the accident defendant was responding to a police dispatch call of a "possible burglar alarm." Defendant further testified that he was not sure whether he was responding to an emergency situation and only knew at the time that he was responding to "an alarm" at an address. We conclude that defendant's own submissions failed to eliminate triable issues of fact whether defendant acted with reckless disregard under the circumstances (*see Portis*, 207 AD3d at 1138; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Contrary to the dissent's urging, our decision in *Herod v Mele* (62 AD3d 1269 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]) and the other cases cited by the dissent do not compel a different result. In *Herod*, the officer was responding to a dispatch call of a "fight in progress" at the time of the accident (*id*. at 1270). This Court concluded that "[b]ased on the threat to the safety of the persons involved in the fight to which [the officer] was responding, he was duty-bound to use all reasonable means to arrive at the scene as soon as possible . . . [and] [t]he risks taken by [the officer] in responding to the call were justified" (*id*.). Unlike that case, here, defendant's evidence established only that the officer was responding to a "possible burglar alarm" and thus, unlike in *Herod*, questions of fact exist whether the emergency to which defendant was responding justified his conduct.

We therefore conclude that the court should have denied defendant's motion for summary judgment dismissing the complaint regardless of the sufficiency of plaintiff's opposing papers (*see Winegrad*, 64 NY2d at 853).

All concur except PERADOTTO, J.P., and LINDLEY, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent because in our view the majority's determination in this case disregards materially indistinguishable case law and improperly dilutes the reckless disregard standard of liability, which is designed to constitute a higher standard than that applicable to ordinary negligence claims.

The subject motor vehicle accident occurred during daytime shortly before 10:00 a.m. when defendant, a New York State Trooper, was traveling northbound on a rural, two-lane road in a sparsely populated area while responding to a radio dispatch. Plaintiff, driving southbound on the road, attempted to make a left turn onto another road in front of the oncoming police car operated by defendant. Unable to stop in time, defendant struck plaintiff's vehicle on the passenger side, causing injuries to plaintiff. There is no dispute that defendant had the right-of-way and that plaintiff was later convicted of failing to yield the right-of-way in violation of Vehicle and Traffic Law § 1140 (a).

We agree with the majority that defendant, in moving for summary judgment dismissing the complaint, met his initial burden of establishing as a matter of law that he was engaged in an emergency operation within the meaning of Vehicle and Traffic Law § 114-b at the time of the accident. We also agree with the majority that Supreme Court properly determined that the standard of care to be applied to defendant's conduct is "reckless disregard for the safety of others," as set forth in Vehicle and Traffic Law § 1104 (e), rather than ordinary negligence (*see generally Kabir v County of Monroe*, 16 NY3d 217, 222-223 [2011]). Unlike the majority, however, we conclude that defendant also met his initial burden of establishing that his conduct did not "rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach" (*Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]), and in response plaintiff failed to raise an issue of fact. Thus, in our view, the court properly granted defendant's motion for summary judgment dismissing the complaint, and we would therefore affirm.

As the Court of Appeals has made clear, the reckless disregard standard "demands more than a showing of a lack of 'due care under the circumstances'—the showing typically associated with ordinary negligence claims" (*Saarinen v Kerr*, 84 NY2d 494, 501 [1994]). Rather, liability under the reckless disregard standard "is established upon a showing that the covered vehicle's operator has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1105 [2015] [internal quotation marks omitted]; *see Alexandra R. v Krone*, 186 AD3d 981, 982 [4th Dept 2020], *appeal dismissed* 36 NY3d 922 [2020], *lv denied* 37 NY3d 907 [2021]).

Here, the evidence submitted by defendant established that he was traveling no more than 70 miles per hour when responding to the emergency, and that the posted speed limit in the area is 55 miles per hour. Data retrieved from the "black box" in the police vehicle showed that defendant started slowing down five seconds before the collision, decreasing his speed to 47 miles per hour by the time of impact. It is well settled that speeding by a police officer while operating an emergency vehicle during an emergency operation "certainly cannot alone constitute a predicate for liability, since it is expressly privileged under Vehicle and Traffic Law § 1104 (b) (3)"

(*Saarinen*, 84 NY2d at 503; *see Hubbard v Robinson*, 184 AD3d 1097, 1099 [4th Dept 2020]; *Michaels v Drake* [appeal No. 2], 120 AD3d 1593, 1594 [4th Dept 2014]), and the record here reveals no other conduct allegedly engaged in by defendant that made it " 'highly probable that harm would follow' " (*Saarinen*, 84 NY2d at 501).

Indeed, "[t]he other circumstances on which plaintiff and [the majority] rely—[i.e.,] the wet condition of the road[and defendant's decision not to activate the emergency lights of the police vehicle]—are similarly unpersuasive, particularly in the context of an inquiry based on the 'reckless disregard' standard" (*id.* at 503). We considered a materially indistinguishable fact pattern in *Herod v Mele* (62 AD3d 1269 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]), where there was evidence that, in addition to exceeding the posted speed limit, the officer "was traveling on wet roads without having activated the lights and siren on his police vehicle and . . . experienced a short-term reduction in visibility of the intersection where the collision occurred" (*id.* at 1270). We nevertheless concluded that "those factors also do not rise to the level of reckless disregard for the safety of others" (*id.*). As here, the officer in *Herod* "had the right-of-way at the intersection," and there was "no evidence of any traffic at or near that intersection other than [the] plaintiffs' vehicle" (*id.*). Inasmuch as there is no evidence that defendant violated internal policies of the New York State Police or regulations by not activating his emergency lights and sirens (*cf. McLoughlin v City of Syracuse*, 206 AD3d 1600, 1602 [4th Dept 2022]), our holding in *Herod* is dispositive.

Notably, the majority does not—and cannot—reasonably distinguish *Herod*. In the case before us, defendant, although speeding during his daytime response to a radio dispatch for a burglary alarm, was operating his vehicle within and in the direction of his lane of travel and had the right-of-way, and nothing in the record suggests that such a response to a suspected burglary, which defendant characterized as serious, was reckless (*see Saarinen*, 84 NY2d at 503). Consequently, we see no basis to support the conclusion that a triable issue of fact exists on the issue whether defendant acted with reckless disregard. Because the majority's determination in this case contravenes the standard established by the legislature and applied in our case law, we decline to join in that result.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 17-00980

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERNON L. CLEVELAND, JR., DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered April 4, 2017. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree, robbery in the first degree and robbery in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences shall run concurrently with one another, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of kidnapping in the second degree (Penal Law § 135.20), robbery in the first degree (§ 160.15 [4]), and two counts of robbery in the second degree (§ 160.10 [1], [3]). The conviction arose from events in which defendant and another male perpetrator robbed at gunpoint a food delivery worker (victim) after he had made a delivery at an apartment building, accompanied the victim to his vehicle and had him sit in the back seat and, after driving the vehicle for a time, forced the victim to get into the trunk, from which the victim eventually escaped by pulling the release latch and running away when the vehicle stopped.

Defendant contends on appeal that County Court erred by failing to conduct a sufficient minimal inquiry into his complaints about defense counsel underlying his pretrial request for substitution of counsel. We reject that contention. Here, even assuming, arguendo, that defendant's complaints about defense counsel "suggested a serious possibility of good cause for a substitution of counsel requiring a need for further inquiry" (*People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]), we conclude that the court "conducted the requisite

'minimal inquiry' to determine whether substitution of counsel was warranted" (*People v Chess*, 162 AD3d 1577, 1579 [4th Dept 2018], quoting *People v Sides*, 75 NY2d 822, 825 [1990]). The record establishes that the court "afforded defendant the opportunity to express his objections concerning defense counsel, and . . . thereafter reasonably concluded that defendant's objections were without merit" (*Bethany*, 144 AD3d at 1669), and "properly concluded that defense counsel was 'reasonably likely to afford . . . defendant effective assistance' of counsel" (*People v Bradford*, 118 AD3d 1254, 1255 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014], quoting *People v Medina*, 44 NY2d 199, 208 [1978]).

Defendant next contends that the court erred in permitting, over his objection, the victim to identify him as one of the perpetrators for the first time at trial. We reject that contention as well. Where, as here, "[a] witness is unable to render a positive identification of the defendant [during a pretrial identification procedure], and the defendant is identified in court [by that witness] for the first time, the defendant is not [thereby] deprived of a fair trial because the [defendant] is able to explore weaknesses and suggestiveness of the identification in front of the jury" (*People v Leigh*, 208 AD3d 1463, 1464 [3d Dept 2022] [internal quotation marks omitted]; *see People v Madison*, 8 AD3d 956, 957 [4th Dept 2004], *lv denied* 3 NY3d 709 [2004]). The record establishes that, "during cross-examination of the victim, defendant questioned [him] about potential suggestiveness that may have tainted the . . . in-court identification, and then discussed those weaknesses during summation" (*Leigh*, 208 AD3d at 1464). Indeed, "[t]he victim's prior inability to identify defendant in a photo array [went] to the weight to be given [his] identification, not its admissibility" (*People v Fuller*, 185 AD2d 446, 449 [3d Dept 1992], *lv denied* 80 NY2d 974 [1992], *reconsideration denied* 81 NY2d 788 [1993]; *see Leigh*, 208 AD3d at 1464; *People v Clark*, 139 AD3d 1368, 1370 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]). We thus conclude that "defendant's right to a fair trial was not infringed by the victim's positive in-court identification" (*Leigh*, 208 AD3d at 1464).

Defendant further contends that the evidence is legally insufficient to establish his identity as one of the perpetrators of the offenses. Initially, contrary to the People's assertion, we conclude that "[w]hile [defendant's general motion for a trial order of dismissal] alone would not have been sufficient to preserve the issue for our review . . . , when coupled with the trial [court's] specific findings as to [identity], the question now on appeal was expressly decided by that court" and is thus preserved for our review (*People v Prado*, 4 NY3d 725, 726 [2004], *rearg denied* 4 NY3d 795 [2005]; *see* CPL 470.05 [2]; *People v Jones*, 100 AD3d 1362, 1363 [4th Dept 2012], *lv denied* 21 NY3d 1005 [2013], *cert denied* 571 US 1077 [2013]). Defendant's contention nonetheless lacks merit. "Legal sufficiency review requires that we view the evidence in the light most favorable to the prosecution, and, when deciding whether a jury could logically conclude that the prosecution sustained its burden of proof, [w]e must assume that the jury credited the People's witnesses

and gave the prosecution's evidence the full weight it might reasonably be accorded" (*People v Allen*, 36 NY3d 1033, 1034 [2021] [internal quotation marks omitted]; *see People v Hampton*, 21 NY3d 277, 287-288 [2013]; *People v Delamota*, 18 NY3d 107, 113 [2011]). Viewed in that light, we conclude that the direct and circumstantial evidence—including the victim's in-court identification of defendant, the DNA evidence linking defendant to the apartment building, the fingerprint evidence establishing defendant's interaction with the vehicle, and defendant's cell phone data placing him in the area of the apartment building at the time of the incident—is legally sufficient to establish defendant's identity as a perpetrator of the offenses (*see People v Clark*, 171 AD3d 942, 942 [2d Dept 2019], *lv denied* 33 NY3d 1067 [2019]; *see also People v Spencer*, 191 AD3d 1331, 1331-1332 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]).

We reject defendant's related assertion that the victim's identification testimony is incredible as a matter of law. Under a legal sufficiency review, "[i]ncredibility as a matter of law may result '[w]hen all of the evidence of guilt comes from a single prosecution witness who gives irreconcilable testimony pointing both to guilt and innocence,' because in that event 'the jury is left without basis, other than impermissible speculation, for its determination of either' " (*People v Calabria*, 3 NY3d 80, 82 [2004], quoting *People v Jackson*, 65 NY2d 265, 272 [1985]; *see Hampton*, 21 NY3d at 288). Here, however, the victim "did not provide internally inconsistent testimony, and [he] was not the source of 'all of the evidence of [defendant's] guilt' " (*Hampton*, 21 NY3d at 288; *see Calabria*, 3 NY3d at 82-83; *People v Mulligan*, 118 AD3d 1372, 1375 [4th Dept 2014], *lv denied* 25 NY3d 1075 [2015]). Indeed, the victim provided a rational explanation for the difference between his pretrial inability to identify defendant in the photo array and his in-court identification of defendant as one of the perpetrators—i.e., that although he was unable to recognize defendant "[j]ust based on the photo" alone, he was able to make an identification once he saw defendant in person at trial for the first time since the incident—and the victim was unwavering in his testimony that defendant was one of the perpetrators (*see Delamota*, 18 NY3d at 116; *Calabria*, 3 NY3d at 82-83). To the extent that the victim's pretrial statements regarding his description or identification of the perpetrators differed from his trial testimony, "resolution of such inconsistencies [was] for the jury" (*Hampton*, 21 NY3d at 288; *see Delamota*, 18 NY3d at 116; *Jackson*, 65 NY2d at 272).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to defendant's identity as a perpetrator (*see People v Brown*, 204 AD3d 1390, 1392 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]; *People v Thomas*, 176 AD3d 1639, 1640 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see*

Brown, 204 AD3d at 1393; *Thomas*, 176 AD3d at 1640; *see generally Bleakley*, 69 NY2d at 495).

Next, defendant contends that he was denied his right to meaningful representation because defense counsel failed to call his aunts as alibi witnesses and failed to call the customer of the food delivery to provide exculpatory testimony. We reject that contention. "To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]). Here, the record establishes that defense counsel's decision not to call defendant's aunts in support of an alibi defense premised on defendant's purported presence at another location at the time of the incident, which the People had already contradicted with an analysis of defendant's cell phone data, " 'was a matter of trial strategy and cannot be characterized as ineffective assistance of counsel' " (*Atkins*, 107 AD3d at 1465; *see People v Villone*, 138 AD2d 971, 971 [4th Dept 1988], *lv denied* 72 NY2d 913 [1988]; *see also People v Baldi*, 54 NY2d 137, 147 [1981]). The record also establishes that, upon investigation, defense counsel discovered that the customer would not be able to provide exculpatory testimony, and we thus conclude that "[defense c]ounsel's decision not to call [that] witness, whose testimony he assessed as weak, was a strategic legal decision which does not amount to ineffective assistance of counsel" (*People v Smith*, 82 NY2d 731, 733 [1993]).

Finally, although we reject defendant's contention and the People's incorrect concession (*see People v Berrios*, 28 NY2d 361, 366-367 [1971]; *People v Adair*, 177 AD3d 1357, 1357 [4th Dept 2019], *lv denied* 34 NY3d 1125 [2020]) that the court erred in directing that the sentence on the kidnapping in the second degree count run consecutively to the concurrent sentences imposed on the robbery counts (*see* Penal Law § 70.25 [2]; *People v Leonard*, 206 AD3d 1665, 1666 [4th Dept 2022], *lv denied* 39 NY3d 1073 [2023], *reconsideration denied* 39 NY3d 1112 [2023]; *see generally People v Brahney*, 29 NY3d 10, 14-15 [2017], *rearg denied* 29 NY3d 10 [2017]), we nonetheless conclude that the imposition of consecutive sentences renders the sentence unduly harsh and severe under the circumstances of this case. We therefore modify the judgment, as a matter of discretion in the interest of justice, by directing that all of the sentences shall run concurrently with one another (*see* CPL 470.15 [6] [b]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 20-01654

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAR TURNER, DEFENDANT-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (DANIELLE C. WILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 9, 2020. 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 Supreme Court erred in refusing to suppress evidence obtained from him during an encounter with the police because the police lacked the requisite reasonable suspicion that he committed a reported burglary to justify his detention and pat frisk, which resulted in the discovery of a handgun. We reject that contention.

According to the evidence presented at the suppression hearing, in the early morning hours while in her residence, a 10-year-old girl (witness) observed a black male inside her bedroom. Later that day, the police were dispatched to the residential address to investigate the reported burglary. While the police were there, the witness returned from a nearby clothing store and told the police that the person who had committed the reported burglary—i.e., the male who had been inside her bedroom earlier that morning—was currently present inside the store, and provided a detailed description of the suspect. The police immediately responded to the store, where they observed a person—later identified as defendant—who matched the description provided by the witness. Following some discussion with defendant, the police eventually detained him and, during a corresponding pat frisk, discovered a handgun in defendant’s waistband.

It is well established that when an officer "confronts an individual whom [the officer] reasonably suspects has committed, is committing or is about to commit such a serious and violent crime as . . . burglary, . . . that suspicion not only justifies the detention but also the frisk, thus making it unnecessary to particularize an independent source for the belief of danger" (*People v Mack*, 26 NY2d 311, 317 [1970], *cert denied* 400 US 960 [1970]; *see People v Moore*, 32 NY2d 67, 70 [1973], *cert denied* 414 US 1011 [1973]; *People v Collado*, 72 AD3d 614, 615 [1st Dept 2010], *lv denied* 15 NY3d 850 [2010]; *People v Williams*, 4 AD3d 852, 852 [4th Dept 2004], *lv denied* 2 NY3d 809 [2004]; *People v Downes*, 259 AD2d 424, 424-425 [1st Dept 1999], *lv denied* 93 NY2d 969 [1999]). The question in this case is thus whether the police had the requisite reasonable suspicion that defendant committed the reported burglary to justify detaining and frisking him in the store. On that question, "[r]egardless of whether we apply a totality of the circumstances test or the *Aguilar-Spinelli* standard" (*People v Argyris*, 24 NY3d 1138, 1140 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* 577 US 1069 [2016]), we conclude that the detention and frisk of defendant was lawful.

More particularly, with respect to the reliability prong of the *Aguilar-Spinelli* test, the court properly determined that, despite her age and unsworn hearsay statement recounted by one of the police officers, the 10-year-old witness was "[a]n identified citizen informant" who "is presumed to be personally reliable" (*People v Parris*, 83 NY2d 342, 350 [1994]; *see People v Hetrick*, 80 NY2d 344, 349 [1992]; *People v Walker*, 278 AD2d 852, 852 [4th Dept 2000], *lv denied* 96 NY2d 869 [2001]). In any event, given the evidence presented at the suppression hearing, including defendant's proximity to the location of the reported burglary and the witness's "detailed and specific" description of the burglary suspect, we conclude that there are "ample indicia of the reliability of [the witness's] statements" (*Hetrick*, 80 NY2d at 348; *see People v Spencer*, 257 AD2d 638, 638 [2d Dept 1999], *lv denied* 93 NY2d 902 [1999]). With respect to the second prong, we note that, "[w]ithout question, [the witness] had a basis of knowledge for her statements, i.e., her personal observation of the events she described" (*Hetrick*, 80 NY2d at 348). In sum, we conclude that "[t]he evidence in the record establishes that the information provided by the identified citizen informant 'was reliable under the totality of the circumstances, satisfied the two-pronged *Aguilar-Spinelli* test for the reliability of hearsay tips in this particular context and contained sufficient information about' defendant's commission of the crime of [burglary]" (*People v Wisniewski*, 147 AD3d 1388, 1388 [4th Dept 2017], *lv denied* 29 NY3d 1038 [2017], quoting *Argyris*, 24 NY3d at 1140-1141). The police thus had reasonable suspicion that defendant had committed the "serious and violent crime" of burglary, thereby justifying both the detention and frisk of defendant (*Mack*, 26 NY2d at 317; *see Williams*, 4 AD3d at 852; *Downes*, 259 AD2d at 424-425).

Defendant's additional contention challenging the propriety of the frisk is not preserved for our review inasmuch as he failed to raise that specific contention in his motion papers, at the

suppression hearing, or in his written submission as a ground for suppression (*see People v Boswell*, 197 AD3d 950, 951 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]; *People v Burden*, 191 AD3d 1260, 1261 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Next, defendant contends that he is entitled to reversal of the judgment of conviction and dismissal of the indictment because the single statutory offense under which he was charged and convicted (Penal Law § 265.03 [3]) is facially unconstitutional under the Second Amendment of the United States Constitution as interpreted by the United States Supreme Court in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). Although defendant "d[id] not forfeit the right on appeal from the conviction to challenge the constitutionality of the statute under which he was convicted" by pleading guilty (*People v Lee*, 58 NY2d 491, 493 [1983]) and he has notified the Attorney General of the State of New York pursuant to Executive Law § 71 that he is challenging the constitutionality of the statute on appeal (*see People v Tucker*, 181 AD3d 103, 105 [4th Dept 2020], *cert denied* — US —, 141 S Ct 566 [2020]), defendant correctly concedes that his challenge to the constitutionality of the statute is not preserved for our review inasmuch as he failed to raise any such challenge before the trial court (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *People v Gerow*, 85 AD3d 1319, 1320 [3d Dept 2011]; *cf. People v Hughes*, 22 NY3d 44, 48-49 [2013]; *see generally People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]).

Defendant nonetheless contends that his constitutional challenge to Penal Law § 265.03 (3) is exempt from the preservation requirement by relying on language from *People v McLucas* (15 NY2d 167 [1965]), in which the Court of Appeals broadly stated that "no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right" (*id.* at 172). Defendant, however, omits from his brief the fact that the Court of Appeals has since clarified that "this sweeping statement [in *McLucas*] is no longer good law" (*People v McLean*, 15 NY3d 117, 120 [2010]). Instead, under current law, "[t]he unconstitutionality of a statute is not exempt from the requirement of preservation" (*People v Scott*, 126 AD3d 645, 646 [1st Dept 2015], *lv denied* 25 NY3d 1171 [2015]; *see People v Iannelli*, 69 NY2d 684, 685 [1986], *cert denied* 482 US 914 [1987]; *People v Dozier*, 52 NY2d 781, 783 [1980]; *People v Thomas*, 50 NY2d 467, 473 [1980]). For the reasons stated in *People v McWilliams* (214 AD3d 1328, 1329-1330 [4th Dept 2023]), we reject defendant's remaining claims that his constitutional challenge to his conviction is exempt from preservation. We decline to exercise our power to review defendant's challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00219

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

JOHN CLYDE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRANCISCAN SISTERS OF ALLEGANY, N.Y., INC.,
DEFENDANT,
AND KINLEY CORPORATION, DEFENDANT-APPELLANT.

KINLEY CORPORATION, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

NEW YORK COMMERCIAL FLOORING, INC.,
THIRD-PARTY DEFENDANT-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

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

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

Appeals from an order of the Supreme Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered January 3, 2022. The order, among other things, denied that part of the motion of defendant-third-party plaintiff seeking summary judgment dismissing the complaint against it, and denied in part the motion of third-party defendant for summary judgment dismissing the third-party complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant-third-party plaintiff's motion in its entirety, granting third-party defendant's motion insofar as it sought summary judgment dismissing the first cause of action in the third-party complaint and dismissing that cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action seeking to recover damages for injuries that he sustained when he slipped and fell on an accumulation of snow and ice located in a temporary parking lot used by workers on a remodeling project for a residential building owned by defendant Franciscan Sisters of Allegany, N.Y., Inc.

Defendant-third-party plaintiff Kinley Corporation (Kinley) had been retained to perform work on the remodeling project including, inter alia, the construction of the temporary parking lot to be used by workers on the site. Kinley subcontracted with plaintiff's employer—third-party defendant New York Commercial Flooring, Inc. (NYCF)—to perform specific work on the remodeling project. Kinley commenced a third-party action against NYCF asserting causes of action for, inter alia, contractual indemnification and breach of the subcontract. NYCF and Kinley appeal from an order that, inter alia, granted those parts of Kinley's motion for summary judgment with respect to the contractual indemnification and breach of contract causes of action in the third-party complaint, denied those parts of NYCF's motion seeking summary judgment dismissing those same two causes of action, and denied Kinley's motion to the extent that it sought summary judgment dismissing the complaint against it.

Initially, on its appeal, NYCF contends that Supreme Court erred in granting Kinley's motion for summary judgment with respect to the first cause of action, for contractual indemnification, and that, instead, it should have granted that part of NYCF's motion seeking summary judgment dismissing that cause of action. We agree and therefore modify the order accordingly. The indemnification provision in the subcontract between Kinley and NYCF plainly obligates NYCF "to indemnify [Kinley] for [its] own acts of negligence," rendering it "void and unenforceable under General Obligations Law § 5-322.1 (1)" (*Charney v LeChase Constr.*, 90 AD3d 1477, 1479 [4th Dept 2011]; *see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 794 [1997], *rearg denied* 90 NY2d 1008 [1997]). Further, the indemnification provision does not contain a savings clause stating that indemnification is required only " '[t]o the fullest extent permitted by law' " (*Charney*, 90 AD3d at 1479; *see Bink v F.C. Queens Place Assoc., LLC*, 27 AD3d 408, 409 [2d Dept 2006]), and the liability giving rise to indemnification is predicated on a finding of negligence (*see Delaney v Spiegel Assoc.*, 225 AD2d 1102, 1104 [4th Dept 1996]). Indeed, the sole potential basis for Kinley's liability here is its own negligence, particularly in light of the fact that in the third-party complaint and its motion papers Kinley made no allegations—or offered any evidence showing—that the accident was the result of NYCF's or another party's negligence (*see Clavin v CAP Equip. Leasing Corp.*, 156 AD3d 404, 404-405 [1st Dept 2017]).

We also agree with NYCF that the court erred in granting Kinley's motion with respect to the breach of contract cause of action in the third-party complaint, and we therefore further modify the order accordingly. In that cause of action, Kinley alleged that NYCF breached the subcontract because it had failed to procure insurance for Kinley. As relevant here, "[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an . . . insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Corter-Longwell v Juliano*, 200 AD3d 1578, 1580 [4th Dept 2021] [internal quotation marks omitted]; *see DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011]). We conclude that Kinley did not meet its initial burden here because, although the subcontract

required NYCF to procure insurance for Kinley, Kinley submitted no evidence that NYCF failed to so procure insurance in compliance with the subcontract (*see Hunt v Ciminelli-Cowper Co., Inc.*, 66 AD3d 1506, 1510 [4th Dept 2009]). The only evidence Kinley supplied to support its allegation is the assertion in an affidavit from Kinley's attorney that NYCF's insurer had not accepted Kinley's tender for defense and indemnity. In that affidavit, Kinley's attorney asserts that, in response to its tender for defense and indemnity, he was told merely that "further discovery [was] needed . . . to determine whether Kinley was responsible" for the accident. Kinley has supplied no evidence establishing that tender was not accepted because NYCF did not procure insurance for Kinley—it did not even submit a copy of NYCF's insurance policy. Indeed, at this point, to the extent that Kinley contends that it has been denied a defense by NYCF's insurance carrier, "the proper remedy is to commence a declaratory judgment action against [NYCF's] insurer[] based upon [its] rights as [an] additional insured[]" (*id.* at 1510-1511). For similar reasons, we conclude that, contrary to NYCF's contention, the court properly denied NYCF's motion to the extent it sought dismissal of the breach of contract cause of action because NYCF failed to supply any evidence to show either that it was not required to obtain insurance coverage for Kinley or that it had actually obtained such coverage as required by the subcontract (*see generally Corter-Longwell*, 200 AD3d at 1580-1581).

On its appeal, Kinley contends that the court should have granted that part of its motion seeking summary judgment dismissing the complaint against it on the ground that it did not own, control or have a special use of the property where the accident occurred and because it lacked actual or constructive notice of the dangerous condition that purportedly caused the accident. We reject that contention. To establish its entitlement to summary judgment dismissing the complaint, Kinley "had the [initial] burden of establishing either that it lacked control over the area where [plaintiff] was injured or that it lacked actual or constructive notice of the dangerous condition" (*Lacey v Lancaster Dev. & Tully Constr. Co., LLC*, 193 AD3d 1398, 1400 [4th Dept 2021]; *see Hargrave v LeChase Constr. Servs., LLC*, 115 AD3d 1270, 1272 [4th Dept 2014]). Here, we conclude that Kinley's own evidentiary submissions raised questions of fact with respect to both control and notice (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Specifically, Kinley submitted its contract with the general contractor on the remodeling project, which specifically provided that Kinley was "responsible for snow plowing as required to keep construction access to the temporary parking [lot and] construction parking." That provision directly contradicts Kinley's assertion in its motion that the subcontract required it to maintain the temporary parking lot only "as required to maintain a level surface for automobile traffic." Further, Kinley's submissions established that it had constructed the temporary parking lot and required workers, including plaintiff, to park there (*see Lacey*, 193 AD3d at 1400-1401). Kinley's contention that it is entitled to summary judgment dismissing the complaint against it under *Espinal v Melville Snow Contrs.* (98 NY2d 136, 138 [2002]) is unpreserved for our review because Kinley did not raise that argument before the motion court (*see generally*

Ciesinski v Town of Aurora, 202 AD2d 984, 985 [4th Dept 1994]).

We also reject Kinley's contention that the court should have granted its motion on the ground that Kinley lacked actual or constructive notice of the accumulation of snow and ice that caused plaintiff to slip and fall. We conclude that Kinley did not meet its initial burden with respect to actual notice because it did not submit evidence establishing that it "did not receive any complaints concerning the area where plaintiff fell and [was] unaware of any [snow and ice] in that location prior to plaintiff's accident" (*Britt v Northern Dev. II, LLC*, 199 AD3d 1434, 1435 [4th Dept 2021] [internal quotation marks omitted]; *see Cosgrove v River Oaks Rests., LLC*, 161 AD3d 1575, 1576 [4th Dept 2018]). The affidavit from Kinley's president submitted in support of the motion is insufficient to establish lack of actual notice because it merely states that "Kinley never received any complaints that the subject parking lot did not have a level surface for automobile traffic" prior to the accident—it says nothing whatsoever about there being no complaints about snow and ice on the parking lot.

Similarly, we conclude that Kinley failed to meet its initial burden with respect to the issue of constructive notice. "To constitute constructive notice, a [dangerous condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Arghittu-Atmekjian v TJX Cos., Inc.*, 193 AD3d 1395, 1395-1396 [4th Dept 2021]; *Salvania v University of Rochester*, 137 AD3d 1607, 1609 [4th Dept 2016]). Here, Kinley failed to establish that the accumulation of snow and ice formed in such close proximity to the accident that Kinley could not have noticed and remedied it (*see Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1401 [4th Dept 2018]; *Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128, 1129 [4th Dept 2007]). Moreover, it is a well-settled proposition that "[d]efendants cannot establish . . . entitlement to summary judgment dismissing the complaint [merely] by pointing to alleged gaps in [the] plaintiff's proof," but that is precisely what Kinley attempts to do here by arguing that plaintiff could not demonstrate that Kinley had notice of the dangerous condition (*Godlewski v Carthage Cent. School Dist.*, 83 AD3d 1571, 1572 [4th Dept 2011]; *see End of the Hill, LLC v Brock Acres Realty, LLC*, 206 AD3d 1587, 1587-1588 [4th Dept 2022]; *DeVaul v Erie Ins. Co. of N.Y.*, 174 AD3d 1520, 1520 [4th Dept 2019]).

Because Kinley failed to meet its initial burden on that part of its motion, the burden never shifted to plaintiff, and denial of that part of the motion "was required 'regardless of the sufficiency of the opposing [or reply] papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Korthas v U.S. Foodservice, Inc.*, 61 AD3d 1407, 1408 [4th Dept 2009]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00736

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

MELISSA SANCHEZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LOREN VAN RIPER, M.D., ET AL., DEFENDANTS, DUC NGUYEN, P.A., LOUIS DEVITO, P.A., LINDA LUPO, F.N.P., EASTERN FINGER LAKES EMERGENCY MEDICAL CARE, PLLC, PAUL KOENIG, M.D., GERALD MCMAHON, M.D., AND ST. JOSEPH'S HOSPITAL HEALTH CENTER, DEFENDANTS-APPELLANTS.

HIRSCH & TUBIOLO, P.C., ROCHESTER (RICHARD S. TUBIOLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS DUC NGUYEN, P.A., LOUIS DEVITO, P.A., AND EASTERN FINGER LAKES EMERGENCY MEDICAL CARE, PLLC.

GALE GALE & HUNT, LLC, FAYETTEVILLE (MAX D. GALE OF COUNSEL), FOR DEFENDANTS-APPELLANTS GERALD MCMAHON, M.D., AND ST. JOSEPH'S HOSPITAL HEALTH CENTER.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ZACHARY M. MATTISON OF COUNSEL), FOR DEFENDANTS-APPELLANTS LINDA LUPO, F.N.P., AND PAUL KOENIG, M.D.

GILLETTE & IZZO LAW OFFICE PLLC, SYRACUSE (JANET M. IZZO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ERIC G. JOHNSON OF COUNSEL), FOR DEFENDANTS AUBURN MEMORIAL MEDICAL SERVICES, P.C., AUBURN COMMUNITY HOSPITAL, AND CHRISTINA GRAY, RN, MSN, ANP.

Appeals from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered April 22, 2022. The order, inter alia, denied the motion of defendants Duc Nguyen, P.A., Louis DeVito, P.A., and Eastern Finger Lakes Emergency Medical Care, PLLC, for summary judgment dismissing the complaint against them.

Now, upon reading and filing the stipulation of discontinuance with respect to defendants Louis DeVito, P.A., Linda Lupo, F.N.P., Paul Koenig, M.D., Gerald McMahon, M.D., and St. Joseph's Hospital Health Center, signed by the attorneys for the parties in April 2023,

It is hereby ORDERED that said appeals by defendants Louis DeVito, P.A., Linda Lupo, F.N.P., Paul Koenig, M.D., Gerald McMahon, M.D., and St. Joseph's Hospital Health Center are unanimously dismissed upon stipulation, and the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action alleging, inter alia, that defendant Duc Nguyen, P.A. was negligent in failing to diagnose and treat plaintiff, and that defendant Eastern Finger Lakes Emergency Medical Care, PLLC (Finger Lakes), is liable for Nguyen's negligence under the theory of respondeat superior. Finger Lakes and Nguyen (collectively, defendants) appeal from an order that denied their motion for summary judgment dismissing the complaint against them. We affirm.

We reject defendants' contention that plaintiff's expert failed to offer an adequate foundation for their qualifications to render an opinion about the standard of care to be followed by physician's assistants in a hospital emergency department. "It is well recognized that a plaintiff's expert need not have practiced in the same specialty as the defendants" (*Payne v Buffalo Gen. Hosp.*, 96 AD3d 1628, 1629 [4th Dept 2012]), and "any alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony" (*Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1471 [4th Dept 2020] [internal quotation marks omitted]). Here, plaintiff's expert is a board certified emergency medicine physician with over 40 years of experience practicing emergency medicine, which included directing two hospital emergency departments and serving as the chief medical officer of a substantial network of hospitals, in which capacities the expert managed and supervised doctors as well as physician's assistants, nurse practitioners, nurses, and other medical staff personnel. We conclude that plaintiff's expert "had the requisite skill, training, education, knowledge or experience from which it can be assumed that [the expert's] opinion[] . . . [is] reliable" (*Leberman v Glick*, 207 AD3d 1203, 1205 [4th Dept 2022] [internal quotation marks omitted]; *see Stradtman*, 179 AD3d at 1470-1471; *Payne*, 96 AD3d at 1629-1630). Moreover, although defendants met their initial burden of establishing entitlement to judgment as a matter of law, we conclude that "the affirmation of plaintiff's expert submitted in opposition to the motion . . . raised triable issues of fact sufficient to defeat the motion" (*Payne*, 96 AD3d at 1630; *see Leberman*, 207 AD3d at 1205).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 19-00344

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANCIS SPELLICY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered November 8, 2018. The judgment convicted defendant upon a jury verdict of burglary in the third degree, possession of burglar's tools and attempted petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20), possession of burglar's tools (§ 140.35), and attempted petit larceny (§§ 110.00, 155.25). We affirm.

Defendant contends that his constitutional right to self-representation (*see generally* US Const 6th, 14th Amends; NY Const, art I, § 6; *People v LaValle*, 3 NY3d 88, 106 [2004]) was violated when Supreme Court did not grant his request to proceed pro se until six days before trial. Specifically, defendant contends that, as a result of the delay, he "was unable to properly prepare for trial." Initially, we note that defendant's contention with respect to the delay in granting his request and its effects on trial preparation is subject to harmless error analysis. That is because defendant's contention is not that his right to self-representation was violated; rather, he challenges the timing and manner of the court's decision to permit him to proceed pro se (*cf. McKaskle v Wiggins*, 465 US 168, 177 n 8 [1984], *reh denied* 465 US 1112 [1984]; *People v LaValle*, 3 NY3d 88, 106 [2004]; *see generally People v Lott*, 23 AD3d 1088, 1089 [4th Dept 2005]; *People v Hicks*, 205 AD2d 478, 478 [1st Dept 1994], *lv denied* 84 NY2d 868 [1994]). Even assuming, arguendo, that the court erred in that regard, we conclude that the error was harmless under the circumstances of this case (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). We further conclude that defendant's remaining

contentions with respect to the right to self-representation lack merit.

Contrary to defendant's further contention, the court did not err in allowing the People to introduce into evidence at trial a statement made by defendant after his arrest, which the court had originally suppressed. We conclude that the court properly determined that defendant opened the door to that evidence during his cross-examination of one of the police officers who had been present at the time of defendant's arrest (*see People v Gonzalez*, 145 AD3d 1432, 1433 [4th Dept 2016], *lv denied* 29 NY3d 1079 [2017]; *see generally People v Melendez*, 55 NY2d 445, 451 [1982]). Inasmuch as defendant's cross-examination of that witness may have created a misimpression, the People were entitled to correct that misimpression, even through testimony regarding defendant's suppressed statement (*see People v Paul*, 171 AD3d 1467, 1469 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019], *reconsideration denied* 34 NY3d 953 [2019], *cert denied* — US —, 140 S Ct 1151 [2020]; *People v Cordero*, 110 AD3d 1468, 1470 [4th Dept 2013], *lv denied* 22 NY3d 1137 [2014]; *see generally People v Hill*, 284 AD2d 193, 194 [1st Dept 2001], *lv denied* 96 NY2d 919 [2001]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 19-00782

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COLLICE PARSON, ALSO KNOWN AS C,
DEFENDANT-APPELLANT.

ERIK TEIFKE, PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN 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 (Charles A. Schiano, Jr., J.), rendered February 25, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree and criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal was inadequate under *People v Thomas* (34 NY3d 545 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and, therefore, it "does not preclude our review of [his] challenge to the severity of [his] sentence" (*People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]). We conclude that his sentence is not unduly harsh or severe.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00946

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

KATHARINE MERTZ AND STEVEN MERTZ,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LECHASE CONSTRUCTION SERVICES, LLC,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

SEGAR & SCIORTINO PLLC, ROCHESTER (KYLE P. RITER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (JENNIFER M. SCHAUERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered January 7, 2022. The order granted the motion of defendant LeChase Construction Services, LLC, for summary judgment and dismissed the complaint against it.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Katharine Mertz (plaintiff) when she tripped and fell on a walkway at the hospital where she worked as a nurse. Defendant LeChase Construction Services, LLC (defendant) had served as a construction manager for the first phase of a larger hospital renovation project and constructed the walkway as part of that project. Defendant moved for summary judgment dismissing the complaint against it on, inter alia, the ground that it owed no duty of care to plaintiff. Supreme Court granted that motion, and plaintiffs appeal. We affirm.

Contrary to plaintiffs' contention, defendant met its initial burden of demonstrating that it did not owe plaintiff a duty of care arising from its alleged control over the walkway. Defendant established that it had completed work on the walkway and returned control over that area to the University of Rochester (University), the party with which defendant had contracted, prior to plaintiff's accident, and it is undisputed that defendant did not own the premises (*see Greenstein v Realife Land Improvement, Inc.*, 13 AD3d 338, 339 [2d Dept 2004]; *see generally Peluso v ERM*, 63 AD3d 1025, 1025-1026 [2d Dept 2009]). In opposition, plaintiffs failed to raise a triable

issue of fact whether defendant retained control of the walkway.

Plaintiffs further contend that the court erred in granting defendant's motion because defendant had a duty to plaintiff arising from its contract with the University under the first exception set forth in *Espinal v Melville Snow Contrs.* (98 NY2d 136, 138-140 [2002]). We likewise reject that contention. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*id.* at 139; *see Spaulding v Loomis Masonry, Inc.*, 105 AD3d 1309, 1310 [4th Dept 2013]). There is an exception to that general rule, however, "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launche[s] a force or instrument of harm" (*Espinal*, 98 NY2d at 140 [internal quotation marks omitted]), thereby "creat[ing] an unreasonable risk of harm to others, or increas[ing] that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). Here, the sole defect in the walkway area identified by plaintiff as causing her accident was the allegedly dim lighting, which prevented her from seeing the step-down off a curb (*see generally Stempien v Walls*, 193 AD3d 1383, 1384 [4th Dept 2021]; *Bissett v 30 Merrick Plaza, LLC*, 156 AD3d 751, 751 [2d Dept 2017]; *Twersky v Incorporated Vil. of Great Neck*, 127 AD3d 739, 740 [2d Dept 2015]). Defendant established, however, that its contract with the University did not require it to install lighting around the walkway, and that the University supplied defendant with the design to be used for the walkway. Thus, defendant demonstrated that it did not breach a contractual obligation to install lighting in the area, and it therefore " 'cannot be said that [defendant] affirmatively created a dangerous condition' " for which it could be held liable to plaintiff (*Peluso*, 63 AD3d at 1026). Further, under the circumstances of this case, defendant was justified in relying upon the plans and specifications for the walkway that, defendant established, it did not prepare (*see Dentico v Turner Constr. Co.*, 207 AD3d 1036, 1037-1038 [4th Dept 2022]). Plaintiffs failed to raise an issue of fact in opposition thereto.

Lastly, plaintiffs' theory of liability premised on defendant's alleged negligent design of the walkway was improperly raised for the first time in opposition to defendant's motion and we therefore do not address that contention (*see Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01439

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

JOSEPH SINDONI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF SKANEATELES CENTRAL SCHOOL DISTRICT AND SKANEATELES CENTRAL SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (KATE I. REID OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHERUNDOLO LAW FIRM PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered July 5, 2022. The order, inter alia, denied the motion of defendants seeking summary judgment dismissing the second cause of action, and seeking to dismiss the third cause of action pursuant to CPLR 3211 (a) (7).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendants' motion, dismissing the second and third causes of action, and granting judgment to defendants on the first cause of action as follows:

> It is ADJUDGED and DECLARED that the executive session conducted by defendant Board of Education of Skaneateles Central School District prior to its public meeting on January 5, 2021 was not in violation of Public Officers Law § 100,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff brought this action against defendants, Board of Education of Skaneateles Central School District (Board) and Skaneateles Central School District (District), asserting causes of action in the second amended complaint (complaint) for violations of the Open Meetings Law (Public Officers Law art 7) (first cause of action), violations of plaintiff's civil rights pursuant to 42 USC § 1983 (second cause of action), and defamation (third cause of action). Plaintiff, who had previously been appointed by the Board as the District's varsity high school football coach, was notified shortly after a closed session meeting of the Board on January 5, 2021 that his appointment to that position would not be renewed. Plaintiff

moved, in effect, for summary judgment seeking a declaration in his favor on the first cause of action and for, among other things, a preliminary injunction (underlying motion). Supreme Court granted that motion in part by, inter alia, granting partial summary judgment declaring that the executive session violated the Public Officers Law and that the action taken during that session was void, and by granting a preliminary injunction enjoining the District from terminating plaintiff's employment as the District's varsity football coach until a constitutionally sufficient notice of charges was provided along with an opportunity to be heard. On a prior appeal, defendants appealed from the ensuing judgment and, while the appeal was pending, plaintiff voluntarily resigned and moved in this Court to dismiss defendants' appeal as moot in light of his resignation. We granted plaintiff's motion to dismiss the appeal insofar as it sought to dismiss the portion of the appeal relating to the preliminary injunction, and modified the judgment by denying that part of the underlying motion seeking a declaration with respect to the first cause of action and vacating the declaration because plaintiff failed to establish that he was entitled to relief under Public Officers Law § 107 (*Sindoni v Board of Educ. of Skaneateles Cent. Sch. Dist.*, 202 AD3d 1457, 1458-1459 [4th Dept 2022]).

Defendants thereafter moved for summary judgment seeking dismissal of the second cause of action pursuant to CPLR 3212 and dismissal of the third cause of action for failure to state a cause of action pursuant to CPLR 3211 (a) (7). Plaintiff cross-moved for summary judgment on the first cause of action. The court denied the motion and cross-motion, and defendants now appeal.

Initially, we agree with defendants that the court erred in denying that part of their motion seeking summary judgment with respect to the second cause of action, i.e., the "stigma-plus" cause of action pursuant to 42 USC § 1983. We therefore modify the order accordingly. Plaintiff alleged that the District's decision to not renew plaintiff's appointment as varsity football coach for the spring of 2021 occurred contemporaneously with the circulation of a letter to the community that, according to the complaint, implicitly accused plaintiff of "disregard[ing] COVID-19 precautions and recklessly expos[ing] students to the virus." Plaintiff further alleged that those actions deprived him of a protected liberty interest without due process of law as guaranteed by the NY and US Constitutions. A stigma-plus cause of action requires a plaintiff to establish "(1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights" (*Sadallah v City of Utica*, 383 F3d 34, 38 [2d Cir 2004] [internal quotation marks omitted]; *see Segal v City of New York*, 459 F3d 207, 212 [2d Cir 2006]; *Velez v Levy*, 401 F3d 75, 87 [2d Cir 2005]). Because a defamatory statement, standing alone, does not amount to a constitutional deprivation, "the 'plus' imposed by the defendant[s] must be a specific and adverse action clearly restricting the plaintiff's liberty—for example, the loss of employment" (*Velez*, 401 F3d at 87-88; *see Patterson v City of Utica*, 370 F3d 322, 330 [2d Cir

2004]; *Donato v Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F3d 623, 630 [2d Cir 1996], *cert denied* 519 US 1150 [1997]).

Here, defendants met their initial burden on that part of the motion with respect to the stigma-plus cause of action by submitting evidence demonstrating that plaintiff did not suffer a material state-imposed burden or state-imposed alteration of his status or rights (*see generally Patterson*, 370 F3d at 332). The unrefuted evidence established that the court granted plaintiff a preliminary injunction, resulting in the renewal of his appointment, and that plaintiff remained in his position as varsity football coach until he voluntarily resigned in November 2021. Although there was a period during which defendants told plaintiff that his appointment would not be renewed, we conclude that "[i]t cannot, as a matter of law, be viewed as a significant alteration of plaintiff's employment status when, in fact, he was quickly hired back in the same position from which he was supposedly fired" (*id.*). Indeed, " '[b]rief interruption[s]' of work do not give rise to a Due Process claim" (*Hu v City of New York*, 927 F3d 81, 102 [2d Cir 2019], quoting *Conn v Gabbert*, 526 US 286, 292 [1999]; *see Barzilay v City of New York*, 610 F Supp 3d 544, 614-615 [SD NY 2022]). Plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We further agree with defendants that the court erred in denying their motion insofar as it sought to dismiss the third cause of action because the allegedly defamatory statements were absolutely privileged. We therefore further modify the order accordingly. The absolute privilege defense affords complete immunity from liability for defamation to "an official [who] is a principal executive of State or local government . . . with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties" (*Clark v McGee*, 49 NY2d 613, 617 [1980] [internal quotation marks omitted]). "The first prong of that test . . . [requires an examination of] the personal position or status of the speaker," and "the second prong . . . requires an examination of the subject matter of the statement and the forum in which it is made in the light of the speaker's public duties" (*Doran v Cohalan*, 125 AD2d 289, 291 [2d Dept 1986], *lv dismissed* 69 NY2d 984 [1987]).

Here, the complaint alleges that the District superintendent, whose role included termination of employees like plaintiff, circulated the allegedly defamatory letter. A school superintendent is a principal executive whose statements may be protected by absolute privilege (*see Santavicca v City of Yonkers*, 132 AD2d 656, 656-657 [2d Dept 1987]). Further, based on the allegations in the complaint, we conclude that "the [superintendent] was acting wholly within the scope of his duties" when making the relevant statements (*Monroe v Schenectady County*, 266 AD2d 792, 795 [3d Dept 1999]). The complaint alleges that there was press coverage of the incidents that led up to the Board's decision not to renew plaintiff's appointment, and that the District "received a significant number of calls, e-mails and letters" regarding that decision. Inasmuch as the subjects at issue "became a matter of public attention and controversy, [the

superintendent]'s form of communication, i.e., [a letter to the community], was warranted" (*Spring v County of Monroe*, 169 AD3d 1384, 1386 [4th Dept 2019]). Issuance of the letter was therefore "sufficiently related to the performance of [the superintendent]'s duties" such that "the statements made therein were absolutely privileged" and the third cause of action must be dismissed (*Metrosearch Recoveries, LLC v City of New York*, 169 AD3d 512, 512 [1st Dept 2019], *lv denied* 33 NY3d 910 [2019]; *see Monroe*, 266 AD2d at 795; *see also Spring*, 169 AD3d at 1386).

Defendants did not move for summary judgment with respect to the first cause of action, which alleges violations of Public Officers Law § 107. However, "CPLR 3212 (b) permits us to search the record and to grant summary judgment to a nonmoving party where . . . it appears that a nonmoving party is entitled to such relief" (*Cagnina v Onondaga County*, 90 AD3d 1626, 1627 [4th Dept 2011]; *see generally Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110 [1984]; *Allington v Templeton Found.*, 167 AD3d 1437, 1441 [4th Dept 2018]). As noted in our prior decision, "[t]here is no dispute that, during the closed session on January 5, 2021, the Board and the District superintendent met with the District's counsel seeking legal advice 'regarding the [p]laintiff's legal employment status, employment rights, [and] the process for appointing school employees' " (*Sindoni*, 202 AD3d at 1459). We therefore concluded that "the court erred in determining that there was a violation of the Open Meetings Law" inasmuch as it appeared that the attorney-client exemption applied to the closed session (*id.*; *see Matter of Brown v Feehan*, 125 AD3d 1499, 1501 [4th Dept 2015]; *see generally* CPLR 4503 [a] [1]).

On his cross-motion seeking summary judgment on the first cause of action, plaintiff submitted the affidavit of an attendee at the closed session, whose account of that meeting was largely consistent with the accounts provided in the affidavits submitted by defendants in opposition. The account of the meeting as described in the affidavit submitted by plaintiff differed only in asserting that, after the District's counsel provided preliminary legal advice, there was "a lengthy discussion" and a "roll call" of the attendees regarding plaintiff's employment status. It is well settled that the attorney-client privilege encompasses not only confidential communications from client to attorney but also from attorney to client (*see Rossi v Blue Cross and Blue Shield of Greater N.Y.*, 73 NY2d 588, 594 [1989]). Moreover, "[s]o long as [a] communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters" (*id.*). Here, the District's counsel averred that she was continuously responding to the participants' discussion during the closed session and that the participants were, in turn, "incorporat[ing] the legal advice [she] had given to the Board earlier in the meeting." Inasmuch as "it is plain" from that description that the communication "was for the purpose of facilitating the lawyer's rendition of legal advice to [her] client[s]" (*id.*), and inasmuch as the affidavit submitted by plaintiff is not inconsistent with counsel's description, we conclude that the entire closed session

consisted of "communications made pursuant to an attorney-client relationship," and that the closed session was thus "exempt from the provisions of the Open Meetings Law" (*Brown*, 125 AD3d at 1501 [internal quotation marks omitted]).

"[I]n view of the uncontroverted proof in the record, there is no basis upon which relief might be granted to plaintiff" under Public Officers Law § 107 (*Five Star Bank v CNH Capital Am., LLC*, 55 AD3d 1279, 1282 [4th Dept 2008] [internal quotation marks omitted]), and we therefore search the record pursuant to CPLR 3212 (b) and grant summary judgment in defendants' favor.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

166

CA 22-00969

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

GWENDOLYN COLE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EDDIE L. HOOVER, DEFENDANT-RESPONDENT.

MCGRATH LAW FIRM, PLLC, KENMORE (PETER MCGRATH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TRONOLONE & SURGALLA, P.C., BUFFALO (JOHN B. SURGALLA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered December 23, 2021. The order denied the motion of plaintiff for summary judgment on the first cause of action.

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

> It is ADJUDGED and DECLARED that the oral stipulation entered into on May 14, 2018 is invalid and unenforceable.

Memorandum: In this postjudgment matrimonial action, plaintiff, the former wife of defendant, sought vacatur of the judgment of divorce and a judgment declaring that the parties' oral stipulation was "invalid and unenforceable." Plaintiff appeals from an order that denied her motion for summary judgment on the first cause of action, alleging that the oral stipulation was invalid because it did not comply with Domestic Relations Law § 236 (B) (3). We reverse.

As plaintiff correctly contends, the parties' oral stipulation is not enforceable because, although it was entered in open court, it was not reduced to writing, subscribed, or acknowledged by the parties, as required by Domestic Relations Law § 236 (B) (3). Although plaintiff's attorney stated at the time of the oral stipulation that she "would prefer just to do the oral stipulation," the statute unambiguously provides that, in order for an agreement regarding maintenance or a distributive award "made before or during the marriage" to be valid and enforceable in a matrimonial action, the agreement must be "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (*id.*). We have repeatedly held that oral stipulations do

not comply with the statute (*see McGovern v McGovern*, 186 AD3d 988, 989 [4th Dept 2020]; *Keegan v Keegan*, 147 AD3d 1417, 1418 [4th Dept 2017]; *Lewis v Lewis*, 70 AD3d 1432, 1433 [4th Dept 2010]). Although the First and Second Departments have held differently (*see Ostolski v Solounias*, 55 AD3d 889, 890 [2d Dept 2008]; *Storette v Storette*, 11 AD3d 365, 365 [1st Dept 2004]), the Third Department has agreed with our position (*see Birr v Birr*, 70 AD3d 1221, 1222-1223 [3d Dept 2010]), thus creating an even split at the Appellate Division level on that issue.

We note that the Court of Appeals has written that "the unambiguous statutory language of section 236 (B) (3), its history and related statutory provisions establish that the Legislature did not mean for the formality of acknowledgment to be expendable" (*Matisoff v Dobi*, 90 NY2d 127, 135 [1997]). Indeed, the Court of Appeals made it clear that there is "*no exception*" to the statute's requirements (*id.* at 136 [emphasis added]).

We agree with plaintiff that defendant failed to preserve his responsive contention that plaintiff waived compliance with Domestic Relations Law § 236 (B) (3) (*see Harmacol Realty Co. LLC v Nike, Inc.*, 143 AD3d 503, 504 [1st Dept 2016]) and, under the circumstances of this case, the issue whether plaintiff knowingly and voluntarily waived her rights under the statute is not a strictly legal issue that may be raised for the first time on appeal (*cf. Edwards v Siegel, Kelleher & Kahn*, 26 AD3d 789, 790 [4th Dept 2006]; *see generally Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]).

We also agree with plaintiff that Supreme Court erred in denying the motion on the ground that plaintiff ratified the oral stipulation. The proposition that an agreement that fails to comply with Domestic Relations Law § 236 (B) (3) could be upheld if ratified by the parties was implicitly rejected by the Court of Appeals in *Matisoff*. In that case, the First Department held that the parties' oral agreement was enforceable because, inter alia, its "terms were acknowledged and *ratified* in the daily activities and property relations of the parties throughout their eleven-year marriage" (*Matisoff v Dobi*, 228 AD2d 200, 202 [1st Dept 1996], *revd* 90 NY2d 127 [1997] [emphasis added]). By reversing the First Department, the Court of Appeals necessarily rejected the contention that an agreement that fails to comply with Domestic Relations Law § 236 (B) (3) may be upheld if it is ratified by the parties (*see Matisoff*, 90 NY2d at 135-136). The ratification cases cited by defendant are all distinguishable (*see Mesiti v Mongiello*, 84 AD3d 1547, 1550-1551 [3d Dept 2011]; *Weimer v Weimer*, 281 AD2d 989, 989 [4th Dept 2001]; *see also Gardella v Remizov*, 144 AD3d 977, 981 [2d Dept 2016]).

Finally, we note that plaintiff's failure to submit a statement of material undisputed facts in support of her motion, as then required by the Uniform Rules for the Trial Courts (22 NYCRR § 202.8-g [a]), did not compel the court to deny her motion (*see generally On the Water Prods., LLC v Glynos*, 211 AD3d 1480, 1481-1482 [4th Dept

2022]; *Leberman v Instantwhip Foods, Inc*., 207 AD3d 850, 850-851 [3d Dept 2022]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

183

CA 22-01503

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

SUSAN M. WEICHERT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GREGORY C. HEMMERICH AND HEMMERICH TREE SERVICE,
DEFENDANTS-RESPONDENTS.

SUSAN M. WEICHERT, PLAINTIFF-APPELLANT PRO SE.

DAVID A. LONGERETTA, ESQ., PLLC, UTICA (DAVID A. LONGERETTA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Lewis County (Charles C. Merrell, J.), entered April 7, 2022. The order and judgment granted plaintiff a money judgment in the amount of $12,660.

It is hereby ORDERED that said appeal is unanimously dismissed with costs.

Memorandum: Plaintiff commenced this action seeking damages for, as relevant here, defendants' alleged breach of a contract pursuant to which defendants were to pay for, at scheduled rates by quantity, the various forms of wood that they removed from plaintiff's property. After defendants failed to appear or answer, plaintiff moved for a default judgment (*see* CPLR 3215 [a]). Supreme Court subsequently issued an order in which it granted plaintiff a default judgment on the issue of liability and, consistent with plaintiff's representation in her affidavit in support of the motion that her claim was not for a sum certain or a sum which could by computation be made certain (*see* CPLR 3215 [a]), ordered an inquest on damages. Months later, during an appearance scheduled for the inquest on damages, the parties negotiated a resolution and placed on the record a stipulation of settlement pursuant to which defendants would pay plaintiff a total of $27,460 in two scheduled installments and, in the event of nonpayment, plaintiff would be entitled to file confessions of judgment (*see* CPLR 3218) for any unpaid amounts.

Although defendants made partial payments pursuant to the stipulation of settlement, they were unable to fully satisfy their payment obligation by the scheduled deadline. Plaintiff then moved for a judgment against defendants, contending that defendants' breach of the stipulation of settlement rendered them liable in default for the amount demanded in the pleadings, i.e., $550,000, and also for an

order sanctioning defendants for their purported failure to respond to a subpoena duces tecum allegedly served prior to the stipulation of settlement. The court granted plaintiff's motion in part by directing the County Clerk to enter a money judgment against defendants in the amount of $12,660, i.e., the remaining balance under the stipulation of settlement. In rejecting plaintiff's contention that she was entitled to the amount demanded in the pleadings, the court reasoned that the stipulation of settlement did not provide for such a remedy in the event that defendants failed to fulfill their payment obligations thereunder and plaintiff's remedy was instead to seek enforcement of the stipulation of settlement. The court also denied that part of plaintiff's motion seeking sanctions against defendants. The record establishes that, shortly after issuance of the court's order and judgment, defendants fulfilled their payment obligation by tendering to plaintiff the remaining balance under the stipulation of settlement. Plaintiff nonetheless now appeals from that order and judgment.

We agree with defendants that the appeal must be dismissed. Plaintiff appeals only from the aforementioned order and judgment wherein the court granted in part plaintiff's motion for a judgment, held that plaintiff's remedy for defendants' nonpayment was to seek enforcement of the stipulation of settlement, which did not provide that plaintiff would be entitled to the amount demanded in the pleadings in the event that defendants failed to fulfill their payment obligations, and denied that part of plaintiff's motion seeking sanctions against defendants for their alleged failure to respond to a pre-settlement subpoena duces tecum. Plaintiff's brief, however, addresses only the court's earlier determination to grant plaintiff a default judgment on the issue of liability only and order an inquest on damages, rather than to immediately award plaintiff the amount demanded in the pleadings following defendants' default in the action. Inasmuch as that determination was embodied in a prior order that is not subject to the present appeal, we are foreclosed from reviewing plaintiff's contention (*see Capozzolo v Capozzolo*, 195 AD3d 1534, 1535 [4th Dept 2021]; *Weichert v Delia*, 1 AD3d 1058, 1058-1059 [4th Dept 2003], *lv denied* 1 NY3d 509 [2004]). " '[T]he only issues which we may consider are limited by the notice of appeal' " (*Weichert*, 1 AD3d at 1058), and we are thus limited to reviewing the propriety of the court's holding that payment of the amount demanded in the pleadings is not a remedy under the stipulation of settlement and its denial of plaintiff's request for sanctions. Because plaintiff has not raised any issue with respect to the order and judgment on appeal, she has abandoned any contentions with respect thereto, and therefore the appeal from that order and judgment must be dismissed (*see Capozzolo*, 195 AD3d at 1535; *Weichert*, 1 AD3d at 1058-1059). Finally, inasmuch as plaintiff pursued this appeal despite having received satisfaction of the remaining balance under the stipulation of settlement, and then presented no argument with respect to the issues embodied in the order and judgment appealed from, we dismiss the appeal with costs (*see Weichert*, 1 AD3d at 1058-1059; *see also Jones v Town of Carroll*, 197

AD3d 1003, 1004 [4th Dept 2021]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

189

CA 22-01130

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

CHRISTINE CASTIGLIONE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAN PISANCZYN, DEFENDANT-APPELLANT.

BURGIO, CURVIN & BANKER, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK M. BOGULSKI, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered December 30, 2021. The order denied the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries that she allegedly sustained as a result of a motor vehicle accident. Defendant appeals from an order denying her motion to dismiss the complaint pursuant to CPLR 3216 for failure to prosecute. We conclude under the circumstances of this case that Supreme Court did not abuse its discretion in denying defendant's motion. Even assuming, arguendo, that plaintiff failed to establish a justifiable excuse for any delay and a meritorious cause of action upon failing to comply with defendant's 90-day demand (*see* CPLR 3216 [e]), we note that, contrary to defendant's contention, "[a] court retains discretion to deny a motion to dismiss pursuant to CPLR 3216 even [under those circumstances]" (*Rust v Turgeon*, 295 AD2d 962, 963 [4th Dept 2002]; *see Hawe v Delmar*, 148 AD3d 1788, 1789 [4th Dept 2017]; *Amanda C.S. v Stearns* [appeal No. 1], 49 AD3d 1227, 1228 [4th Dept 2008]; *Restaino v Capicotto*, 26 AD3d 771, 771 [4th Dept 2006]; *see generally Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503-505 [1997]). Here, plaintiff's efforts to move the case forward during the 90-day period, which included reaching a stipulation with defendant to bifurcate the trial, " 'negated any inference that [plaintiff] intended to abandon [the] action' " (*Restaino*, 26 AD3d at 772; *see Hawe*, 148 AD3d at 1789). Finally, we further note that "[t]here is no parallel between the circumstances of the instant case and those where CPLR 3216 dismissals have been justified based on patterns of persistent neglect, a history of extensive delay, evidence of an intent to abandon prosecution, and lack of any tenable excuse for such delay" (*Amanda C.S.*, 49 AD3d at 1228 [internal quotation

marks omitted]; *see Hawe*, 148 AD3d at 1789).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

190

CA 21-00131

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

MORGAN JAMIE DUNBAR AND MACNORE CAMERON,
PLAINTIFFS-APPELLANTS,

V ORDER

WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, AND ITS SUCCESSORS IN INTEREST, INCLUDING CORPORATIONS AND/OR ENTITIES, JOHN R. OISHEI CHILDREN'S HOSPITAL, PREVIOUSLY KNOWN AS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, KALEIDA HEALTH, INC., GIL MICHAEL FARKASH, M.D., DEBRA M. ERCKERT, R.N., DENISE M. MEISSNER, R.N., KATHARINE V. MORRISON, M.D., KATHARINE V. MORRISON, M.D., PLLC, THE BIRTHING CENTER OF BUFFALO, DOING BUSINESS AS BUFFALO WOMENSERVICES, LLC, BUFFALO GYN WOMENSERVICES, INC., EILEEN STEWART, CNM, BUFFALO MIDWIFERY SERVICES, PLLC, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

MORGAN JAMIE DUNBAR, PLAINTIFF-APPELLANT PRO SE.

MACNORE CAMERON, PLAINTIFF-APPELLANT PRO SE.

CONNORS LLP, BUFFALO (MOLLIE C. MCGORRY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, AND ITS SUCCESSORS IN INTEREST, INCLUDING CORPORATIONS AND/OR ENTITIES, JOHN R. OISHEI CHILDREN'S HOSPITAL, PREVIOUSLY KNOWN AS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, KALEIDA HEALTH, INC., DEBRA M. ERCKERT, R.N., AND DENISE M. MEISSNER, R.N.

THE TARANTINO LAW FIRM, LLP, BUFFALO (KIMBERLY A. CLINE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS EILEEN STEWART, CNM, AND BUFFALO MIDWIFERY SERVICES, PLLC.

EAGAN & HEIMER PLLC, BUFFALO (NEAL A. JOHNSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KATHARINE V. MORRISON, M.D., KATHARINE V. MORRISON, M.D., PLLC, THE BIRTHING CENTER OF BUFFALO, DOING BUSINESS AS BUFFALO WOMENSERVICES, LLC, AND BUFFALO GYN WOMENSERVICES, INC.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 2, 2020. The order settled the order on motions to dismiss.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1575-1576 [4th Dept 2014]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

191

CA 22-01713

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

MORGAN JAMIE DUNBAR AND MACNORE CAMERON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, AND ITS SUCCESSORS IN INTEREST, INCLUDING CORPORATIONS AND/OR ENTITIES, JOHN R. OISHEI CHILDREN'S HOSPITAL, PREVIOUSLY KNOWN AS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, KALEIDA HEALTH, INC., GIL MICHAEL FARKASH, M.D., DEBRA M. ERCKERT, R.N., DENISE M. MEISSNER, R.N., KATHARINE V. MORRISON, M.D., KATHARINE V. MORRISON, M.D., PLLC, THE BIRTHING CENTER OF BUFFALO, DOING BUSINESS AS BUFFALO WOMENSERVICES, LLC, BUFFALO GYN WOMENSERVICES, INC., EILEEN STEWART, CNM, BUFFALO MIDWIFERY SERVICES, PLLC, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

MORGAN JAMIE DUNBAR, PLAINTIFF-APPELLANT PRO SE.

MACNORE CAMERON, PLAINTIFF-APPELLANT PRO SE.

CONNORS LLP, BUFFALO (MOLLIE C. MCGORRY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, AND ITS SUCCESSORS IN INTEREST, INCLUDING CORPORATIONS AND/OR ENTITIES, JOHN R. OISHEI CHILDREN'S HOSPITAL, PREVIOUSLY KNOWN AS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, KALEIDA HEALTH, INC., DEBRA M. ERCKERT, R.N., AND DENISE M. MEISSNER, R.N.

THE TARANTINO LAW FIRM, LLP, BUFFALO (KIMBERLY A. CLINE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS EILEEN STEWART, CNM, AND BUFFALO MIDWIFERY SERVICES, PLLC.

EAGAN & HEIMER PLLC, BUFFALO (NEAL A. JOHNSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KATHARINE V. MORRISON, M.D., KATHARINE V. MORRISON, M.D., PLLC, THE BIRTHING CENTER OF BUFFALO, DOING BUSINESS AS BUFFALO WOMENSERVICES, LLC, AND BUFFALO GYN WOMENSERVICES, INC.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 2, 2020. The order, inter alia, granted in part three separate motions to dismiss the fourth amended complaint.

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

Memorandum: Plaintiffs are the parents of an infant who died shortly after birth, and they commenced this medical malpractice action seeking to recover damages for emotional injuries that they allegedly sustained as a result of defendants' negligence in providing medical treatment during plaintiff Morgan Jamie Dunbar's labor and delivery of the child. Plaintiffs appeal from an order that, inter alia, granted those parts of the motions of all defendants-respondents except Gil Michael Farkash, M.D. and Katharine V. Morrison, M.D., PLLC (collectively, defendants) seeking to dismiss plaintiffs' claims sounding in ordinary negligence and their cause of action for lack of informed consent against them. We affirm.

Contrary to plaintiffs' contention, Supreme Court properly granted those parts of defendants' motions seeking to dismiss the ordinary negligence claims asserted against them in the fourth amended complaint. Specifically, we conclude that the first three causes of action "sound[] in medical malpractice rather than ordinary negligence [because] the challenged conduct 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician' to a particular patient" (*Cullinan v Pignataro*, 266 AD2d 807, 808 [4th Dept 1999], quoting *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]; *see Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996]). Additionally, the first through third causes of action do not sound in ordinary negligence inasmuch as the allegations in the fourth amended complaint with respect to those causes of action involve matters "not within the ordinary experience and knowledge of laypersons" (*McDonald v State of New York*, 13 AD3d 1199, 1200 [4th Dept 2004] [internal quotation marks omitted]), and thus the parties would be required to proffer expert testimony to establish the relevant standard of care concerning the challenged conduct (*see generally B.F. v Reproductive Medicine Assoc. of N.Y., LLP*, 136 AD3d 73, 80 [1st Dept 2015], *affd* 30 NY3d 608 [2017], *rearg denied* 31 NY3d 991 [2018]; *McDonald*, 13 AD3d at 1200).

With respect to the cause of action for medical malpractice based on lack of informed consent, we conclude that the court properly granted those parts of defendants' motions seeking to dismiss that cause of action against them. "The right of action to recover for medical, dental or podiatric malpractice based on a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d [2]). Here, we conclude that plaintiffs failed to state a cause of action for lack of informed consent because, as pleaded in the operative complaint, "[t]he injuries allegedly sustained . . . were not the result of an invasive procedure, but instead were alleged to have been the result of a negligent failure to undertake or negligent postponing of such procedure"—i.e., defendants' alleged delay in ordering a cesarean section—during an ongoing emergency situation (*Jaycox v Reid*, 5 AD3d 994, 995 [4th Dept 2004]; *see generally Saguid v Kingston Hosp.*, 213 AD2d 770, 772 [3d Dept

1995], *lv denied* 87 NY2d 861 [1995], *lv dismissed* 88 NY2d 868 [1996]).

We have considered plaintiffs' remaining contention and conclude that it does not warrant reversal or modification of the order.

Entered: June 9, 2023

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 21-00904

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

MORGAN JAMIE DUNBAR AND MACNORE CAMERON,
PLAINTIFFS-APPELLANTS,

V ORDER

WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, AND ITS SUCCESSORS IN INTEREST, INCLUDING CORPORATIONS AND/OR ENTITIES, JOHN R. OISHEI CHILDREN'S HOSPITAL, PREVIOUSLY KNOWN AS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, KALEIDA HEALTH, INC., GIL MICHAEL FARKASH, M.D., DEBRA M. ERCKERT, R.N., DENISE M. MEISSNER, R.N., KATHARINE V. MORRISON, M.D., KATHARINE V. MORRISON, M.D., PLLC, THE BIRTHING CENTER OF BUFFALO, DOING BUSINESS AS BUFFALO WOMENSERVICES, LLC, BUFFALO GYN WOMENSERVICES, INC., EILEEN STEWART, CNM, BUFFALO MIDWIFERY SERVICES, PLLC, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 3.)

MORGAN JAMIE DUNBAR, PLAINTIFF-APPELLANT PRO SE.

MACNORE CAMERON, PLAINTIFF-APPELLANT PRO SE.

CONNORS LLP, BUFFALO (MOLLIE C. MCGORRY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, AND ITS SUCCESSORS IN INTEREST, INCLUDING CORPORATIONS AND/OR ENTITIES, JOHN R. OISHEI CHILDREN'S HOSPITAL, PREVIOUSLY KNOWN AS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, KALEIDA HEALTH, INC., DEBRA M. ERCKERT, R.N., AND DENISE M. MEISSNER, R.N.

THE TARANTINO LAW FIRM, LLP, BUFFALO (KIMBERLY A. CLINE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS EILEEN STEWART, CNM, AND BUFFALO MIDWIFERY SERVICES, PLLC.

EAGAN & HEIMER PLLC, BUFFALO (NEAL A. JOHNSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KATHARINE V. MORRISON, M.D., KATHARINE V. MORRISON, M.D., PLLC, THE BIRTHING CENTER OF BUFFALO, DOING BUSINESS AS BUFFALO WOMENSERVICES, LLC, AND BUFFALO GYN WOMENSERVICES, INC.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 4, 2021. The order settled a record on appeal.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

193

CA 22-00657

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

MARY HAAS AND JAMES HAAS, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA, DEFENDANT-RESPONDENT.

CANTOR, WOLFF, NICASTRO & HALL LLC, BUFFALO (DAVID J. WOLFF, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

JOSEPH G. MAKOWSKI, LLC, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered March 25, 2022. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Mary Haas (plaintiff) allegedly sustained when she tripped and fell on a street owned and maintained by defendant. Plaintiffs appeal from an order granting the motion of defendant seeking summary judgment dismissing the complaint on the ground of lack of prior written notice. We affirm.

Defendant met its initial burden on the motion by establishing the location of the accident and that it lacked prior written notice of a defect at that location as prescribed by the Code of the Town of Cheektowaga § 168-2, and plaintiffs thus had the burden to demonstrate, as relevant here, that defendant "affirmatively created the defect through an act of negligence . . . 'that immediately result[ed] in the existence of a dangerous condition' " (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Franklin v Learn*, 197 AD3d 982, 983 [4th Dept 2021], *lv denied* 37 NY3d 918 [2022]). Plaintiffs submitted an affidavit from an expert, who opined that defendant defectively paved portions of the street approximately one year prior to the accident, based on photographs taken by plaintiff's son that depicted a portion of the street with "water risers" in the pavement. The expert's affidavit did not raise a question of fact with respect to whether defendant created the defective condition that caused the accident, however, because defendant's moving papers included evidence establishing that the area where plaintiff allegedly fell did not contain the water risers (*see generally Zuckerman v City*

of New York, 49 NY2d 557, 562 [1980]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

195

KA 18-00389

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AYKUT OZKAYNAK, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered January 11, 2018. The appeal was held by this Court by order entered March 11, 2022, decision was reserved and the matter was remitted to Livingston County Court for further proceedings (203 AD3d 1616 [4th Dept 2022]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and tampering with physical evidence (§ 215.40 [2]). We previously rejected defendant's contention challenging the weight of the evidence, and we held this case, reserved decision and remitted the matter to County Court to determine whether the warrant authorizing law enforcement officials to obtain, inter alia, cellular site location information (CSLI) from defendant's cellular service provider was supported by probable cause (*People v Ozkaynak*, 203 AD3d 1616, 1616-1617 [4th Dept 2022]). Upon remittal, the court determined that there was sufficient information in the warrant application to support a reasonable belief that evidence of a crime would be contained in defendant's cellular telephone records. We now address the remaining issues left unresolved on the prior appeal.

We reject defendant's contention that the search warrants authorizing searches for a motel room, electronic devices seized from that motel room and the contents of his cellular phone, including CSLI, were not supported by probable cause. It is well settled that " 'a search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur . . . , and where there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found

inside the location sought to be searched' " (*People v McLaughlin*, 193 AD3d 1338, 1339 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]; *see People v Hightower*, 207 AD3d 1199, 1200 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]).

"Probable 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]; *see People v Wright*, 210 AD3d 1486, 1491 [4th Dept 2022]; *People v Griswold*, 155 AD3d 1658, 1659 [4th Dept 2017], *lv denied* 31 NY3d 984 [2018]). "Affording great deference to the determination of the issuing Magistrate and reviewing the application in a common-sense and realistic fashion" (*People v Humphrey*, 202 AD3d 1451, 1451 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022] [internal quotation marks omitted]; *see generally People v Johnson*, 66 NY2d 398, 406 [1985]), we conclude that the information contained in the search warrant applications provided a reasonable belief that information from the motel room, electronic devices and cellular phones would connect defendant to the murder of the victim or, at the very least, would connect him to locations where physical evidence had been tampered with, i.e., the removal and subsequent burning of the victim's body in a fire pit located some distance away from the victim's residence.

Contrary to defendant's further contention, the search warrants with limited exception were not overly broad. Although defendant failed to preserve that contention with respect to the data to be obtained from the electronic devices and cellular phones (*see People v Williams*, 127 AD3d 612, 612 [1st Dept 2015], *lv denied* 27 NY3d 1009 [2016]; *see generally People v Samuel*, 137 AD3d 1691, 1693 [4th Dept 2016]), we nevertheless exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree with defendant that, to the extent that the warrant for the six cellular phones and laptop computers permitted the seizure of "all data and graphic files," it was overly broad (*see People v Thompson*, 178 AD3d 457, 458 [1st Dept 2019]). We can, however, sever the overbroad portion of the warrant "because the warrant was largely specific and based on probable cause" (*People v Brown*, 96 NY2d 80, 88 [2001]; *see People v Couser*, 303 AD2d 981, 982 [4th Dept 2003]). The remaining directives in that warrant, which limit the search and seizure to items pertaining to the death of the victim and concealment of that crime, are appropriately specific and particularized (*see Brown*, 96 NY2d at 88; *see generally People v Bush*, 189 AD3d 643, 644 [1st Dept 2020]), and the search conducted by the police did not exceed those remaining directives (*see Brown*, 96 NY2d at 89).

With respect to defendant's last challenge to the warrants, we conclude that the description of the CSLI and the items to be recovered from the motel room "was not broader than was justified by the probable cause upon which the warrants were based" (*People v*

Crupi, 172 AD3d 898, 899 [2d Dept 2019], *lv denied* 34 NY3d 950 [2019], *cert denied* — US —, 140 S Ct 2815 [2020]; *see People v Socciarelli*, 203 AD3d 1556, 1558 [4th Dept 2022], *lv denied* 38 NY3d 1035 [2022]; *cf. People v Carter*, 31 AD3d 1167, 1169 [4th Dept 2006]).

Contrary to defendant's contention, the court properly denied his challenge for cause of a prospective juror. That contention is properly before us inasmuch as defendant used a peremptory challenge on that juror and thereafter exhausted his peremptory challenges (*see* CPL 270.20 [2]; *People v Culhane*, 33 NY2d 90, 97 [1973]; *People v Hargis*, 151 AD3d 1946, 1948 [4th Dept 2017]). Although the prospective juror expressed concern whether she would be preoccupied with work-related issues, she never stated that her preoccupation with work would affect her ability to be fair and impartial (*see People v Wilson*, 52 AD3d 941, 942 [3d Dept 2008], *lv denied* 11 NY3d 743 [2008]; *see also People v Acevedo*, 136 AD3d 1386, 1387 [4th Dept 2016], *lv denied* 27 NY3d 1127 [2016]). "[D]ismissal is not warranted unless the juror indicates that [they] would be distracted or preoccupied to the extent that it would preclude [them] from deliberating in a fair and impartial manner" (*People v DeFreitas*, 116 AD3d 1078, 1080 [3d Dept 2014], *lv denied* 24 NY3d 960 [2014]). "Considering that almost every potential juror is inconvenienced by taking a week or more away from one's work or normal routine, and that each has personal concerns which could cause some distraction from a trial," we conclude that the court "did not abuse its discretion in denying defendant's challenge for cause" (*Wilson*, 52 AD3d at 942; *see Acevedo*, 136 AD3d at 1387).

Defendant further contends that his "purported admission" to a fellow inmate should have been suppressed because that inmate was acting as an agent of the prosecution and thus violated defendant's right to counsel when he solicited the statements from defendant. We reject that contention. Although there was an existing agreement between the inmate and the federal government, the evidence at the suppression hearing establishes that the inmate was working independently of the prosecution. Where, as here, "an informer works independently of the *prosecution*, provides information on [their] own initiative, and the government's role is limited to the passive receipt of such information, the informer is not, as a matter of law, an agent of the government" (*People v Cardona*, 41 NY2d 333, 335 [1977] [emphasis added]; *see People v Davis*, 38 AD3d 1170, 1171 [4th Dept 2007], *lv denied* 9 NY3d 842 [2007], *cert denied* 552 US 1065 [2007]). Moreover, "[m]ore than a cooperation agreement is required to make an informant a government agent with regard to *a particular defendant*" (*United States v Whitten*, 610 F3d 168, 193 [2d Cir 2010] [emphasis added]; *see United States v Birbal*, 113 F3d 342, 346 [2d Cir 1997], *cert denied* 522 US 976 [1997]). Rather, "[a]n informant becomes a government agent vis-a-vis a defendant when the informant is 'instructed by the police to get information about the particular defendant' " (*Whitten*, 610 F3d at 193; *see Birbal*, 113 F3d at 346), and there was no such instruction here.

Based on our determination, we reject defendant's additional contention that he was denied effective assistance of counsel when

defense counsel did not seek to reopen the suppression hearing after the inmate testified at trial that he repeatedly asked questions of defendant (*see generally People v Caban*, 5 NY3d 143, 152 [2005]). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

209

CA 22-00730

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

LPCIMINELLI, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JPW STRUCTURAL CONTRACTING, INC.,
DEFENDANT-APPELLANT,
FREY ELECTRIC CONSTRUCTION CO., INC.,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GUY J. AGOSTINELLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BYRNE COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeals from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 18, 2022. The order, among other things, granted the motion of defendant Frey Electric Construction Co., Inc. for summary judgment.

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

Same memorandum as in *LPCiminelli, Inc. v JPW Structural Contr., Inc.* ([appeal No. 2] — AD3d — [June 9, 2023] [4th Dept 2023]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

210

CA 22-01470

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

LPCIMINELLI, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JPW STRUCTURAL CONTRACTING, INC.,
DEFENDANT-APPELLANT,
FREY ELECTRIC CONSTRUCTION CO., INC.,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GUY J. AGOSTINELLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeals from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 1, 2022. The judgment awarded defendant Frey Electric Construction Co., Inc. a money judgment against plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated without costs and the order entered March 18, 2022 is modified on the law by denying the motion to the extent that it sought a determination of the amount of damages, and as modified the order is affirmed.

Memorandum: These appeals arise out of claims related to an extensive construction and renovation project (Project) at the Chautauqua Institution. Almost immediately, the Project encountered numerous delays and, based upon those delays, defendant Frey Electric Construction Co., Inc. (Frey), the electrical subcontractor on the Project, experienced labor inefficiencies. Frey made a claim for delay damages to plaintiff, LPCiminelli, Inc. (LPC), the Project's construction manager.

LPC commenced this action seeking, inter alia, a determination of the amounts owed by or to LPC. Frey answered the complaint and counterclaimed for breach of contract, seeking, inter alia, a money judgment for the additional costs and damages it allegedly incurred in

relation to the Project as a result of the delays. Frey moved for summary judgment on its counterclaim. In appeal No. 1, LPC and another subcontractor, defendant JPW Structural Contracting, Inc. (JPW), which, according to LPC's complaint, may be required to indemnify LPC for damages owed to Frey, separately appeal from an order that, inter alia, granted the motion. In appeal No. 2, LPC appeals from a subsequent judgment in favor of Frey and against LPC.

At the outset, we note that the order appealed from in appeal No. 1 is subsumed within the subsequently entered judgment in appeal No. 2, and the appeal lies from the judgment rather than the prior order (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]). We therefore dismiss the appeal from the order in appeal No. 1. Further, although JPW did not file a notice of appeal from the judgment, we deem its appeal to be taken from the judgment inasmuch as its notice of appeal from the order granting summary judgment is "deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of" this Court (CPLR 5501 [c]). The appeal from the judgment in appeal No. 2 brings up for review the propriety of the order in appeal No. 1 (*see* CPLR 5501 [a] [1]).

With respect to the merits, we conclude that Frey met its initial burden on that part of its motion seeking a determination that LPC breached its subcontract with Frey, and LPC failed to raise a triable issue of fact on that issue in its opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to LPC's contention, to the extent that its expert opined that Frey was a cause of the delay, that opinion is speculative and without support in the record (*see generally Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 9 [2005]; *Lopez v Fordham Univ.*, 69 AD3d 532, 533 [1st Dept 2010], *lv dismissed* 15 NY3d 821 [2010]). Supreme Court thus properly granted the motion to the extent of determining that Frey was entitled to recover damages for breach of contract related to the Project delays.

We further conclude, however, that the court erred in granting the motion to the extent that it sought a determination of the amount of those damages. We therefore vacate the judgment and modify the order entered March 18, 2022 accordingly. Frey failed to meet its initial burden of establishing that it properly calculated the amount of damages. "It is fundamental to the law of damages that one complaining of injury has the burden of proving the extent of the harm suffered" (*Berley Indus. v City of New York*, 45 NY2d 683, 686 [1978]). In a case such as this, where a subcontractor is claiming delay damages, the subcontractor "must establish the extent to which its costs were increased by the improper acts because its recovery will be limited to damages actually sustained" (*id.* at 687; *see Manshul Constr. Corp. v Dormitory Auth. of State of N.Y.*, 79 AD2d 383, 387 [1st Dept 1981]). "[I]t has repeatedly been held improper to prove excess labor costs by comparing the total labor costs for the project with the bid estimate for the labor, because of[, among other things,] the inherent unreliability of the price elements of a bid" (*Peter*

Scalamandre & Sons v Village Dock, 187 AD2d 496, 496 [2d Dept 1992], *lv denied* 81 NY2d 710 [1993]; *see Five Star Elec. Corp. v A.J. Pegno Constr. Co., Inc./Tully Constr. Co., Inc.*, 209 AD3d 464, 464 [1st Dept 2022]; *Novak & Co. v Facilities Dev. Corp.*, 116 AD2d 891, 892 [3d Dept 1986]). In support of its motion, Frey submitted, inter alia, the report of LPC's expert concluding that Frey used that improper method of establishing damages. Moreover, contrary to Frey's contention and the conclusion of the court, neither LPC's written correspondence in response to Frey's claim nor the deposition testimony of one of LPC's vice-presidents, which Frey also submitted in support of its motion, establishes as a matter of law that LPC agreed that Frey's damages should be established as the difference between Frey's bid estimate and its actual labor costs incurred. Rather, in a letter dated September 8, 2017, LPC explained to Frey that Frey was required to establish its damages pursuant to the "measured mile" approach, which compares a contractor's "productivity when its work was unimpeded" with its "productivity when its work was impeded." Thus, in the letter, LPC asked Frey to "provide all records as to productivity when work was proceeding in the normal course so that it could be compared to productivity that was experienced when the work was affected by the claimed delay." We conclude that, in this case, the measure of Frey's damages and the method by which to compute those damages are issues for the trier of fact.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

216

CA 22-00686

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

WILLIAM M. SYWAK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA GRANDE, DEFENDANT,
JOSEPH D. DWYER AND ROBERT D. DWYER,
DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (BRIAN M. WEBB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 26, 2022. The order, among other things, denied in part the motion of defendants Joseph D. Dwyer and Robert D. Dwyer for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants Joseph D. Dwyer and Robert D. Dwyer in part and dismissing the complaint against those defendants insofar as the complaint, as amplified by the bill of particulars, alleges that plaintiff sustained a serious injury under Insurance Law § 5102 (d) related to his cervical spine, left hip, left arm, left shoulder and left leg and that plaintiff sustained a serious injury to his lumbar spine under the 90/180-day category of serious injury within the meaning of section 5102 (d) and dismissing the claim for economic loss in excess of basic economic loss, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident during which he was a passenger in a vehicle owned and operated by defendant Barbara Grande. Grande's vehicle was rear-ended by a vehicle owned by defendant Robert D. Dwyer and operated by defendant Joseph D. Dwyer (collectively, Dwyer defendants). Plaintiff alleged that he sustained serious injuries under six categories of Insurance Law § 5102 (d), related to injuries to his lumbar spine, cervical spine, left hip, left arm, left shoulder and left leg.

The Dwyer defendants moved for summary judgment dismissing the complaint against them, contending that plaintiff sustained no serious

injuries as a result of this accident and that he did not suffer any economic loss in excess of basic economic loss (BEL). Grande adopted the motion of the Dwyer defendants as her own. In opposition to the motions, plaintiff asserted that he did, in fact, sustain serious injuries under the permanent consequential limitation of use (PCLU), significant limitation of use (SLU) and 90/180-day categories and that he sustained economic loss in excess of BEL. He failed to address the other three categories of serious injury.

Supreme Court granted defendants' respective motions in part, dismissing plaintiff's claims of serious injury under the fracture, significant disfigurement and permanent loss of use categories, denied the motions with respect to the remaining three categories of serious injury, and denied the motions insofar as they related to BEL. Only the Dwyer defendants appeal.

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]; *see Cohen v Broten*, 197 AD3d 949, 950 [4th Dept 2021]). Here, the Dwyer defendants correctly contend that the court erred in denying their motion with respect to the alleged injuries to plaintiff's left hip, left leg, left arm, and left shoulder inasmuch as they established as a matter of law that those alleged injuries did not constitute serious injuries under any category of serious injury, and plaintiff failed to raise any triable issues of fact in opposition thereto (*see Markiewicz v Jones*, 207 AD3d 1098, 1101 [4th Dept 2022]). We therefore modify the order accordingly.

With respect to the remaining claims of injury, i.e., the cervical and lumbar spine injuries, we conclude that the court erred in denying the motion of the Dwyer defendants with respect to the 90/180-day category, and we therefore further modify the order accordingly. The Dwyer defendants met their initial burden on the motion with respect to the 90/180-day category. The Dwyer defendants established that plaintiff was not prevented " 'from performing substantially all of the material acts which constituted his usual daily activities' for at least 90 out of the 180 days following the accident" (*Cohen*, 197 AD3d at 950, quoting *Licari v Elliott*, 57 NY2d 230, 238 [1982]), and plaintiff failed to raise a triable issue of fact in opposition to the motion with respect to the 90/180-day category.

Regarding plaintiff's alleged injury to his cervical spine under the PCLU and SLU categories, we agree with the Dwyer defendants that they met their initial burden on the motion with respect thereto by submitting evidence that plaintiff suffered from preexisting and degenerative conditions in his cervical spine and that he did not suffer a traumatic injury as a result of the accident (*see id.*; *Woodward v Ciamaricone*, 175 AD3d 942, 943 [4th Dept 2019]; *cf. Green v Repine*, 186 AD3d 1059, 1060-1061 [4th Dept 2020]). The Dwyer

defendants submitted the imaging studies of plaintiff's cervical spine, which were performed prior to and subsequent to the instant accident, and those studies were " 'essentially the same' " (*Overhoff v Perfetto*, 92 AD3d 1255, 1256 [4th Dept 2012], *lv denied* 19 NY3d 804 [2012]). Moreover, the Dwyer defendants' expert established that plaintiff had no functional disability or limitations to his cervical spine causally related to the instant accident (*see id.*). The burden thus shifted to plaintiff "to come forward with evidence addressing [the] claimed lack of causation" (*Pommells v Perez*, 4 NY3d 566, 580 [2005]; *see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Woodward*, 175 AD3d at 944). Plaintiff failed to do so. The evidence submitted by plaintiff failed to adequately address how his alleged cervical injuries, " 'in light of [his] past medical history, [were] causally related to the subject accident' " (*Woodward*, 175 AD3d at 944; *see Franchini*, 1 NY3d at 537; *Overhoff*, 92 AD3d at 1256). Thus, we conclude that the court erred in denying the motion with respect to the PCLU and SLU categories insofar as they related to plaintiff's cervical spine, and we further modify the order accordingly.

The Dwyer defendants also contend that the court erred in denying their motion with respect to the claim that plaintiff's lumbar spine injury constituted a serious injury under the PCLU and SLU categories. We reject that contention.

Even assuming, arguendo, that the Dwyer defendants met their initial burden of establishing their entitlement to judgment as a matter of law on the PCLU and SLU categories of injury related to plaintiff's lumbar spine, we conclude that plaintiff raised a triable issue of fact by submitting the expert opinion of his treating chiropractor, "who relied upon objective proof of plaintiff's [lumbar spine] injury, provided quantifications of plaintiff's loss of range of motion along with qualitative assessments of plaintiff's condition, and concluded that 'plaintiff's [lumbar spine] injury was significant, permanent, and causally related to the accident' " (*Moore v Gawel*, 37 AD3d 1158, 1159 [4th Dept 2007]; *see Jackson v City of Buffalo*, 155 AD3d 1522, 1524 [4th Dept 2017]; *Stamps v Pudetti*, 137 AD3d 1755, 1757 [4th Dept 2016]).

Contrary to the contention of the Dwyer defendants, there are sufficient facts in the record to explain the gap in plaintiff's treatment for his lumbar spine issues (*see Croisdale v Weed*, 139 AD3d 1363, 1364 [4th Dept 2016]; *see generally Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906-907 [2013]).

Finally, we agree with the Dwyer defendants that the court erred in denying their motion with respect to plaintiff's claim that he suffered economic loss in excess of BEL, and we therefore further modify the order accordingly. The Dwyer defendants met their initial burden by establishing that plaintiff sustained no economic loss as a result of this accident. The evidence submitted by the Dwyer defendants demonstrated that plaintiff was unemployed due to an earlier workers' compensation accident. The Dwyer defendants also submitted the deposition testimony of plaintiff, wherein he admitted that all of his medical bills were paid by workers' compensation

benefits or no-fault insurance and that he sustained no out-of-pocket expenses or any other alleged economic loss as a result of this accident. In opposition to that part of the motion, plaintiff did not raise any triable issue of fact (*see Rulison v Zanella*, 119 AD2d 957, 958 [3d Dept 1986]; *see also* Insurance Law §§ 5102 [a] [1]-[3]; 5104 [a]; *Carlson v Manning*, 208 AD3d 997, 1001 [4th Dept 2022]; *Wilson v Colosimo*, 101 AD3d 1765, 1767 [4th Dept 2012]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

224

KA 22-01016

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTWUNN HARRIS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS M. LEITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), entered April 7, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk under the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court erred in refusing to grant him a downward departure from his presumptive risk level. We reject that contention.

Preliminarily, even assuming, arguendo, that the court violated Correction Law § 168-n (3) by failing to adequately set forth the findings of fact and conclusions of law on which it based its determination to deny defendant's request for a downward departure (*see People v Dean*, 169 AD3d 1414, 1415 [4th Dept 2019]), we conclude that the record before us is sufficient to enable us to make our own findings of fact and conclusions of law, thus rendering remittal unnecessary (*see People v Simmons*, 195 AD3d 1566, 1567 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]).

On the merits, we conclude that many of the purported mitigating circumstances alleged by defendant, including his acceptance of responsibility, release with specialized supervision, performance in educational and vocational programs, and participation in treatment programs, do not constitute proper mitigating circumstances inasmuch as they are already adequately taken into account by the guidelines (*see People v Forshey*, 201 AD3d 1352, 1353 [4th Dept 2022], *lv denied* 38 NY3d 907 [2022]; *People v Maus*, 195 AD3d 1438, 1438-1439 [4th Dept

2021], *lv denied* 37 NY3d 912 [2021]; *People v Davis*, 170 AD3d 1519, 1519-1520 [4th Dept 2019], *lv denied* 33 NY3d 907 [2019]; *People v Curry*, 158 AD3d 52, 62 [2d Dept 2017], *lv denied* 31 NY3d 905 [2018]).

Next, "while an offender's response to treatment, 'if exceptional' . . . , may constitute a mitigating factor to serve as the basis for a downward departure" (*People v Scott*, 186 AD3d 1052, 1054 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020], quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]), we conclude that, here, defendant failed to prove by the requisite preponderance of the evidence (*see People v Gillotti*, 23 NY3d 841, 861 [2014]) that his response to treatment was exceptional (*see People v Antonetti*, 188 AD3d 1630, 1631 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]; *Scott*, 186 AD3d at 1054; *People v June*, 150 AD3d 1701, 1702 [4th Dept 2017]). In addition, although defendant's alleged past participation in volunteer activities reflective of his empathy and good character constitutes a proper mitigating circumstance (*see Gillotti*, 23 NY3d at 864), we conclude that defendant failed to establish the existence of that mitigating circumstance by a preponderance of the evidence inasmuch as it is based exclusively on a brief, self-serving statement that defendant made during his testimony at the hearing (*see June*, 150 AD3d at 1702; *People v Martinez*, 104 AD3d 924, 924-925 [2d Dept 2013], *lv denied* 21 NY3d 857 [2013]). Defendant further asserts that a downward departure is warranted because the instant offense did not involve forcible compulsion and the victim's lack of consent was based only on her age. "[T]he nonforcible nature of the offense may be a mitigating factor" (*People v Askins*, 148 AD3d 1598, 1599 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]), particularly where there is a "relatively slight age difference between [the offender] and the victim" and "the victim's lack of consent was premised only on [the] inability to consent by virtue of . . . age" (*People v George*, 141 AD3d 1177, 1178 [4th Dept 2016]; *see People v Goossens*, 75 AD3d 1171, 1172 [4th Dept 2010]). Here, however, despite the lack of forcible compulsion, we conclude that defendant failed to establish the existence of the subject mitigating circumstance given the age disparity between the nearly 31-year-old defendant and the 14-year-old victim, the circumstances surrounding the oral sexual conduct, and the fact that defendant had previously been convicted of a felony sex crime for having sexual intercourse with a 13-year-old victim (*see People v Catalano*, 178 AD3d 1460, 1461 [4th Dept 2019], *lv denied* 35 NY3d 906 [2020]; *People v Love*, 175 AD3d 1835, 1835 [4th Dept 2019], *lv denied* 34 NY3d 910 [2020]; *cf. People v Stevens*, 201 AD3d 1344, 1345 [4th Dept 2022]; *George*, 141 AD3d at 1178; *Goossens*, 75 AD3d at 1172).

Finally, even if defendant surmounted the first two steps of the analysis (*see generally Gillotti*, 23 NY3d at 861), upon weighing the mitigating circumstances against the aggravating circumstances—most prominently defendant's " 'overall criminal history' " (*People v Duryee*, 130 AD3d 1487, 1488 [4th Dept 2015]), including his prior failures to register a change of address as a sex offender (*see People v Perez*, 158 AD3d 1070, 1071 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018])—we conclude that the totality of the circumstances establishes

that defendant's presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism (*see People v Gatling*, 204 AD3d 1428, 1430 [4th Dept 2022], *lv denied* 38 NY3d 912 [2022]; *People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *see generally People v Sincerbeaux*, 27 NY3d 683, 690-691 [2016]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

235

CA 22-01270

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

IN THE MATTER OF LETITIA JAMES, ATTORNEY GENERAL OF STATE OF NEW YORK, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VDRNC, LLC, DOING BUSINESS AS VAN DUYN CENTER FOR REHABILITATION AND NURSING, RESPONDENT-APPELLANT, AND DESG SOFTWARE, LLC, DOING BUSINESS AS E & I SOFTWARE INC., RESPONDENT.

O'CONNELL & ARONOWITZ, ALBANY (FRANCIS J. SMITH OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, NEW YORK CITY (MARGARET CIEPRISZ OF COUNSEL), FOR PETITIONER-RESPONDENT.

MANDELBAUM BARRETT PC, NEW YORK CITY (ANDREW GIMIGLIANO OF COUNSEL), FOR RESPONDENT.

HODGSON RUSS LLP, ALBANY (JANE BELLO BURKE OF COUNSEL), FOR NEW YORK STATE HEALTH FACILITIES ASSOCIATION, INC., AMICUS CURIAE.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered August 3, 2022. The order granted the motion of petitioner seeking leave to reargue and, upon reargument, directed respondents to disclose certain documents.

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

Memorandum: In the course of investigating alleged instances of neglect and abuse at a skilled nursing facility operated by respondent VDRNC, LLC, doing business as Van Duyn Center for Rehabilitation and Nursing (Van Duyn), petitioner's Medicaid Fraud Control Unit subpoenaed records from respondents, including Medication Administration Records (MARs) and Treatment Administration Records (TARs). MARs and TARs, respectively, document the administration of medications and treatments provided to residents of the facility. Additionally, petitioner sought metadata showing, among other things, the time that MARs and TARs were entered into Van Duyn's computer system.

Respondents failed to fully comply with the subpoenas, and petitioner moved to compel. Van Duyn cross-moved for a protective order, contending that the time-of-entry metadata was privileged pursuant to the quality assurance privilege in the Federal Nursing Home Reform Act (*see* 42 USC §§ 1395i-3 [b] [1] [B]; 1396r [b] [1] [B]). Van Duyn did not contend that the MARs and TARs themselves were privileged.

Supreme Court entered an order in which it determined that the MARs and TARs were subject to the quality assurance privilege. Petitioner then moved for leave to reargue or renew its motion to compel. The court granted the motion insofar as it sought leave to reargue and, upon reargument, determined that the MARs and TARs were not privileged and that the time-of-entry metadata also was not privileged. Van Duyn now appeals.

Contrary to Van Duyn's contention, the court properly granted petitioner's motion to the extent that it sought leave to reargue. Pursuant to CPLR 2221 (d) (2), a motion for leave to reargue shall be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining [a] prior motion." As noted above, the dispute between the parties concerns the applicability of the quality assurance privilege to the time-of-entry metadata. In its initial order, however, the court never reached that issue because it concluded that the MARs and TARs themselves were privileged, which was not an argument raised by Van Duyn. Van Duyn correctly concedes that the court's conclusion was erroneous and afforded it relief that it did not seek. Under these circumstances, we conclude that the court properly granted petitioner leave to reargue (*see Dentico v Turner Constr. Co.*, 207 AD3d 1036, 1037 [4th Dept 2022]; *Timpano v New York Cent. Mut. Fire Ins. Co.*, 206 AD3d 1675, 1676 [4th Dept 2022]; *see also Centerline/Fleet Hous. Partnership, L.P.—Series B v Hopkins Ct. Apts., L.L.C.*, 195 AD3d 1375, 1376 [4th Dept 2021], *lv dismissed* 37 NY3d 1227 [2022]).

Contrary to Van Duyn's additional contention, we conclude that, upon reargument, the court properly granted petitioner's motion to compel and concluded that the time-of-entry metadata was not subject to the quality assurance privilege. In opposing petitioner's motion to compel and in support of its own cross-motion for a protective order, Van Duyn failed to establish that the time-of-entry metadata was "generated by or at the behest of [its] quality assurance committee for quality assurance purposes" (*Matter of Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 441 [2003]; *see Sanchez v Kateri Residence*, 79 AD3d 492, 492 [1st Dept 2010]; *Clement v Kateri Residence*, 60 AD3d 527, 527 [1st Dept 2009]; *Spakoski v Amsterdam Mem. Hosp. Skilled Nursing Facility*, 6 Misc 3d 757, 758 [Sup Ct, Montgomery County 2005]). In light of our conclusion, we need not address Van Duyn's remaining contentions.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

252

CA 22-00164

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

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN, AND STEVEN M. DEPERRIOR, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF BRIGHTON, NEW YORK OFFICE OF THE BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY AS BUILDING INSPECTOR, TOWN OF BRIGHTON, NEW YORK ZONING BOARD OF APPEALS, TOWN OF BRIGHTON, NEW YORK, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F LLC, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF BRIGHTON, NEW YORK OFFICE OF THE BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY AS BUILDING INSPECTOR, TOWN OF BRIGHTON, NEW YORK ZONING BOARD OF APPEALS, AND TOWN OF BRIGHTON, NEW YORK.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F LLC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 3, 2022 in a proceeding pursuant to CPLR article 78. The judgment dismissed the amended petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination of respondents the Town of Brighton, New York, the Town of Brighton, New York Office of the Building Inspector, and Ramsey Boehner, in his capacity as Building Inspector (collectively, Town), to issue a building permit and the

determination of respondent the Town of Brighton, New York Zoning Board of Appeals (ZBA) denying petitioners' appeal of that determination. The amended petition asserted three causes of action alleging violations of certain provisions of the Brighton Town Code for issuing a building permit that allowed construction of a building larger than approved in the site plan (first cause of action), without sufficient cross-access easements (second cause of action), and that allowed phased construction lasting longer than 18 months (third cause of action). The amended petition also asserted a fourth cause of action alleging a violation of the Open Meetings Law (Public Officers Law art 7). Petitioners appeal from a judgment that dismissed their amended petition.

Petitioners contend that Supreme Court erred in dismissing the first cause of action inasmuch as the issuance of a building permit authorizing construction of a building at least 130 square feet larger than the site plan approval allowed violated the requirement in the Brighton Town Code that "[n]o building permit shall be issued for any building subject to site plan approval by the Planning Board, or subject to review by the Architectural Review Board, except in conformity with the plans approved by either or both of the said Boards as appropriate" (§ 225-3 [B]). We reject that contention. The ZBA determined that the building permit was "in conformity" with the site plan approval, explaining that the Code permits minor deviations from an approved site plan where the size of the project as a whole does not exceed the approved site plan and meets all the setback and other requirements. A zoning board's interpretation of its governing code is generally entitled to deference by the courts (*see Matter of Fox v Town of Geneva Zoning Bd. of Appeals*, 176 AD3d 1576, 1577 [4th Dept 2019]; *Matter of McLiesh v Town of Western*, 68 AD3d 1675, 1676 [4th Dept 2009]; *see generally Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]), and must be sustained where, as here, "the interpretation is neither irrational, unreasonable nor inconsistent with the governing [code]" (*Fox*, 176 AD3d at 1577 [internal quotation marks omitted]).

We agree with petitioners that the court erred in determining that their second and third causes of action, seeking to annul the determinations because they allowed construction without sufficient cross-access easements and phased construction lasting longer than 18 months, are barred by collateral estoppel. "Collateral estoppel applies when (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Lowes v Anas*, 195 AD3d 1579, 1580 [4th Dept 2021] [internal quotation marks omitted]). "The party seeking to invoke collateral estoppel has the burden to show the identity of the issues, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate" (*Matter of Dunn*, 24 NY3d 699, 704 [2015]). Here, although there is no dispute that petitioners litigated the issues raised in the second and third causes of action in a prior proceeding, resulting in an interlocutory order, that prior order does

not have preclusive effect here because petitioners have thus far been "prevented . . . from obtaining appellate review" (*Morley v Quinones*, 208 AD2d 813, 814 [2d Dept 1994]; *see Williams v Moore*, 197 AD2d 511, 513 [2d Dept 1993]; *Zangiacomi v Hood*, 193 AD2d 188, 195 [1st Dept 1993]).

We nevertheless conclude that the court properly dismissed the second and third causes of action inasmuch as they lack merit. With respect to the merits of the second cause of action, petitioners contend that the Town improperly issued the building permit because respondents Daniele Management, LLC, Daniele SPC, LLC, Mucca Mucca, LLC, Mardanth Enterprises, Inc., and M&F LLC provided easements required by the incentive zoning approval that were defective due to the possibility of third-party challenges to the easements. We reject that contention. The Town was required to determine whether the application for the building permit "complie[d] with the municipality's standards and conditions contained in the zoning ordinance" (*Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 432 [2004]), and it did so. The Town was not required to determine whether any third parties might assert conflicting rights in the future (*see generally Matter of Friends of Shawangunks v Knowlton*, 64 NY2d 387, 392 [1985]; *People ex rel. Rosevale Realty Co., Inc. v Kleinert*, 204 App Div 883, 883 [2d Dept 1922], *appeal dismissed* 236 NY 605 [1923]).

With respect to the merits of the third cause of action, petitioners contend that the building permit was improperly issued because it violated requirements in the incentive zoning approval and State Environmental Quality Review Act (SEQRA) findings statement that anticipated single-phase construction with separate components and projected time frames of 18 months and 24 months. We likewise reject that contention. The determination of the ZBA that the issuance of the building permit was consistent with the anticipated phasing "has a rational basis and is supported by substantial evidence" (*Matter of HoliMont, Inc. v Village of Ellicottville Zoning Bd. of Appeals*, 112 AD3d 1315, 1315 [4th Dept 2013] [internal quotation marks omitted]; *see generally Pecoraro*, 2 NY3d at 613; *Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428-1429 [4th Dept 2017]).

Contrary to petitioners' further contention, the court did not err in dismissing the fourth cause of action, which alleges that the ZBA violated the Open Meetings Law. A court has "the power, in its discretion, upon good cause shown," to void any action taken by a public body in violation of the Open Meetings Law (Public Officers Law § 107 [1]; *see Matter of New York Univ. v Whalen*, 46 NY2d 734, 735 [1978]), but "[a]n unintentional failure to fully comply with the notice provisions . . . shall not alone be grounds for invalidating any action taken at a meeting of a public body" (§ 107 [1]; *see Matter of Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1498 [4th Dept 2018]). Here, any violation amounted to "mere negligence" that did not rise to the level of good cause for invalidating the ZBA's determination (*Matter of Cunney v Board of Trustees of the Vil. of Grand View, N.Y.*, 72 AD3d 960, 962 [2d Dept

2010]; *see Fichera*, 159 AD3d at 1498). Inasmuch as petitioners were not "the successful party" as to this cause of action, the court properly declined to award attorneys' fees (§ 107 [2]; *see generally Matter of Gordon v Village of Monticello*, 87 NY2d 124, 127-128 [1995]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00036

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

JOHN J. CAI AND JOHN J. CAI, MD PLLC,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOY E. MISERENDINO AND THE JOY E. MISERENDINO
LAW FIRM, PC, DEFENDANTS-APPELLANTS.

MERCY HOSPITAL OF BUFFALO AND CATHOLIC HEALTH
SYSTEM, INC., NONPARTY-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, SARATOGA SPRINGS (PHILLIP A. OSWALD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP, BUFFALO (STEVEN W. KLUTKOWSKI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

STILLWELL VISCO, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR NONPARTY-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered December 1, 2021. The order determined that certain documents are not discoverable.

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

Memorandum: Plaintiffs commenced this action alleging, inter alia, breach of oral contract, quantum meruit, promissory estoppel, and unjust enrichment arising out of defendants' alleged failure to compensate plaintiffs for medical consulting services provided in connection with defendants' law practice during a time when plaintiff John J. Cai, a cardiologist, and defendant Joy E. Miserendino, an attorney, were in a romantic relationship. Plaintiffs also alleged that defendants induced plaintiffs to terminate their affiliation with Catholic Health System, Inc. and Mercy Hospital of Buffalo (collectively, nonparties) and resign Cai's medical staff privileges with the nonparties, resulting in his loss of income.

During discovery, defendants moved, inter alia, to compel plaintiffs and the nonparties to produce records from the nonparties "relating to the suspension, revocation, and/or resignation of Cai's rights or privileges . . . for the period from December 2014 through November 2015" under the theory that those documents would demonstrate

that Cai terminated his working relationship with the nonparties for reasons unrelated to his relationship with Miserendino, or any representations made by her. The nonparties and plaintiffs opposed the motion on the ground that the records consist of Cai's medical staff credentialing and privileges information and are protected from disclosure pursuant to Education Law § 6527 (3) and Public Health Law § 2805-m (2).

Supreme Court issued an order on the motion directing the production of, inter alia, "any contract or agreement between [p]laintiffs and [the nonparties] effective between the dates of December of 2014 through November of 2015" and "any document solely relating to the resignation of [plaintiffs'] rights or privileges . . . with [the nonparties]" during the same time period. In response, the nonparties disclosed certain documents and submitted additional documents to the court for an in camera review. Following its in camera review of those additional documents alleged to be privileged, the court issued an order determining that the additional documents are privileged and therefore not discoverable and not subject to disclosure pursuant to Education Law § 6527 and Public Health Law § 2805-m. Defendants now appeal from that order, and we affirm.

Defendants contend that the privilege found in Education Law § 6527 (3) and Public Health Law § 2805-m (2) is inapplicable because plaintiffs' action is for breach of contract and not for any tort arising out of Cai's and the nonparties' care for and treatment of patients. We reject that contention. "It is evident from the plain language of the statutes that the privilege extends to all civil causes of action, not just medical malpractice [or other tort] claims" (*DiCostanzo v Schwed*, 146 AD3d 1044, 1046 [3d Dept 2017]; *see Crea v Newfane Inter-Community Mem. Hosp.*, 224 AD2d 976, 977 [4th Dept 1996]). Moreover, the records sought by defendants "fall squarely within the materials that are made confidential by Education Law § 6527 (3) and article 28 of the Public Health Law" (*Logue v Velez*, 92 NY2d 13, 18 [1998]; *see Crea*, 224 AD2d at 977). The records in question are thus not subject to disclosure.

Defendants further contend that, if the records in question are not subject to disclosure, plaintiffs should be precluded from presenting "any evidence relating to the resignation, termination, and/or loss of [Cai's] rights or privileges with [the nonparties]." That contention is not properly before us. The court did not rule on defendants' request for preclusion of such evidence, which is thus deemed denied (*see generally Sochan v Mueller*, 162 AD3d 1621, 1622 [4th Dept 2018]), and that denial is not appealable inasmuch as it constitutes a pretrial ruling on the admissibility of evidence (*see Sykes v Roth*, 101 AD3d 1673, 1674 [4th Dept 2012]; *Drechsel v Narby*, 59 AD3d 1095, 1096 [4th Dept 2009]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

310

CA 22-00218

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

LPCIMINELLI, INC., PLAINTIFF,

V MEMORANDUM AND ORDER

JPW STRUCTURAL CONTRACTING, INC., ET AL.,
DEFENDANTS.
(ACTION NO. 1.)

JPW STRUCTURAL CONTRACTING, INC.,
PLAINTIFF-RESPONDENT,

V

LPCIMINELLI, INC., FEDERAL INSURANCE COMPANY,
LIBERTY MUTUAL INSURANCE COMPANY, TRAVELERS
CASUALTY AND SURETY COMPANY OF AMERICA,
DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (GUY J. AGOSTINELLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 20, 2021. The order granted the motion of plaintiff JPW Structural Contracting, Inc. for partial summary judgment in action No. 2.

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

Memorandum: LPCiminelli, Inc. (LPC), plaintiff in action No. 1 and a defendant in action No. 2, subcontracted construction work to JPW Structural Contracting, Inc. (JPW), a defendant in action No. 1 and plaintiff in action No. 2. Following a dispute over payment, JPW filed a mechanic’s lien against LPC, which LPC discharged with a bond issued by its sureties, Federal Insurance Company, Liberty Mutual Insurance Company, and Travelers Casualty and Surety Company of America, who are defendants in action No. 2. LPC thereafter commenced action No. 1 against JPW, among others, seeking as relevant here a determination with respect to the amount it owed, if any, to JPW on the subcontract, including disputed change orders, and further alleging that JPW was

liable to LPC for increased costs charged by other subcontractors arising from JPW's failure to perform its work in the time specified in its subcontract. JPW answered the complaint and asserted counterclaims; it then commenced action No. 2 against LPC and its sureties seeking, inter alia, to foreclose on the mechanic's lien. LPC and its sureties filed an answer and asserted as a counterclaim that the mechanic's lien was void under the Lien Law because JPW willfully exaggerated the amount owed to it. The two actions were consolidated.

JPW moved for partial summary judgment "as to liability" on its mechanic's lien foreclosure cause of action, arguing that it "met the lawful requirements to properly file, serve, and foreclose on its mechanic's lien" and was therefore "entitled to the enforcement of its lien." LPC and its sureties did not dispute that JPW satisfied the procedural steps for filing a claim to foreclose a mechanic's lien but argued that there were triable issues of fact concerning what amount, if any, was owed by LPC to JPW. Supreme Court granted the motion, and we now reverse.

A plaintiff is not entitled to summary judgment on its lien foreclosure claim where, as here, there are questions of fact " 'whether plaintiff breached the [sub]contract, and the extent of unpaid work performed by plaintiff' " (*Proline Concrete of WNY, Inc. v G.M. Crisalli & Assoc., Inc.*, 177 AD3d 1368, 1370 [4th Dept 2019]). JPW failed to meet its initial burden on the motion of establishing as a matter of law that LPC owed any money to it and thus failed to establish that the mechanic's lien, even though properly filed, was valid and enforceable (*see W(M) B. Morse Lbr. Co. v North Ponds Apts., LLC*, 114 AD3d 1215, 1217 [4th Dept 2014]; *Tomaselli v Oneida County Indus. Dev. Agency*, 77 AD3d 1315, 1316-1317 [4th Dept 2010]; *Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club*, 156 AD2d 550, 552 [2d Dept 1989]; *see also Terra Nova Constr., Inc. v Philadelphia Indem. Ins. Co.*, 68 Misc 3d 1224[A], 2020 NY Slip Op 51062[U], *1 [Sup Ct, NY County 2020]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

325

KA 18-02110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE D. MCKOY, ALSO KNOWN AS JUNE,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered August 20, 2018. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence imposed on count two of the indictment shall run concurrently with the sentence imposed on count one of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), arising from the fatal shooting of the victim as he sat in the front passenger seat of a vehicle in a parking lot at night.

Defendant contends that he was denied a fair trial by prosecutorial misconduct because the prosecutor failed to correct trial testimony that he knew to be false when two eyewitnesses gave discrepant accounts whether they had seen and spoken with each other in the parking lot. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Reed*, 151 AD3d 1821, 1823 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017]; *People v Mulligan*, 118 AD3d 1372, 1374 [4th Dept 2014], *lv denied* 25 NY3d 1075 [2015]) and, in any event, it lacks merit. Although a prosecutor has a "duty to correct [trial testimony that the prosecutor] knows to be false and [to] elicit the truth" (*People v Savvides*, 1 NY2d 554, 557 [1956]; *see People v Colon*, 13 NY3d 343, 349 [2009], *rearg denied* 14 NY3d 750

[2010]; *People v Williams*, 61 AD3d 1383, 1383 [4th Dept 2009], *lv denied* 13 NY3d 751 [2009]), the record contains no evidence that the prosecutor knowingly elicited or failed to correct false testimony or misled the jury (*see Reed*, 151 AD3d at 1823; *Mulligan*, 118 AD3d at 1374; *Williams*, 61 AD3d at 1383; *People v Encarnacion*, 269 AD2d 779, 780 [4th Dept 2000], *lv denied* 94 NY2d 918 [2000]).

Defendant next contends that testimony at trial revealed for the first time that the police located him following the shooting by "pinging" his cell phone, and that any evidence derived therefrom should have been suppressed as the product of an illegal warrantless search. That contention is not properly before us inasmuch as defendant failed to move to reopen the suppression hearing based on the relevant trial testimony (*see People v Huddleston*, 160 AD3d 1359, 1361 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]; *see also People v Carzoglio*, 198 AD3d 810, 811-812 [2d Dept 2021], *lv denied* 39 NY3d 985 [2022]; *People v Jin Zheng*, 127 AD3d 890, 890 [2d Dept 2015], *lv denied* 25 NY3d 1203 [2015]).

Defendant further contends that Supreme Court erred in admitting, over his foundation objection, the testimony of a female acquaintance that defendant sent her text messages following the shooting stating, inter alia, that he was going to be arrested and requesting that the acquaintance provide him with an alibi for the night of the shooting. We reject that contention. Here, although the acquaintance deleted the text messages, and there was no Internet service provider evidence or other technical evidence in this regard, the text messages were properly authenticated, through circumstantial evidence, as sent by defendant (*see People v Pierre*, 41 AD3d 289, 291 [1st Dept 2007], *lv denied* 9 NY3d 880 [2007]). The acquaintance's testimony established that defendant's phone number was saved in her cell phone under his nickname and that she frequently texted with defendant at that number (*see People v Kingsberry*, 194 AD3d 843, 844 [2d Dept 2021], *lv denied* 37 NY3d 993 [2021]; *People v Serrano*, 173 AD3d 1484, 1488 [3d Dept 2019], *lv denied* 34 NY3d 937 [2019]), and "the identity of the sender[] . . . of the messages was [also] sufficiently authenticated by the content of the text messages" (*People v Mencel*, 206 AD3d 1550, 1552 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]; *see People v Green*, 107 AD3d 915, 916 [2d Dept 2013], *lv denied* 22 NY3d 1088 [2014]; *Pierre*, 41 AD3d at 291). Moreover, "[t]he credibility of the authenticating witness goes to the weight to be accorded the evidence, not to its admissibility" and, to the extent that defendant suggests that someone else could have sent the messages from the phone number associated with him, the likelihood of that scenario "presented a factual issue for the jury to resolve" (*Serrano*, 173 AD3d at 1488; *see People v Tucker*, 200 AD3d 1584, 1586 [4th Dept 2021], *lv denied* 38 NY3d 954 [2022]).

Contrary to defendant's related contention, we conclude that the court did not err in admitting in evidence a letter allegedly written by defendant to the acquaintance inasmuch as the circumstantial evidence was sufficient to authenticate the letter (*see People v Myers*, 87 AD3d 826, 827-828 [4th Dept 2011], *lv denied* 17 NY3d 954

[2011]; *People v Bryant*, 12 AD3d 1077, 1079 [4th Dept 2004], *lv denied* 4 NY3d 761 [2005]). Contrary to defendant's challenge to the relevance of the letter, inasmuch as the letter could reasonably be interpreted as an attempt to obtain a false alibi from the acquaintance, it "comes within the broad category of conduct evidencing a 'consciousness of guilt' and, therefore, [was] admissible and relevant on the question of . . . defendant's guilt" (*People v Leyra*, 1 NY2d 199, 208 [1956]; *see generally People v Moses*, 63 NY2d 299, 308 [1984]). We have reviewed defendant's remaining challenge to the admission of the letter and the testimony concerning the text messages and conclude that it does not warrant reversal or modification of the judgment.

Defendant's contention that the prosecutor erred in eliciting testimony with respect to defendant's invocation of the right to counsel is not preserved for our review (*see* CPL 470.05 [2]; *People v Vrooman*, 115 AD3d 1189, 1190 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Jackson*, 41 AD3d 1268, 1269-1270 [4th Dept 2007], *lv denied* 10 NY3d 812 [2008], *reconsideration denied* 11 NY3d 789 [2008]). Contrary to defendant's related contention, he was not denied effective assistance of counsel by defense counsel's failure to object to that fleeting testimony inasmuch as the single error by defense counsel was not "sufficiently egregious and prejudicial as to compromise . . . defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]; *see Vrooman*, 115 AD3d at 1190; *Jackson*, 41 AD3d at 1270).

We further conclude that, contrary to defendant's contention, the court did not abuse its discretion in denying his motion for a mistrial based on alleged juror misconduct (*see People v Quinones*, 174 AD3d 1514, 1516 [4th Dept 2019], *lv denied* 34 NY3d 983 [2019]; *see generally People v Buford*, 69 NY2d 290, 299 [1987]).

Defendant further contends that the People improperly introduced, without obtaining an advance ruling and in violation of *People v Molineux* (168 NY 264 [1901]), testimony of one of the eyewitnesses that she had observed defendant in possession of the same gun used to shoot the victim a couple of weeks before the shooting. Contrary to defendant's contention, the record establishes that there was no unfairness to him inasmuch as the prosecutor asked for a ruling out of the presence of the jury and the court conducted a hearing with respect to the admissibility of such evidence before the eyewitness testified to the prior bad act or uncharged crime, during which the prosecutor detailed the testimony to be elicited as an offer of proof, defense counsel made arguments in opposition to the admissibility of the testimony, and the court ruled that the testimony was admissible on the ground that its probative value outweighed its prejudicial effect (*see People v Small*, 12 NY3d 732, 733 [2009]; *People v Ventimiglia*, 52 NY2d 350, 361-362 [1981]). Defendant failed to preserve for our review his related contention that the court erred in failing to provide an immediate limiting instruction with respect to

the foregoing *Molineux* evidence (*see* CPL 470.05 [2]; *People v Hildreth*, 199 AD3d 1366, 1368 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Hildreth*, 199 AD3d at 1368). We note in any event that the court's "limiting instruction in its jury charge 'served to alleviate any potential prejudice resulting from the admission of the evidence' " (*People v Holmes*, 104 AD3d 1288, 1289 [4th Dept 2013], *lv denied* 22 NY3d 1041 [2013]; *see People v Bibbes*, 98 AD3d 1267, 1269-1270 [4th Dept 2012], *amended on rearg* 100 AD3d 1473 [4th Dept 2012], *lv denied* 20 NY3d 931 [2012]). Defendant also failed to preserve for our review his further contention that the prosecutor elicited testimony that exceeded the court's *Molineux* ruling (*see People v Green*, 196 AD3d 1148, 1150-1151 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1161 [2022]; *People v King*, 181 AD3d 1233, 1235 [4th Dept 2020], *lv denied* 35 NY3d 1027 [2020]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *King*, 181 AD3d at 1235).

Next, even assuming, arguendo, that an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]), upon acting, in effect, as a second jury by independently reviewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Kancharla*, 23 NY3d 294, 302-303 [2014]; *People v Delamota*, 18 NY3d 107, 116-117 [2011]; *Danielson*, 9 NY3d at 348-349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's additional contention, we conclude that the record of the reconstruction hearing conducted by the court supports its determinations that three unmarked documents contained in the court file were not jury notes that had been duly transmitted to the court during deliberations, and that there was thus no failure to comply with the procedures required by CPL 310.30 and *People v O'Rama* (78 NY2d 270 [1991]) with respect to those documents (*see People v Meyers*, 162 AD3d 1074, 1075 [2d Dept 2018], *affd* 33 NY3d 1018 [2019]).

Furthermore, there is no merit to defendant's contention that reversal is required due to the cumulative effect of alleged errors that occurred during trial (*see People v Wilson*, 96 AD3d 1470, 1471 [4th Dept 2012], *lv denied* 19 NY3d 1002 [2012]; *People v Drayton*, 270 AD2d 826, 827 [4th Dept 2000], *lv denied* 95 NY2d 834 [2000]).

We agree with defendant, however, that the sentence is illegal insofar as the court directed that the sentence imposed for criminal possession of a weapon in the second degree shall run consecutively to the sentence imposed for murder in the second degree (*see People v Colon*, 196 AD3d 1043, 1047 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; *People v Alligood*, 192 AD3d 1508, 1510 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]). The People had the burden of establishing that the consecutive sentences were legal, i.e., that the crimes were

committed through separate acts or omissions (*see People v Rodriguez*, 25 NY3d 238, 244 [2015]; *see generally* Penal Law § 70.25 [2]), and they failed to meet that burden. In particular, the People "failed to present evidence at trial that defendant's act of possessing the loaded firearm [on the date of the offenses as alleged in the indictment] 'was separate and distinct from' his act of shooting the victim" (*Alligood*, 192 AD3d at 1510; *see Colon*, 196 AD3d at 1047). We therefore modify the judgment accordingly. The sentence, as so modified, is not unduly harsh or severe.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

326

CAF 22-00322

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

IN THE MATTER OF DESTINY F., LAMEEK E.,
AND SHYQUEST E.
---------- MEMORANDUM AND ORDER
ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND
FAMILY SERVICES, PETITIONER-RESPONDENT;

MELISSA F. AND EDWARD F., RESPONDENTS.

TAKARA E., APPELLANT.

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

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

SHARON P. O'HANLON, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered January 4, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, continued the placement of the subject children with petitioner.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, non-respondent mother appeals from an order that, inter alia, continued the placement of the subject children with petitioner. The mother contends that Family Court erred in failing to conduct an age-appropriate consultation with the subject children as mandated by Family Court Act § 1089 (d), and that we should therefore remit the matter for the required consultation or direct the court to comply with section 1089 (d) at future permanency hearings (*see Matter of Sandra DD. [Kenneth DD.]*, 185 AD3d 1259, 1262-1263 [3d Dept 2020]; *Matter of Dawn M. [Michael M.]*, 151 AD3d 1489, 1492-1493 [3d Dept 2017], *lv denied* 29 NY3d 917 [2017]).

We agree with petitioner and the attorney for the children (AFC), however, that the appeal is moot inasmuch as two subsequent permanency orders have been entered during the pendency of this appeal that continued the subject children's placement with petitioner and did not change the permanency goal of reunification with the mother (*see Matter of Kimberly G. [Natasha G.]*, 203 AD3d 1418, 1419 [3d Dept

2022]; *Matter of Gabrielle N.N. [Jacqueline N.T.]*, 171 AD3d 671, 672 [1st Dept 2019]; *Matter of Francis S. [Wendy H.]*, 67 AD3d 1442, 1442 [4th Dept 2009], *lv denied* 14 NY3d 702 [2010]). We further agree with petitioner and the AFC that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

334

CA 22-01119

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

TINA KNAPP AND MICHAEL KNAPP,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

FINGER LAKES NY, INC., DOING BUSINESS AS DIVERSIFIED CONTRACTING CO., AGGRESSIVE COMPANY, INC., NAPLES RENTAL & SUPPLY COMPANY, INC., NAPLES BARGAINS, INC., A&S MCCALL, INC., JOEL S. SMITH, INDIVIDUALLY, JULIE SMITH, INDIVIDUALLY, BRANDON SMITH, INDIVIDUALLY, AND SARA OUDERKIRK, INDIVIDUALLY,
DEFENDANTS-RESPONDENTS.

TINA KNAPP, PLAINTIFF-APPELLANT PRO SE.

MICHAEL KNAPP, PLAINTIFF-APPELLANT PRO SE.

TREVETT CRISTO, P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 14, 2022. The order, inter alia, granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: In September 2014, plaintiffs hired defendant Finger Lakes NY, Inc., doing business as Diversified Contracting Co. (Diversified), owned by defendant Joel S. Smith, pursuant to a home improvement contract, to renovate their summer cottage. By January 2015, plaintiffs had made deposits to Diversified for the work to be performed on the renovation project in the amount of $240,530. Instead of placing plaintiffs' deposits in an escrow account, however, Diversified transferred those funds to defendant Aggressive Company, Inc. (Aggressive)—another corporation owned by Smith—which purportedly used the money for purposes unrelated to the renovation project. In October 2015, plaintiffs terminated the contract because, inter alia, Diversified had not completed work on the renovation project in a timely fashion.

Shortly thereafter, plaintiffs commenced an action to recover

damages for, inter alia, breach of contract and diversion of trust funds in violation of Lien Law article 3-A (prior action). Following a jury trial, the jury rendered a verdict in favor of plaintiffs against Diversified for money damages on the breach of contract cause of action, but found that plaintiffs sustained no damages as a result of the admitted violation of the Lien Law. A judgment was entered on the verdict. Plaintiffs moved pursuant to CPLR 4404 to set aside the verdict with respect to the Lien Law cause of action and for, inter alia, judgment in their favor on that cause of action. Supreme Court denied the motion, and we dismissed plaintiffs' ensuing appeal (*Knapp v Finger Lakes NY, Inc.*, 184 AD3d 335, 337 [4th Dept 2020], *lv dismissed* 36 NY3d 963 [2021]).

In September 2020, plaintiffs commenced this action to recover damages for, inter alia, fraudulent conveyances made by defendants when they transferred plaintiffs' deposit funds among each other, in violation of several provisions of former Debtor and Creditor Law article 10. Plaintiffs sought, inter alia, a judgment declaring that the challenged transfers were null and void and directing defendants to return the deposit funds to plaintiffs. Alternatively, they sought a new money judgment in the amount awarded in the prior action inasmuch as the judgment in that action had never been satisfied. Defendants moved for summary judgment dismissing the complaint on the ground of res judicata, and plaintiffs cross-moved for, inter alia, leave to amend the complaint. The court granted defendants' motion and denied plaintiffs' cross-motion. Plaintiffs appeal, and we affirm.

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; *see Zayatz v Collins*, 48 AD3d 1287, 1289 [4th Dept 2008]). Generally speaking, " 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' " (*Parker*, 93 NY2d at 347; *see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Consequently, "res judicata bars claims that were not actually decided in the prior action if they could have been decided in that action" (*Zayatz*, 48 AD3d at 1290; *see Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72-73 [2018]; *Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Incredible Invs. Ltd. v Grenga*, 125 AD3d 1362, 1363 [4th Dept 2015]). "The fact that causes of action may be stated separately, invoke different legal theories, or seek different relief will not permit relitigation of claims" (*Sciangula v Montegut*, 165 AD3d 1188, 1190 [2d Dept 2018] [internal quotation marks omitted]).

Here, we conclude that the court properly granted defendants' motion for summary judgment on the ground that plaintiffs' claims are barred by res judicata because plaintiffs' Debtor and Creditor Law causes of action arise out of the same operative facts as their Lien Law cause of action in the prior action and could have been raised in that action (*see Sciangula*, 165 AD3d at 1190; *see generally Hunter*, 4 NY3d at 269). Specifically, in the prior action, plaintiffs' Lien Law

cause of action was predicated on improper transfers of deposit funds from Diversified to Aggressive. Ultimately, following trial, the jury awarded plaintiffs no damages on that cause of action. In this action, the very same transfers of deposit funds that constituted the basis of the Lien Law cause of action now form the basis of plaintiffs' Debtor and Creditor Law causes of action. Thus, plaintiffs' claims in this action could have been raised in the prior action and are barred by res judicata. Supporting that conclusion, we note that the complaint in this action seeks a money judgment in the same amount awarded in the prior action. Indeed, in their proposed amended complaint, plaintiffs sought to increase the amount of damages sought in this action to $240,530—the full amount of the deposits they made for the renovation project and the same amount sought in their Lien Law cause of action in the prior action.

Plaintiffs contend that res judicata does not apply inasmuch as their "claim[s] could not have been raised in the prior [action] because they had not yet matured" (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 159 AD3d 512, 513 [1st Dept 2018], *lv dismissed* 32 NY3d 1080 [2018]). We reject plaintiffs' contention. Indeed, we note that the complaint in this action does not allege any transfers of deposit funds among defendants that occurred *after* the filing of the complaint in the prior action (*see UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 474-475 [1st Dept 2011]). In short, plaintiffs' Debtor and Creditor Law causes of action had matured at the time of the prior action, and—to the extent that they differ from the Lien Law cause of action—could have been raised by plaintiffs in the prior action (*see Hunter*, 4 NY3d at 269; *Incredible Invs. Ltd.*, 125 AD3d at 1363).

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

377

CA 22-00734

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

IN THE MATTER OF KEVIN STUART,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (MICHAEL J. MANUSIA OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered April 18, 2022 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the determination of the Board of Parole (Board) denying his request for release to parole supervision following a hearing in April 2021. The Attorney General has advised this Court that, subsequent to that denial and during the pendency of this appeal, petitioner reappeared before the Board in April 2023 and was again denied release. Consequently, this appeal must be dismissed as moot (*see Matter of Romano v Annucci*, 196 AD3d 1176, 1176 [4th Dept 2021]; *Matter of Colon v Annucci*, 177 AD3d 1393, 1394 [4th Dept 2019]; *see generally Matter of Moissett v Travis*, 97 NY2d 673, 674 [2001]). Contrary to petitioner's contention, we conclude that this case does not fall within the exception to the mootness doctrine (*see Romano*, 196 AD3d at 1176; *Colon*, 177 AD3d at 1394; *Matter of Brunner v Speckard*, 214 AD2d 1040, 1040-1041 [4th Dept 1995], *lv denied* 86 NY2d 707 [1995]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

381.1

CA 22-01284

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

JOELL RUNGE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF NORTH TONAWANDA, DEFENDANT-APPELLANT,
CRAZY JAKE'S INC., WEBSTER PROPERTIES OF
WNY, INC., DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

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

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

ROSENTHAL, KOOSHOIAN & LENNON, LLP, BUFFALO (J. PATRICK LENNON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 3, 2022. The order denied the motion of defendant City of North Tonawanda for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the amended complaint and cross-claims against defendant City of North Tonawanda are dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she allegedly slipped and fell on a cracked portion of a sidewalk located adjacent to property owned by defendant Webster Properties of WNY, Inc. and leased to defendant Crazy Jake's, Inc. (collectively, cross-claim defendants) and located in defendant City of North Tonawanda (City). The City moved for summary judgment dismissing the amended complaint and all cross-claims against it, and Supreme Court denied the motion. We reverse.

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective [sidewalk] . . . condition unless it has received prior written notice of the defect, or an exception to the written notice requirement applies" (*Szuba v City of Buffalo*, 193 AD3d 1386, 1387 [4th Dept 2021] [internal quotation marks omitted]). Here, the City "met its initial burden by establishing that it did not receive the requisite written notice of the allegedly defective

[sidewalk] condition as required by [section 6.002 (d) of the North Tonawanda City Charter]" (*id.* [internal quotation marks omitted]; *see Davison v City of Buffalo*, 96 AD3d 1516, 1518 [4th Dept 2012]). Thus, the burden shifted to plaintiff and the cross-claim defendants to raise a triable issue of fact whether prior written notice was given (*see Szuba*, 193 AD3d at 1387; *Scovazzo v Town of Tonawanda*, 83 AD3d 1600, 1601 [4th Dept 2011]) or "to demonstrate [the existence of a triable issue of fact as to] the applicability of one of [the] two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Groninger v Village of Mamaroneck*, 17 NY3d 125, 127-128 [2011]; *Horst v City of Syracuse*, 191 AD3d 1297, 1297-1298 [4th Dept 2021]).

We conclude that plaintiff and the cross-claim defendants failed to meet that burden. In fact, plaintiff and the cross-claim defendants never contested the City's "proof that it had not received prior written notice of the defect, asserting, instead, that such notice was unnecessary" because the City had actual notice (*Groninger*, 17 NY3d at 129). However, "it is well settled that verbal or telephonic communications to a municipal body, even if reduced to writing, do not satisfy a prior written notice requirement" (*Szuba*, 193 AD3d at 1388). Furthermore, plaintiff and the cross-claim defendants failed to demonstrate the existence of a triable issue of fact as to the applicability of either of the two recognized exceptions to the prior notice requirement (*see Tracy v City of Buffalo*, 158 AD3d 1094, 1094 [4th Dept 2018]; *see also Gorman v Town of Huntington*, 12 NY3d 275, 279 [2009]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

383

KA 20-01047

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VANDON JONES, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Jefferson County Court (David A. Renzi, J.), entered June 10, 2020. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant was previously convicted after a jury trial of two counts of sex trafficking (Penal Law § 230.34 [1] [a]), four counts of attempted sex trafficking (§§ 110.00, 230.34 [1] [a] [two counts]; [4], [5] [c]), and one count each of promoting prostitution in the third degree (§ 230.25 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). He appealed, and we affirmed (*People v Jones*, 194 AD3d 1358 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]). Defendant also moved pursuant to CPL 440.10 to vacate the judgment of conviction on various grounds, including ineffective assistance of counsel. County Court denied the motion without a hearing, and defendant now appeals by permission of this Court from that order. We affirm.

Preliminarily, we agree with defendant that his claim of ineffective assistance of counsel is not procedurally barred by CPL 440.10 (2) (b).

With respect to the merits, defendant’s primary contention is that his trial attorney was ineffective in failing to interview and call as witnesses several people he alleges could have provided exculpatory testimony with respect to certain counts of the indictment. In the prior appeal, we rejected defendant’s contention that the court erred in denying his request to call one of the

witnesses in question to testify at trial, concluding that the proffered testimony was inadmissible (*Jones*, 194 AD3d at 1360). In any event, defendant offered no evidence in his motion papers that any identified witness would have provided exculpatory testimony at trial. Defendant further contends that defense counsel was ineffective in failing to seek introduction into evidence of various documents that would have supported the defense theory and impeached the testimony of prosecution witnesses. Although defendant's main brief does not identify which documents he is referring to, his motion papers reference, inter alia, numerous letters and emails sent to him by a prosecution witness who testified at trial that defendant was her pimp and that he provided drugs to her and other women as an inducement to engage in acts of prostitution from which he profited. We conclude that nothing in the letters or emails tends to exonerate defendant or impeaches the credibility of the author or any other prosecution witness. Defendant's remaining claim of ineffective assistance of counsel is that his attorney failed to advise him regarding the consequences of stipulating to the admission of evidence. Defendant does not specify what stipulated evidence this claim is based upon, nor does he allege that such evidence would have been inadmissible in the absence of a stipulation.

We thus conclude that the court properly rejected defendant's claims of ineffective assistance of counsel without a hearing because "the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts" (CPL 440.30 [4] [b]; *see People v Ozuna*, 7 NY3d 913, 915 [2006]; *People v McCullough*, 144 AD3d 1526, 1527 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]).

Finally, we have reviewed the remaining contention in defendant's main brief and the contentions advanced by defendant in his pro se supplemental brief and conclude that none warrants modification or reversal of the order.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

384

KA 20-01653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT C. WOOD, DEFENDANT-APPELLANT.

LAW OFFICES OF JOSEPH Z. AMSEL, PLLC, NEW YORK CITY (JOSEPH Z. AMSEL OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 16, 2020. The judgment convicted defendant upon his plea of guilty of course of sexual conduct against a child 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 course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), defendant contends that his waiver of the right to appeal is invalid because County Court failed to inform him that the right to appeal was separate and distinct from the rights automatically forfeited by his guilty plea and failed to identify which appellate issues survived the waiver of appeal. We reject defendant's contention.

Upon our review of the colloquy, we conclude that the court did not indicate to defendant that he automatically forfeited his right to appeal upon pleading guilty, but rather "engaged in a fuller colloquy, describing the nature of the right being waived without lumping that right into the panoply of trial rights automatically forfeited upon pleading guilty and eliciting agreements of understanding from . . . defendant on multiple occasions" (*People v Lopez*, 6 NY3d 248, 257 [2006]). In addition, defendant's contention that his waiver of the right to appeal is invalid because the court failed to identify the precise claims that survived the waiver of appeal is without merit. No "particular litany" is required for a waiver of the right to appeal to be valid (*id.* at 256), although the "better practice" is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *see* NY Model Colloquies, Waiver

of Right to Appeal). Here, the court appropriately relied on the Model Colloquy almost verbatim (*see People v Cromie*, 187 AD3d 1659, 1659 [4th Dept 2020], *lv denied* 36 NY3d 971 [2020]).

Defendant further contends that his plea was not knowing, intelligent, and voluntary because the court did not inform him, in advance, of the specific period of postrelease supervision that would be imposed upon sentencing. Initially, as defendant correctly notes, that contention survives a valid waiver of the right to appeal and defendant need not preserve the issue by filing a postallocution motion (*see People v Jordan*, 67 AD3d 1406, 1407-1408 [4th Dept 2009]). "A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences" (*People v Catu*, 4 NY3d 242, 244-245 [2005] [internal quotation marks omitted]; *see People v Turner*, 24 NY3d 254, 258 [2014]). A period of postrelease supervision "is a direct consequence of a criminal conviction," and therefore "a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action" (*Catu*, 4 NY3d at 244, 245; *see People v Robinson*, 160 AD3d 774, 777 [2d Dept 2018]). Here, the court informed defendant during the plea colloquy that a period of postrelease supervision would be imposed and informed him of "the maximum potential duration of postrelease supervision" (*Robinson*, 160 AD3d at 777; *see People v Hernandez*, 83 AD3d 1581, 1581 [4th Dept 2011]). We conclude that defendant's contention that his plea was not knowing, intelligent, and voluntary because he was not informed of the exact period of postrelease supervision that would be imposed is without merit (*cf. People v Rodriguez*, 132 AD3d 1374, 1374 [4th Dept 2015]; *Hernandez*, 83 AD3d at 1581).

Defendant also contends that his plea was not knowing, intelligent, and voluntary because he was induced to plead guilty by the People's assurance that he would not be prosecuted federally for his conduct, which the People did not have the authority to fulfill. Although that contention survives the waiver of the right to appeal, defendant failed to preserve the contention for our review "[b]y failing to move to withdraw his plea or vacate the judgment of conviction" (*People v Williams*, 15 AD3d 863, 863-864 [4th Dept 2005], *lv denied* 5 NY3d 771 [2005], *reconsideration denied* 5 NY3d 811 [2005]). We decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Although defendant's contention that he received ineffective assistance of counsel survives his plea and valid waiver of the right to appeal insofar as defendant "contends 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 Molski*, 179 AD3d 1540, 1540-1541 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020] [internal quotation marks omitted]), that contention involves matters outside the record and

therefore it is not reviewable on direct appeal (*see People v Long*, 151 AD3d 1886, 1886 [4th Dept 2017]; *People v Nichols*, 21 AD3d 1273, 1274 [4th Dept 2005], *lv denied* 6 NY3d 757 [2005]; *Williams*, 15 AD3d at 864).

Finally, defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 20-00983

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE D. MCKOY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered October 16, 2018. 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: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [7]). Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Specifically, the People presented evidence including the victim's medical records, the testimony of the victim, and a video recording of the incident, which established that defendant struck and kicked the victim repeatedly, leaving him with a fractured nose, contusions on his head and chest, and a temporary loss of vision, with minor visual impairment continuing through the time of the trial. This evidence establishes that the victim suffered a "[p]hysical injury" as defined in Penal Law § 10.00 (9) (*see People v Vives*, 1 AD3d 1014, 1015 [4th Dept 2003]; *see also People v McIntosh*, 158 AD3d 1289, 1290 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, contrary to defendant's contention, the sentence is not unduly harsh or severe.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

396

CA 22-00366

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

ALICE MONTGOMERY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BURLINGTON COAT FACTORY OF TEXAS, INC., EXCEL BUILDING SERVICES CORPORATION, ALSO KNOWN AS EXCEL BUILDING SERVICES, LLC, AND T2H SYRACUSE, INC., DOING BUSINESS AS HELPING HANDS, DEFENDANTS-RESPONDENTS.

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT BURLINGTON COAT FACTORY OF TEXAS, INC.

LAW OFFICES OF SANTACROSE, FRARY, TOMKO, DIAZ-ORDAZ & WHITING, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANT-RESPONDENT EXCEL BUILDING SERVICES CORPORATION, ALSO KNOWN AS EXCEL BUILDING SERVICES, LLC.

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANT-RESPONDENT T2H SYRACUSE, INC., DOING BUSINESS AS HELPING HANDS.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered February 15, 2022. The order granted the motions of defendants for summary judgment dismissing the second amended complaint against them.

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

Memorandum: Plaintiff appeals from an order insofar as it granted defendants' motions seeking summary judgment dismissing the second amended complaint against them. We affirm for reasons stated in the decision at Supreme Court. We write only to note that, contrary to the court's determination, it was not required under 22 NYCRR 202.8-g (former [c]) to deem the assertions in two defendants' statements of material facts admitted based on plaintiff's failure to controvert them (*see On the Water Prods., LLC v Glynos*, 211 AD3d 1480, 1481 [4th Dept 2022]). We nonetheless conclude that the court properly determined that defendants otherwise met their initial burden on their motions, and plaintiff failed to raise a triable issue of

fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

408

CAF 22-00949

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

IN THE MATTER OF ROBERT W. BROOKOVER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KAREN M. HARRIS, RESPONDENT-RESPONDENT.

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

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

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered June 9, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued sole custody of the subject child with respondent with visitation for petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father seeks a determination that respondent mother violated a prior stipulated custody and visitation order and also seeks to modify that prior order. Family Court, inter alia, determined that the mother did not violate the prior order and continued sole legal custody of the subject child with the mother with visitation for the father. The father now appeals and we affirm.

We reject the father's contention that the court erred in determining that the mother did not violate the prior order. A court "has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced" (Judiciary Law § 753 [A]; *see* Family Ct Act § 156). There are four elements required for a finding of civil contempt: (1) a lawful court order "expressing an unequivocal mandate"; (2) "reasonable certainty" that the order was disobeyed; (3) knowledge of the court's order by the party in contempt; and (4) prejudice to the right of a party to the litigation (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015] [internal quotation marks omitted]). "The party seeking an order of contempt has the burden of establishing those four elements by clear and convincing evidence" (*Dotzler v Buono*, 144 AD3d 1512, 1514 [4th Dept

2016]). Contrary to the father's contention, the court properly determined that the father did not meet his burden inasmuch as the provision of the prior order that the mother allegedly violated was ambiguous and did not express an unequivocal mandate (*see Matter of Fischione v PM Peppermint, Inc.*, 197 AD3d 970, 971 [4th Dept 2021]).

Contrary to the father's further contention, we conclude that the father failed to establish the requisite change in circumstances after the time of the prior order to warrant an inquiry into the best interests of the child (*see Matter of Wawrzynski v Goodman*, 100 AD3d 1559, 1559 [4th Dept 2012]; *see generally Matter of Yaddow v Bianco*, 67 AD3d 1430, 1431 [4th Dept 2009]; *Matter of Chrysler v Fabian*, 66 AD3d 1446, 1447 [4th Dept 2009], *lv denied* 13 NY3d 715 [2010]). Inasmuch as the mother did not violate the prior order, the court properly determined that the dispute between the parties with respect to the ambiguous provision of the prior order did not demonstrate the requisite change in circumstances (*see Matter of Nelson UU. v Carmen VV.*, 202 AD3d 1414, 1416 [3d Dept 2022]; *cf. Matter of Little v Little*, 175 AD3d 1070, 1072 [4th Dept 2019]). Furthermore, although the record reflects that there is significant acrimony between the parties, there does not appear to have been a change in that respect after the prior custody order was entered (*see Matter of Williams v Reid*, 187 AD3d 1593, 1594 [4th Dept 2020]; *Matter of Avola v Horning*, 101 AD3d 1740, 1741 [4th Dept 2012]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

414

CA 22-00831

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

EMMETT HARRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROME MEMORIAL HOSPITAL, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (MARTIN P. DUFFEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered May 10, 2022. The order, insofar as appealed from, denied in part the motion of defendant Rome Memorial Hospital for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendant Rome Memorial Hospital seeking summary judgment dismissing the second amended complaint, as amplified by the bills of particulars, insofar as it asserts claims against that defendant based on an alleged violation of 42 CFR 482.12 (c) (4) and the alleged malpractice of Rosa Padro, RN and Abigail Peckham, NP, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action against several defendants, including Rome Memorial Hospital (defendant), alleging, inter alia, that defendant and its agents and employees failed to timely diagnose and treat his spinal infection with epidural abscesses that ultimately rendered him quadriplegic. Defendant appeals from an order insofar as it denied in part its motion for summary judgment seeking dismissal of the second amended complaint against it.

Preliminarily, plaintiff has consented in his brief on appeal to the dismissal of the second amended complaint, as amplified by the bills of particulars, insofar as it asserts claims based on an alleged violation of 42 CFR 482.12 (c) (4) and the alleged malpractice of Abigail Peckham, NP, and we therefore modify the order accordingly (*see generally Sochan v Mueller*, 162 AD3d 1621, 1622 [4th Dept 2018]). Next, we agree with defendant that it satisfied its initial burden on its motion with respect to both deviation and causation related to

claim against it based on the alleged malpractice of Rosa Padro, RN, and that plaintiff failed to raise a triable issue of fact in opposition (*see Wicks v Virk*, 198 AD3d 1315, 1315 [4th Dept 2021]). We therefore further modify the order accordingly. We have considered defendant's remaining contentions, however, and conclude that none warrants reversal or further modification of the order.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

417

CA 22-01064

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

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

V MEMORANDUM AND ORDER

ROBERT R., RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (MARGOT BENNETT MITSCHOW OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 7, 2022, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a nonjury trial, that he is a dangerous sex offender requiring confinement (*see* § 10.03 [e]) and committing him to a secure treatment facility.

Respondent contends that Supreme Court erred in refusing to preclude the testimony of one of petitioner's expert witnesses on the ground that the testimony of that expert would be cumulative of the testimony of petitioner's other expert. We reject that contention. Although both experts concluded that respondent suffered from a mental abnormality, their testimony was not cumulative because there are distinctions between their diagnoses of respondent (*see Matter of State of New York v Justin D.*, 145 AD3d 735, 736 [2d Dept 2016], *lv denied* 29 NY3d 906 [2017]; *Matter of State of New York v James K.*, 135 AD3d 35, 38 [3d Dept 2015]; *see generally Matter of State of New York v Bass*, 119 AD3d 1356, 1357 [4th Dept 2014], *lv denied* 24 NY3d 908 [2014], *cert denied* 575 US 941 [2015]).

Respondent failed to preserve for our review his contention that petitioner failed to establish that he had serious difficulty controlling his sexually offending behavior and that he is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility "inasmuch as he did not move for a directed

verdict pursuant to CPLR 4401 or challenge the sufficiency of the evidence on those points in any other way" (*Matter of Vega v State of New York*, 140 AD3d 1608, 1609 [4th Dept 2016]). In any event, viewing the record in the light most favorable to petitioner (*see Matter of State of New York v Floyd Y.*, 30 NY3d 963, 964 [2017]), we conclude that the evidence is legally sufficient to support a determination that respondent has serious difficulty controlling his sexually offending behavior (*see Matter of Akgun v State of New York*, 148 AD3d 1613, 1614 [4th Dept 2017]), and is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility (*see Matter of State of New York v Joseph R.*, 189 AD3d 2126, 2128 [4th Dept 2020], *appeal dismissed & lv denied* 37 NY3d 932 [2021]; *Bass*, 119 AD3d at 1357-1358). To the extent that respondent contends that the determination that he is a dangerous sex offender requiring confinement is against the weight of the evidence, we reject that contention (*see generally Matter of State of New York v Robert T.*, 214 AD3d 1405, 1407 [4th Dept 2023]; *Akgun*, 148 AD3d at 1614).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-01370

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FARON SZYMANSKI, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered March 5, 2021. The judgment convicted defendant upon a plea of guilty of course of sexual conduct against a child 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 two counts of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]). Contrary to defendant's contention, the plea colloquy establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see People v Mess*, 186 AD3d 1069, 1069 [4th Dept 2020]; *see generally People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Although defendant's challenge to the voluntariness of his plea survives his valid waiver of the right to appeal (*see Thomas*, 34 NY3d at 558; *People v Seaberg*, 74 NY2d 1, 10 [1989]), by failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve that challenge for our review (*see People v Garcia-Cruz*, 138 AD3d 1414, 1414-1415 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *see also People v Lopez*, 71 NY2d 662, 665 [1988]). This case does not fall within the rare exception to the preservation requirement (*see generally Lopez*, 71 NY2d at 666). Further, defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

427

KA 19-00323

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE MACON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM 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 (Douglas A. Randall, J.), rendered December 28, 2018. The judgment convicted defendant upon a jury verdict of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), arising from an incident in which he repeatedly hit the victim with what appeared to be a metal pipe. Defendant failed to preserve for our review his challenge to County Court's *Sandoval* ruling (*see People v Noonan*, 202 AD3d 1469, 1470 [4th Dept 2022], *lv denied* 38 NY3d 1009 [2022]; *People v Brown*, 159 AD3d 1415, 1416 [4th Dept 2018], *lv denied* 31 NY3d 1115 [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 [6] [a]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention, "the fact that the [metal pipe purportedly used] by defendant during the incident was not recovered does not render . . . the verdict against the weight of the evidence" (*People v Cohens*, 81 AD3d 1442, 1444 [4th Dept 2011], *lv denied* 16 NY3d 894 [2011]). In addition, although an acquittal would not have been unreasonable in light of certain conflicting witness testimony, based upon our independent review of the evidence, and giving "[g]reat deference . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v Massey*, 140 AD3d 1736, 1738 [4th Dept 2016], *lv denied* 28 NY3d 972

[2016] [internal quotation marks omitted]), we conclude that the jury's rejection of the justification defense is not contrary to the weight of the evidence (*see id.*; *see also People v DeCamp*, 211 AD3d 1121, 1124 [3d Dept 2022], *lv denied* 39 NY3d 1077 [2023]; *People v Cruz*, 175 AD3d 1060, 1061 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]).

Finally, the sentence is not unduly harsh or severe.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

429

KA 21-01241

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEC SWIDERSKI, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 1, 2019. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v 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: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

430

KA 19-01574

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATIFAH CANNON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, EASTON THOMPSON KASPEREK SHIFFRIN LLP (BRIAN SHIFFRIN 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 June 13, 2019. The judgment convicted defendant upon a jury verdict of robbery in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]) and endangering the welfare of a child (§ 260.10 [1]). Viewing the evidence in light of the elements of the crime of robbery in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable, it cannot be said that the jury "failed to give the evidence the weight it should be accorded" (*id.*; *see People v Kalinowski*, 118 AD3d 1434, 1436 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]). We reject defendant's further contention that Supreme Court erred in denying her *Batson* challenge with respect to two prospective jurors. The People gave race-neutral reasons for the peremptory challenges, and defendant did not meet her ultimate burden of establishing that those reasons were pretextual (*see People v Switts*, 148 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *People v Johnson*, 38 AD3d 1327, 1328 [4th Dept 2007], *lv denied* 9 NY3d 866 [2007]). "[T]he court was in the best position to observe the demeanor of the prospective juror[s] and the prosecutor, and its . . . determination that the prosecutor's explanation[s were] race-neutral and not pretextual is entitled to great deference" (*People v Dandridge*, 26 AD3d 779, 780 [4th Dept 2006], *lv denied* 9 NY3d 1032 [2008] [internal quotation marks omitted]). We see no

reason to disturb that determination. Finally, we reject defendant's contention that she was denied a fair trial because of improper statements made by the prosecutor during summation. "To the extent that a portion of the prosecutor's summation could be viewed as containing a misstatement of law, . . . any prejudice was avoided by the court's instructions, which the jury is presumed to have followed" (*People v Harper*, 132 AD3d 1230, 1234 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016] [internal quotation marks omitted]; *see People v Padin*, 121 AD3d 628, 629 [1st Dept 2014], *lv denied* 25 NY3d 1169 [2015]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

439

CA 22-00953

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

IN THE MATTER OF SIERRA CLUB, DARLENE BULLSOVER, SYLVIU DAN, JR., AND DEBORAH GONDEK, PETITIONERS-APPELLANTS,

V ORDER

CITY OF NORTH TONAWANDA, CITY OF NORTH TONAWANDA PLANNING BOARD, FORTISTAR NORTH TONAWANDA LLC, AND DIGIHOST INTERNATIONAL, INC., RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM V. ROSSI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS FORTISTAR NORTH TONAWANDA LLC, AND DIGIHOST INTERNATIONAL, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered March 17, 2022 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the amended petition.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

441

KA 19-02355

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE J. WRIGHT, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered October 24, 2019. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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 driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [c] [i] [A]). Preliminarily, as defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. Supreme Court's "oral waiver colloquy and the written waiver signed by defendant together 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Byrd*, 181 AD3d 1183, 1184 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence, we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

443

KA 19-00250

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHEA'HONNIE D., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered August 24, 2018. The judgment convicted defendant upon her plea of guilty of attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of six years and a period of postrelease supervision of 2½ years, and as modified the judgment is affirmed.

Memorandum: On a prior appeal, we affirmed the judgment convicting defendant upon her plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel had failed to raise an issue on appeal that may have merit, i.e., whether the sentence is unduly harsh and severe, and we vacated our prior order. We now consider the appeal de novo.

We agree with defendant that she did not validly waive her 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]; *see People v Johnson* [appeal No. 1], 169 AD3d 1366, 1366 [4th Dept 2019], *lv denied* 33 NY3d 949 [2019]), defendant's waiver of the right to appeal is invalid because County Court's oral colloquy mischaracterized it as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *cf. People v Cromie*, 187 AD3d 1659, 1659 [4th Dept 2020], *lv denied* 36 NY3d 971 [2020]). We note that the better practice is for the court to use the Model Colloquy, which "neatly

synthesizes . . . the governing principles" (*Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal).

Furthermore, the written waiver executed by defendant did not contain any clarifying language to correct deficiencies in the oral colloquy. Rather, it perpetuated the oral colloquy's mischaracterization of the waiver of the right to appeal as an absolute bar to the taking of a first-tier direct appeal and even stated that the rights defendant was waiving included the "right to have an attorney appointed" if she could not afford one and the "right to submit a brief and argue before an appellate court issues relating to [her] sentence and conviction" (*see Thomas*, 34 NY3d at 554, 564-566). Where, as here, the "trial court has utterly 'mischaracterized the nature of the right a defendant was being asked to cede,' [this] '[C]ourt cannot be certain that the defendant comprehended the nature of the waiver of appellate rights' " (*id.* at 565-566).

Because the purported waiver of the right to appeal is unenforceable, it does not preclude our review of defendant's challenge to the court's refusal to grant her youthful offender status (*see People v Johnson*, 182 AD3d 1036, 1036 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]). Nevertheless, we conclude that the court did not abuse its discretion in declining to adjudicate defendant a youthful offender (*see People v Simpson*, 182 AD3d 1046, 1047 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]; *see generally People v Minemier*, 29 NY3d 414, 421 [2017]). In addition, having reviewed the applicable factors pertinent to a youthful offender determination (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to grant her such status (*see Simpson*, 182 AD3d at 1047; *Lewis*, 128 AD3d at 1400-1401; *cf. Keith B.J.*, 158 AD3d at 1161).

We agree with defendant, however, that the sentence is unduly harsh and severe, and we therefore modify the judgment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]) by reducing the sentence to a determinate term of imprisonment of six years (*see* Penal Law § 70.02 [3] [b]) and a period of postrelease supervision of 2½ years (*see* § 70.45 [2] [f]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

448

KA 22-01216

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHEA'HONNIE D., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CRAVATH, SWAINE & MOORE LLP, NEW YORK CITY (ANDREW WIKTOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK, THE WOMEN & JUSTICE PROJECT, THE SURVIVORS JUSTICE PROJECT, THE NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE, AND WILLOW DOMESTIC VIOLENCE CENTER, AMICI CURIAE.

Appeal from an order of the Onondaga County Court (Matthew J. Doran, J.), entered July 7, 2022. The order denied the motion of defendant for resentencing pursuant to CPL 440.47.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from an order that denied her motion for resentencing pursuant to the Domestic Violence Survivors Justice Act (L 2019, ch 31; L 2019, ch 55, § 1, part WW). The original sentence was imposed by County Court following defendant's conviction upon her plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]). On defendant's de novo direct appeal following our grant of her motion for a writ of error coram nobis, we modified the underlying judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to effectively time served and the period of postrelease supervision to 2½ years (*People v Shea'honnie D.* [appeal No. 1], — AD3d — [June 9, 2023] [4th Dept 2023]).

In light of our determination on her de novo appeal, we conclude that defendant's contentions on this appeal are moot because she has served the reduced sentence of imprisonment in its entirety (*see People v Smallwood*, 145 AD3d 1447, 1447 [4th Dept 2016]; *see generally People v Williams*, 199 AD3d 1446, 1447 [4th Dept 2021], *lv denied* 38 NY3d 931 [2022]) and because, in the de novo appeal, we imposed the

minimum legal period of postrelease supervision (*see generally* Penal Law §§ 60.12 [2] [b]; 70.45 [f]). In short, defendant received "all the relief to which [s]he was entitled," rendering the appeal moot (*People v Odyssty D.R.*, 208 AD3d 1596, 1597 [4th Dept 2022]). We further conclude that none of defendant's contentions fall within the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

465

KA 22-00049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID W. FREE, JR., DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered December 13, 2021. The judgment convicted defendant upon a plea of guilty of attempted course of sexual conduct against a child 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 course of sexual conduct against a child in the first degree (Penal Law §§ 110.00, 130.75 [1] [b]), 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 his challenge to the severity of the sentence (*see People v Terry*, 203 AD3d 1578, 1578 [4th Dept 2022], *lv denied* 38 NY3d 1010 [2022]), we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

468

KA 22-00256

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEONARD BURDEN, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered November 10, 2021. The judgment convicted defendant upon a plea of guilty 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 his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in summarily denying his motion to withdraw his guilty plea based on his claim of innocence. 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 Walcott*, 164 AD3d 1593, 1593 [4th Dept 2018], *lv denied* 32 NY3d 1116 [2018]; *People v Colon*, 122 AD3d 1309, 1309-1310 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]; *People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]).

"When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry 'rest[] largely in the discretion of the Judge to whom the motion is made' and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010]; *see People v Tinsley*, 35 NY2d 926, 927 [1974]). " '[O]ften a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present [their] contentions and the court should be enabled to make an informed determination' " (*People v Harris*, 206 AD3d 1711, 1712 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022], quoting *Tinsley*, 35 NY2d at 927). "[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]).

Defendant's conviction arose from an incident in which he struck the victim in the head with a baseball bat, causing the victim to sustain a concussion and requiring 11 staples in her head. Defendant admitted during the plea colloquy that he struck the victim with a baseball bat, causing physical injury to her. In support of his motion to withdraw the plea, defendant submitted the affidavit of a neighbor of the victim, who averred that the victim said that she "busted [herself] in the head." In opposition to the motion, the People submitted a supporting deposition of the victim denying that she made any such statement to the neighbor. We conclude that this case does not present one of the "rare instance[s]" where a hearing was required (*Tinsley*, 35 NY2d at 927), and that the court did not abuse its discretion in summarily denying the motion. The notion that the victim struck herself in the head with a baseball bat was incredible and properly rejected by the court (*see generally Sparcino*, 78 AD3d at 1509).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

471

CAF 22-00011

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

IN THE MATTER OF AHMED ADEBOLA,
PETITIONER-RESPONDENT,

V ORDER

WIDLINE FRANCILOT, RESPONDENT-APPELLANT.

LAW OFFICE OF HERNANDEZ M. RHAU, NEW YORK CITY (HERNANDEZ M. RHAU OF COUNSEL), FOR RESPONDENT-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (JOSEPH P. MORAWSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

STEPHANIE N. DAVIS, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered November 29, 2021, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and primary physical custody of the subject children.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

473

CA 22-01109

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

BERTHA HOLDEN, PLAINTIFF-RESPONDENT,

V ORDER

SANAA MINI MART, INC., ROYAL BROADWAY FOOD, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

MURA LAW GROUP, PLLC, BUFFALO (BRENDAN S. BYRNE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (THOMAS P. KOTRYS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered June 13, 2022. The order, among other things, denied the motion of defendants Sanaa Mini Mart, Inc., and Royal Broadway Food, Inc., for summary judgment "on [the] ground[] that a question of fact exists as to the issue of constructive notice."

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

474

CA 22-01222

PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, AND MONTOUR, JJ.

JAMIE FOSTER, PLAINTIFF-APPELLANT,

V ORDER

MICHELLE HUGHES, DEFENDANT-RESPONDENT.

KIRWAN LAW FIRM, P.C., SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (KELLY J. PARE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Scott J. DelConte, J.), entered February 9, 2022. The order, among other things, dismissed the complaint.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

478

CA 22-01323

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

ELIZABETH CATLIN, PLAINTIFF-APPELLANT,

V ORDER

DAVID MORABITO, DEFENDANT-RESPONDENT.

SUSSMAN AND ASSOCIATES, GOSHEN (MICHAEL H. SUSSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered July 1, 2022. The order granted defendant's motion to disqualify plaintiff's counsel as the attorney of record.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

494

KA 19-02337

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MORRISON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN R. HUTCHISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered November 12, 2019. 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 modified as a matter of discretion in the interest of justice by reducing the period of postrelease supervision to 2½ years and as modified the judgment is 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 he did not validly waive his right to appeal and that his sentence is unduly harsh and severe. As defendant contends, his waiver of the right to appeal is invalid because Supreme Court's oral colloquy "mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal, and there was no clarification that appellate review remained available for certain issues" (*People v Marshall*, 214 AD3d 1360, 1361 [4th Dept 2023] [internal quotation marks omitted]; *see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

As part of the plea agreement, the court stated that, in exchange for his guilty plea, it would sentence defendant to a prison term of 3½ years with a 2½-year period of postrelease supervision. We agree with defendant that the court erred when, at sentencing, it imposed a 3-year period of postrelease supervision, which departed from the express terms of the plea agreement, despite the fact that the court acknowledged that there had been no material changes in defendant's circumstances since the plea (*see People v Smith*, 101 AD3d 1677, 1677 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]). Although defendant

failed to preserve his contention for our review (*see People v Sprague*, 82 AD3d 1649, 1649 [4th Dept 2011], *lv denied* 17 NY3d 801 [2011]; *see also Smith*, 101 AD3d at 1677), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Thus, we modify the judgment by reducing the period of postrelease supervision to 2½ years, in accordance with the court's sentencing promise. As modified, the sentence is not unduly harsh or severe.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

497

KA 22-01670

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ARMANDO RAMIREZ, DEFENDANT-APPELLANT.

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

Appeal from an order of the Steuben County Court (Patrick F. McAllister, A.J.), entered September 15, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

501

CA 22-01322

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

ZAUSMER FRISCH SCRUTON & AGGARWAL, INC., AND
ZAUSMER-FRISCH CONSTRUCTION, INC.,
PLAINTIFFS-RESPONDENTS,

V ORDER

TWR REAL ESTATE, LLC, THAT WAS RANDOM, INC.,
DOING BUSINESS AS UPSTATE COIN AND GOLD, AND
DAVID COOPER, DEFENDANTS-APPELLANTS.

SHEATS & BAILEY, PLLC, LIVERPOOL (JASON B. BAILEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (MARY D'AGOSTINO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Scott J. DelConte, J.), entered July 28, 2022. The order, insofar as appealed from, granted in part the motion of plaintiffs for partial summary judgment.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

508

KA 19-02367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAITLYN ACOFF, DEFENDANT-APPELLANT.

JULIE CIANCA, 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 Monroe County Court (Douglas A. Randall, J.), rendered September 27, 2019. The judgment convicted defendant, upon her plea of guilty, of arson in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of five years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a guilty plea of arson in the second degree (Penal Law § 150.15). As the People correctly concede, defendant's waiver of the right to appeal is invalid inasmuch as County Court's explanation that the waiver would foreclose any review by a higher court "utterly 'mischaracterized the nature of the right [that] defendant was being asked to cede' " (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Youngs*, 183 AD3d 1228, 1228-1229 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]). Defendant's conviction follows an incident wherein, under the influence of alcohol, defendant attempted to gain access to her locked apartment building by burning a hole in a plexiglass window with a lighter, resulting in the building itself catching fire. We agree with defendant that the sentence is unduly harsh and severe. We note that defendant contacted emergency services immediately upon the building catching fire, that she has previously and is currently engaged in treatment for alcohol abuse and mental health issues, and that the court credited her statement accepting responsibility and expressing remorse for the damage caused by her actions. Under the circumstances of this case, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to a determinate term of five years, to be followed by the five-year period of postrelease supervision previously

imposed by the court.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

510

KA 20-00049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES FRANKLIN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. TRESMOND 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 (Russell P. Buscaglia, A.J.), rendered April 22, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Thornton*, 213 AD3d 1332, 1332 [4th Dept 2023]; *People v Cole*, 201 AD3d 1360, 1360-1361 [4th Dept 2022]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

516

CAF 22-01136

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

IN THE MATTER OF S.M.E., D.E.E., AND R.S.E.

B.J.D. AND S.K.D., PETITIONERS-RESPONDENTS;

H.K.E., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

YORIO, FERRATELLA & BOWES, PAINTED POST (CHRISTOPHER J. FERRATELLA OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

JOHN N. DAGON, HORNELL, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered October 7, 2021, in a proceeding for adoption. The order determined that respondent's consent to the adoption of the subject children by petitioners is not required.

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

Memorandum: Respondent, the biological mother of the subject children, appeals from an order determining, following an evidentiary hearing, that her consent to the adoption of the children by petitioners is not required pursuant to Domestic Relations Law § 111 (2) (a). We affirm.

Contrary to the mother's contention, we conclude that Family Court properly dispensed with her consent inasmuch as petitioners established by clear and convincing evidence that she abandoned the children by her "failure for a period of six months to visit the child[ren] and communicate with the child[ren] or person having legal custody of the child[ren], although able to do so" (Domestic Relations Law § 111 [2] [a]; *see Matter of Brianna B. [Swazette S.—Shacoya L.]*, 175 AD3d 1791, 1792 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020]). Indeed, petitioners established that, although the mother filed a petition in 2016 seeking visitation with the children, she made no attempt to contact the children or the petitioners for over six months preceding the filing of the amended petitions and second amended petition for adoption. Thus, we conclude that the mother's efforts were so "insubstantial or infrequent" that they did not preclude a finding of abandonment (§ 111 [6] [b]; *see Matter of Sophia [Tammy M.W.—Irhad R.]*, 195 AD3d 1549, 1550 [4th Dept 2021], *lv denied* 37 NY3d 914 [2021]). Further, the court "was entitled to discredit the testimony of the

mother that petitioners thwarted her efforts to contact the child[ren],” and we conclude that the record does not support the mother’s contention that petitioners interfered with any such efforts (*Matter of Patrick D.*, 52 AD3d 1280, 1281 [4th Dept 2008], *lv denied* 11 NY3d 711 [2008]; *see Brianna B.*, 175 AD3d at 1792; *Matter of Brittany S.*, 24 AD3d 1298, 1299 [4th Dept 2005], *lv denied* 6 NY3d 708 [2006]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

519

CA 22-00529

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

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR, PETITIONERS-APPELLANTS,

V ORDER

TOWN OF BRIGHTON, NEW YORK OFFICE OF THE BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY AS BUILDING INSPECTOR, TOWN OF BRIGHTON ZONING BOARD OF APPEALS, TOWN OF BRIGHTON, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F, LLC, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF BRIGHTON, NEW YORK OFFICE OF THE BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY AS BUILDING INSPECTOR, TOWN OF BRIGHTON ZONING BOARD OF APPEALS, AND TOWN OF BRIGHTON.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F, LLC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 24, 2022, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs (*see Matter of Save Monroe Ave., Inc. v Town of Brighton* [appeal No. 1], — AD3d — [June 9, 2023] [4th Dept 2023]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

520

CA 22-00537

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

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR, PETITIONERS-APPELLANTS,

V ORDER

TOWN OF BRIGHTON, NEW YORK OFFICE OF THE BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY AS BUILDING INSPECTOR, TOWN OF BRIGHTON ZONING BOARD OF APPEALS, TOWN OF BRIGHTON, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F, LLC, RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC, PETITIONER-APPELLANT,

V

TOWN OF BRIGHTON ZONING BOARD OF APPEALS, TOWN OF BRIGHTON, NEW YORK OFFICE OF THE BUILDING INSPECTOR, TOWN OF BRIGHTON, M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES, RESPONDENTS-RESPONDENTS, ET AL., RESPONDENTS.
(PROCEEDING NO. 2.)
(APPEAL NO. 3.)

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONERS-APPELLANTS IN PROCEEDING NO. 1.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-APPELLANT IN PROCEEDING NO. 2.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF BRIGHTON, NEW YORK OFFICE OF THE BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY AS BUILDING INSPECTOR, TOWN OF BRIGHTON ZONING BOARD OF APPEALS, AND TOWN OF BRIGHTON.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F, LLC.

Appeals from an amended order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 9, 2022, in proceedings pursuant to CPLR article 78. The amended order dismissed the petitions.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

521

CA 22-00538

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

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR, PETITIONERS-APPELLANTS,

V ORDER

TOWN OF BRIGHTON, NEW YORK OFFICE OF THE BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY AS BUILDING INSPECTOR, TOWN OF BRIGHTON ZONING BOARD OF APPEALS, TOWN OF BRIGHTON, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F, LLC, RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC, PETITIONER-APPELLANT,

V

TOWN OF BRIGHTON ZONING BOARD OF APPEALS, TOWN OF BRIGHTON, NEW YORK OFFICE OF THE BUILDING INSPECTOR, TOWN OF BRIGHTON, M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES, RESPONDENTS-RESPONDENTS, ET AL., RESPONDENTS.
(PROCEEDING NO. 2.)
(APPEAL NO. 4.)

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONERS-APPELLANTS IN PROCEEDING NO. 1.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-APPELLANT IN PROCEEDING NO. 2.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF BRIGHTON, NEW YORK OFFICE OF THE BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY AS BUILDING INSPECTOR, TOWN OF BRIGHTON ZONING BOARD OF APPEALS, AND TOWN OF BRIGHTON.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F, LLC.

Appeals from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 5, 2022, in proceedings pursuant to CPLR article 78. The order dismissed the petitions.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

522

CA 22-00552

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

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC,
PETITIONER-APPELLANT,

V ORDER

TOWN OF BRIGHTON ZONING BOARD OF APPEALS,
TOWN OF BRIGHTON OFFICE OF BUILDING INSPECTOR,
TOWN OF BRIGHTON, M&F, LLC, DANIELE SPC, LLC,
MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC.,
DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING
BUSINESS AS DANIELE FAMILY COMPANIES,
RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENTS.
(APPEAL NO. 5.)

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-APPELLANT.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF BRIGHTON ZONING BOARD OF APPEALS, TOWN OF BRIGHTON OFFICE OF BUILDING INSPECTOR, AND TOWN OF BRIGHTON.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., AND DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 24, 2022, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs (*see Matter of Save Monroe Ave., Inc. v Town of Brighton* [appeal No. 1], — AD3d — [June 9, 2023] [4th Dept 2023]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

525

CA 22-00749

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

LOUIS S. PETIX AND LENORE LOHMAIER, INDIVIDUALLY AND AS TRUSTEES/EXECUTORS OF THE ESTATE OF JEAN M. PETIX, FBO JOSEPH PETIX, PLAINTIFFS-RESPONDENTS,

V ORDER

MICHAEL THOMAS RYAN, DEFENDANT-APPELLANT.

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

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM E. BRUECKNER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered May 3, 2022. The order denied defendant's motion for summary judgment.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

533

CAF 20-00893

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

IN THE MATTER OF CHYNAROSE H. AND ANYLA H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

KEONA O., RESPONDENT,
AND BASHAR H., RESPONDENT-APPELLANT.

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

REBECCA C. HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 30, 2020, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondents derivatively severely abused the subject children.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

534

CAF 21-01148

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

IN THE MATTER OF EVALYNN R.B.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KELLI B., RESPONDENT-APPELLANT.

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (KEVIN D. CANALI OF COUNSEL), FOR RESPONDENT-APPELLANT.

NICHOLAS J. NARCHUS, LOCKPORT, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered July 21, 2021, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to the subject child on the ground of mental illness. Contrary to the mother's contention, petitioner established by clear and convincing evidence that the mother was "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; *see Matter of Deon M. [Vernon B.]*, 155 AD3d 1586, 1586 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]). Petitioner presented the testimony of an expert psychologist who opined that the mother suffered from mental illness and as a result, the child " 'would be in danger of being neglected if [she] returned to [the mother's] care at the present time or in the foreseeable future' " (*Matter of Matilda B. [Gerald B.]*, 187 AD3d 1677, 1678 [4th Dept 2020], *lv denied* 36 NY3d 905 [2021]; *see Matter of Norah T. [Norman T.]*, 165 AD3d 1644, 1644-1645 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]).

The mother's contention that Family Court erred in failing to qualify her mental health counselor as an expert is unpreserved for our review, inasmuch as the mother never asked the court to qualify the mental health counselor as an expert (*see Matter of Kaitlyn R.*,

267 AD2d 894, 896 [3d Dept 1999]; *see generally Norah T.*, 165 AD3d at 1645).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

540

CA 22-00988

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

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

V MEMORANDUM AND ORDER

MICHAEL P., RESPONDENT-APPELLANT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (CHRISTOPHER LIBERATI-CONANT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered May 19, 2022, in a proceeding pursuant to Mental Hygiene Law section 33.03. The order, inter alia, granted petitioner's application for authorization to administer medication to respondent over his objection.

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

Memorandum: Respondent appeals from an order granting petitioner's application for authorization to administer medication to respondent over his objection. The order, inter alia, provided that "the [o]rder shall terminate" upon respondent's discharge from civil hospitalization. Because respondent has been discharged from civil hospitalization and transferred to a correctional facility, the order terminated by its own terms, rendering this appeal moot (*see generally Matter of McGrath*, 245 AD2d 1081, 1082 [4th Dept 1997]), and this case does not fall within the exception to the mootness doctrine (*see id.*; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

542

CA 22-00681

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

JUSTIN WAGAR, PLAINTIFF-APPELLANT,

V ORDER

CITY OF ROCHESTER, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(ACTION NO. 1.)

WADE R. REMINGTON AND NICHOL P. DEATON, AS
ADMINISTRATOR OF THE ESTATE OF JASON C.
REGATUSO, DECEASED, PLAINTIFFS-APPELLANTS,

V

CITY OF ROCHESTER, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(ACTION NO. 2.)

JOHN J. FROMEN, ATTORNEYS AT LAW, P.C., SNYDER, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT JUSTIN WAGAR.

ROBERT HILTZIK, JERICHO, FOR PLAINTIFFS-APPELLANTS WADE R. REMINGTON AND NICHOL P. DEATON, AS ADMINISTRATOR OF THE ESTATE OF JASON C. REGATUSO, DECEASED.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered March 21, 2022. The judgment, inter alia, granted the motion of defendant City of Rochester for summary judgment and dismissed the complaints against it.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

544

CA 23-00111

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

KAITLYN L., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF N.L., AN INFANT, PLAINTIFF-APPELLANT,

V ORDER

TOWN OF LEE, DEFENDANT-RESPONDENT.

BLOCK, O'TOOLE & MURPHY, LLP, NEW YORK CITY (CHRISTINA R. MERCADO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (PAUL V. MULLIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 19, 2022. The order denied the motion of plaintiff for partial summary judgment.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

550

KA 22-00348

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MAHALIA G., DEFENDANT-APPELLANT.

SIDLEY AUSTIN LLP, NEW YORK CITY (JAMES R. HORNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

CLEARY GOTTLIEB STEEN & HAMILTON LLP, NEW YORK CITY (MARK E. MCDONALD OF COUNSEL), FOR SANCTUARY FOR FAMILIES, HER JUSTICE, NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE, URBAN RESOURCE INSTITUTE, LEGAL MOMENTUM, NEW YORK LEGAL ASSISTANCE GROUP, SAFE HORIZON, INC., AND THE LAWYERS COMMITTEE AGAINST DOMESTIC VIOLENCE, AMICI CURIAE.

Appeal from an order of the Erie County Court (Suzanne Maxwell Barnes, J.), dated November 17, 2021. The order denied the motion of defendant for resentencing pursuant to CPL 440.47.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

552

CAF 22-01719

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

IN THE MATTER OF DANA NOSE, PETITIONER-APPELLANT,

V ORDER

WILLIAM SAVAGE, DECEASED, RESPONDENT-RESPONDENT.

BRIAN R. WELSH, PLLC, WILLIAMSVILLE (BRIAN R. WELSH OF COUNSEL), FOR PETITIONER-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered March 24, 2022, in a proceeding pursuant to Family Court Act article 4. The order dismissed the petition.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

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

553

CAF 22-01723

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

IN THE MATTER OF PHILIP C. FOURNIER,
PETITIONER-APPELLANT,

V ORDER

BETH SKELLEN AND CHRISTOPHER FOURNIER,
RESPONDENTS-RESPONDENTS.

BRIAN R. WELSH, PLLC, WILLIAMSVILLE (BRIAN R. WELSH OF COUNSEL), FOR PETITIONER-APPELLANT.

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (ALEXANDER E. BASINSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT CHRISTOPHER FOURNIER.

DEBRA D. WILSON, LOCKPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Niagara County (Danielle M. Restaino, A.J.), entered February 23, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner visitation with one of the subject children.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

558

CA 22-00574

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

DAVID JACK AND FELISHA LEGETTE-JACK,
PLAINTIFFS-APPELLANTS,

V ORDER

STATE FARM FIRE AND CASUALTY COMPANY,
DEFENDANT-RESPONDENT.

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

HURWITZ FINE P.C., BUFFALO (SCOTT D. STORM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered March 21, 2022. The order, inter alia, granted the motion of defendant for summary judgment dismissing the complaint.

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

Entered: June 9, 2023

Ann Dillon Flynn
Clerk of the Court