SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 28, 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

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED JULY 28, 2023

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

968
CA 21-01179
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

JEANNE CARROLL, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA FALLS MEMORIAL MEDICAL CENTER,
DEFENDANT-RESPONDENT,
MARK D. PERRY, M.D., MARK D. PERRY, M.D., P.C.,
AND RADIOLOGY SOLUTIONS ASSOCIATES, PLLC,
DEFENDANTS-APPELLANTS.

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

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HUTCHESON, AFFRONTI & DEISINGER, P.C., BUFFALO (ADAM P. DEISINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 21, 2021. The order granted the motion of defendant Niagara Falls Memorial Medical Center for summary judgment and denied the motion of defendants Mark D. Perry, M.D., Mark D. Perry, M.D., P.C., and Radiology Solutions Associates, PLLC, for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant Niagara Falls Memorial Medical Center in part and reinstating the amended complaint, as amplified by the bill of particulars, insofar as it asserts a claim that Niagara Falls Memorial Medical Center is vicariously liable for the negligence of defendant Mark D. Perry, M.D., and granting in part the motion of defendants Mark D. Perry, M.D., Mark D. Perry, M.D., P.C., and Radiology Solutions Associates, PLLC, for summary judgment and dismissing the amended complaint, as amplified by the bill of particulars, against those defendants insofar as it asserts a claim that defendant Mark D. Perry, M.D. committed medical malpractice during the pre- and post-ultrasound treatment of plaintiff, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries she allegedly sustained as the result of, inter alia, the failure of a radiologist to detect a deep vein thrombosis (DVT) on an ultrasound ordered by her primary care

physician. Plaintiff appeals and defendants Mark D. Perry, M.D. (Dr. Perry), i.e., the radiologist, Mark D. Perry, M.D., P.C., and Radiology Solutions Associates, PLLC (RSA) (collectively, Perry defendants) appeal from an order that denied the Perry defendants' motion for summary judgment dismissing the amended complaint and any cross-claims against them and granted the motion of defendant Niagara Falls Memorial Medical Center (hospital) for summary judgment dismissing the amended complaint and any cross-claims against it.

"[A] defendant moving for summary judgment in a medical malpractice action has the [initial] burden of establishing the absence of any departure from good and accepted medical practice *or* that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Campbell v Bell-Thomson*, 189 AD3d 2149, 2150 [4th Dept 2020]). "To meet that burden, a defendant must submit in admissible form factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [the defendant] complied with the accepted standard of care or did not cause any injury to the patient" (*Edwards v Myers*, 180 AD3d 1350, 1352 [4th Dept 2020] [internal quotation marks omitted]; *see Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]). " '[T]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact only after the defendant . . . meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden' " (*Bubar*, 177 AD3d at 1359).

Taking the appeal of the Perry defendants first, we agree with the Perry defendants that they met their initial burden with respect to the absence of any deviation from the accepted standard of care. In support of their motion, the Perry defendants submitted an affidavit from Dr. Perry himself, which was "detailed, specific and factual in nature and addresse[d] plaintiff's specific . . . claim[s] of negligence" (*Campbell*, 189 AD3d at 2150 [internal quotation marks omitted]). Contrary to the Perry defendants' contention, however, they did not meet their initial burden with respect to causation. In his affidavit, Dr. Perry opined that errors in plaintiff's post-ultrasound treatment by her primary care physician and other treatment providers, specifically their failure to order additional studies, constituted an intervening cause that severed the causal nexus between Dr. Perry's alleged negligence and plaintiff's injuries. Dr. Perry's affidavit failed, however, to establish as a matter of law that the alleged "intervening act[s were] extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from [Dr. Perry's] conduct" such that they could constitute "superseding act[s] which break[] the causal nexus" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]; *see Siegal v Adler*, 179 AD3d 471, 472-473 [1st Dept 2020]; *Romanelli v Jones*, 179 AD3d 851, 857 [2d Dept 2020]).

The burden therefore shifted to plaintiff to demonstrate the existence of a triable issue of fact with respect to only the element of Dr. Perry's alleged deviation from the appropriate standard of care

(*see Bubar*, 177 AD3d at 1359). Contrary to the Perry defendants' contention, we conclude that the affidavit of plaintiff's expert raised triable issues of fact with respect to plaintiff's theory that Dr. Perry's failure to identify a DVT on the ultrasound constituted medical malpractice. In contrast to the opinion of Dr. Perry that the ultrasound images showed no evidence of a DVT, plaintiff's expert opined that the black lentiform area on at least one image showed "a classic sign of DVT/blood clot." Thus, the affidavit of plaintiff's expert squarely contradicted Dr. Perry's affidavit and created a classic battle of the experts on the element of deviation that is properly left to a jury for resolution (*see Cooke v Corning Hosp.*, 198 AD3d 1382, 1383 [4th Dept 2021]).

The Perry defendants further assert that, pursuant to *Bubar* and its progeny, Supreme Court was required, and failed, to grant them partial summary judgment dismissing each of the particularized *factual allegations* contained in the bill of particulars that were not expressly addressed by plaintiff's expert in opposition to the motion. We reject that assertion and, in doing so, we take this opportunity to clarify our holdings by resolving the apparent tension between *Abbotoy v Kurss* (52 AD3d 1311 [4th Dept 2008]) and *Bubar* and its progeny (*see e.g. Revere v Burke*, 200 AD3d 1607, 1609-1610 [4th Dept 2021]; *Noga v Brothers of Mercy Nursing & Rehabilitation Ctr.*, 198 AD3d 1277, 1279 [4th Dept 2021]; *Pasek v Catholic Health Sys., Inc.*, 186 AD3d 1035, 1036 [4th Dept 2020]).

As we previously stated in *Abbotoy*, the assertion that a defendant is entitled to partial summary judgment with respect to each allegation in the bill of particulars not specifically addressed by a plaintiff's expert in opposition to the motion "is based on a misperception of the function of a bill of particulars" (52 AD3d at 1312). " '[A] bill of particulars is not a pleading, but just an expansion of one,' " and thus a plaintiff opposing a motion for summary judgement is "not required to submit an expert opinion with respect to each *allegation* in the bill of particulars inasmuch as the bill of particulars merely amplifie[s] th[e] causes of action" (*id.* [emphasis added]). Notably, the individual allegations in the plaintiffs' bill of particulars in *Abbotoy* amplified a single cohesive theory of medical malpractice. Nothing in our decision in *Abbotoy* was intended to preclude a defendant in a medical malpractice action from seeking partial summary judgment where the complaint, as amplified by a bill of particulars, asserts more than one distinct theory (i.e., more than one claim) of malpractice (*see generally Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755-756 [3d Dept 2001]). *Bubar* and its progeny should be read as consistent with that approach, and nothing therein should be interpreted as contrary to the holding in *Abbotoy*. In sum, a plaintiff opposing a motion for summary judgment is not required to submit an expert opinion with respect to each allegation in the bill of particulars, but rather must raise a triable issue of fact with respect to each distinct theory or claim of malpractice on which the defendant made a prima facie showing of entitlement to judgment as a matter of law, and the defendant will be entitled to partial summary judgment dismissing any distinct theory or claim of

malpractice left unaddressed or unopposed by the plaintiff in opposition to the motion (*see e.g. Revere*, 200 AD3d at 1609-1610; *Bubar*, 177 AD3d at 1360; *Abbotoy*, 52 AD3d at 1312).

Here, in addition to asserting the theory that Dr. Perry's failure to detect a DVT on the ultrasound was a deviation from the accepted standard of care, plaintiff further asserted in the amended complaint as amplified by the bill of particulars the distinct theory that Dr. Perry deviated from the accepted standard of care in the pre- and post-ultrasound treatment of plaintiff. Inasmuch as the Perry defendants met their initial burden of establishing that Dr. Perry had no involvement in plaintiff's treatment outside of his involvement as the radiologist and plaintiff failed to address that theory in opposition to the motion, we conclude that plaintiff abandoned that distinct theory of medical malpractice (*see Pasek*, 186 AD3d at 1036). We therefore modify the order by granting in part the motion of the Perry defendants for summary judgment and dismissing the amended complaint, as amplified by the bill of particulars, against those defendants insofar as it asserts a claim that Dr. Perry committed medical malpractice during the pre- and post-ultrasound treatment of plaintiff.

On her appeal, plaintiff contends that the hospital failed to establish as a matter of law that it was not vicariously liable for Dr. Perry's alleged malpractice. We agree. A hospital "is liable for the negligence or malpractice of its employees" (*Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). Further, "[d]espite a physician's independent contractor status, a hospital may be held liable for such physician's negligence if it maintained control over the manner and means of the physician's work" (*Torns v Samaritan Hosp.*, 305 AD2d 965, 966-967 [3d Dept 2003]; *see Pasek v Catholic Health Sys., Inc.*, 195 AD3d 1381, 1382 [4th Dept 2021]). "[V]icarious liability for the medical malpractice of an independent, private attending physician may [also] be imposed under a theory of apparent or ostensible agency by estoppel" (*Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept 2007]; *see Pasek*, 195 AD3d at 1382).

Here, plaintiff alleged in her amended complaint and her bill of particulars to the hospital that Dr. Perry "was an agent, servant and/or employee of" the hospital. The hospital failed to establish, prima facie, that Dr. Perry was an independent contractor, rather than an employee (*see Vazquez v Beth Abraham Health Servs.*, 172 AD3d 411, 411-412 [1st Dept 2019]; *Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 1213-1214 [2d Dept 2018]). Although the hospital established that Dr. Perry was a member of RSA, which provided services to several hospitals, it also submitted evidence that he was chief of the hospital's department of diagnostic imaging and, with respect thereto, the hospital's submissions lacked any affidavit from a hospital representative with personal knowledge of Dr. Perry's employment status or the nature of his position with the hospital, and Dr. Perry's affidavit and deposition testimony each likewise failed to establish as a matter of law that he was not an employee of the hospital (*see Vazquez*, 172 AD3d at 411-412; *cf. Pasek*, 195 AD3d at 1382; *Weiszberger v KCM Therapy*, 189 AD3d 1121, 1123 [2d

Dept 2020]; *Angelhow v Chahfe*, 174 AD3d 1285, 1286 [4th Dept 2019]; *Sledziewski v Cioffi*, 137 AD2d 186, 188-189 [3d Dept 1988]). In addition, the hospital failed to establish that Dr. Perry, even if he were a non-employee physician, was not an agent of the hospital or under the hospital's control (*see Castro v Durban*, 161 AD3d 939, 942 [2d Dept 2018]; *Contreras v Adeyemi*, 102 AD3d 720, 722-723 [2d Dept 2013]). Inasmuch as the hospital failed to establish its prima facie entitlement to summary judgment with respect to plaintiff's claim that the hospital is vicariously liable for Dr. Perry's alleged negligence, the motion must be denied insofar as it sought dismissal of that claim (*see Castro*, 161 AD3d at 942; *cf. Pasek*, 195 AD3d at 1383). We therefore further modify the order accordingly.

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

989
CA 21-01313
PRESENT: WHALEN, P.J., SMITH, CURRAN, MONTOUR, AND OGDEN, JJ.

CITIMORTGAGE, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KELIANN M. ELNISKI, ALSO KNOWN AS KELIANN M.
ARGY, TULLEY ELNISKI, KEEGHAN ELNISKI,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

KELIANN M. ARGY, AS ADMINISTRATOR OF THE ESTATE
OF KEVIN P. ELNISKI, APPELLANT.

ELNISKI LAW, P.C., ORCHARD PARK (KELIANN M. ARGY OF COUNSEL), FOR
DEFENDANTS-APPELLANTS AND APPELLANT.

Appeal from an order of the Erie County Court (Suzanne Maxwell Barnes, J.), entered August 6, 2021. The order, among other things, granted plaintiff’s motion for, inter alia, summary judgment.

It is hereby ORDERED that said appeal insofar as taken by Keliann M. Argy, as administrator of the Estate of Kevin P. Elniski, and defendants Tulley Elniski and Keeghan Elniski is unanimously dismissed and the order is affirmed without costs.

Memorandum: Defendant Keliann M. Elniski, also known as Keliann M. Argy (Argy), and her then-husband Kevin P. Elniski (collectively, Elniskis) executed a note secured by a mortgage on their residence. The Elniskis later executed a second note and mortgage as well as a consolidated note and a consolidation, extension and modification agreement (CEMA) consolidating the two mortgages. Following the Elniskis’ default, plaintiff, as holder of the consolidated note and CEMA, accelerated the loan and commenced this foreclosure action. The Elniskis subsequently divorced. Several years later, Kevin died, and his mother, defendant Patricia Elniski, was granted limited letters of administration for his estate.

Argy thereafter executed a stipulation withdrawing her answer to the complaint and consenting to entry of an order of reference and judgment of foreclosure and sale “at the time [p]laintiff may move for such relief.” Pursuant to the stipulation, Argy further consented to entry of “any other orders or other relief for which [p]laintiff may move or apply in order to complete the foreclosure process in this action.” Patricia purportedly also consented to foreclosure on behalf of the estate.

Plaintiff subsequently filed an amended complaint substituting Patricia, in her capacity as administrator of the estate, as a party defendant in place of Kevin and adding defendants Tulley Elniski and Keeghan Elniski (Elniski children) pursuant to EPTL 4-1.1. The Elniski children were appointed a guardian ad litem to defend them in the action.

Notwithstanding her stipulation withdrawing her answer and consenting to foreclosure, Argy answered the amended complaint and asserted several affirmative defenses. Plaintiff moved for, inter alia, summary judgment on the amended complaint. For reasons not apparent from this record, Argy was thereafter appointed successor administrator of the estate. On behalf of the estate, the Elniski children, and herself, Argy cross-moved to, inter alia, dismiss the amended complaint against them. The court granted the motion and denied the cross-motion. Argy and the Elniski children now appeal.

Initially, we note that the appeal insofar as taken by the Elniski children and Argy as administrator of the estate must be dismissed inasmuch as they failed to provide a record adequate to permit this Court to determine whether they are proper appellants in this action (*see generally Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]).

With respect to the merits of Argy's appeal, we reject Argy's contention that County Court erred in granting the motion insofar as it sought summary judgment with respect to her. "[A] plaintiff moving for summary judgment in a mortgage foreclosure action establishes its prima facie case by submitting a copy of the mortgage, the unpaid note and evidence of default" (*Citibank, N.A. v Gifford*, 204 AD3d 1382, 1384 [4th Dept 2022] [internal quotation marks omitted]; *see Bank of N.Y. Mellon v Simmons*, 169 AD3d 1446, 1446 [4th Dept 2019]). Plaintiff met its initial burden on the motion by submitting, among other things, a copy of the CEMA, the consolidated note, and affidavits demonstrating Argy's default. The burden then shifted to Argy "to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action" (*Bank of N.Y. Mellon*, 169 AD3d at 1446 [internal quotation marks omitted]; *see Mason v Caruana*, 181 AD3d 1158, 1159 [4th Dept 2020]; *Lawler v KST Holdings Corp.*, 115 AD3d 1196, 1198-1199 [4th Dept 2014], *lv dismissed* 24 NY3d 989 [2014]).

"Even '[v]iewing, as we must, the evidence of the nonmoving party as true and granting [her] every favorable inference' " (*Bank of N.Y. Mellon*, 169 AD3d at 1446; *see Hartford Ins. Co. v General Acc. Group Ins. Co.*, 177 AD2d 1046, 1047 [4th Dept 1991]), we conclude that Argy did not meet her burden. We reject Argy's contention that she raised a triable issue of fact with respect to default on the consolidated note and the CEMA. That contention relies on the assertion that the loan and corresponding payment amount had been modified before this action was commenced, but the record is devoid of any proof of a written modification as required under the plain terms of the CEMA. Moreover, Argy executed the stipulation consenting to foreclosure well after the CEMA was allegedly modified and, pursuant to the terms of the stipulation, she waived any defenses to foreclosure (*see generally*

Fortress Credit Corp. v Hudson Yards, LLC, 78 AD3d 577, 577 [1st Dept 2010]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 205 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]; *Socia v Trovato*, 197 AD2d 916, 917 [4th Dept 1993]). Contrary to Argy's related contention, her alleged financial distress at the time she executed the stipulation is not a sufficient ground on which to void her consent to foreclosure (*see Eastern Sav. Bank, FSB v Campbell*, 167 AD3d 712, 715 [2d Dept 2018]; *see generally Hallock v State of New York*, 64 NY2d 224, 230 [1984]).

We reject Argy's further contention that the court erred in denying the cross-motion insofar as it sought to dismiss the foreclosure action against her on the ground that plaintiff unreasonably delayed in substituting Patricia, as administrator of the estate, as a defendant. Any delay by plaintiff in that regard has no effect on the action against Argy, who is not "the party for whom substitution should have been made" (CPLR 1021; *see Vicari v Kleinwaks*, 157 AD3d 975, 977-978 [2d Dept 2018]; *see generally Fitzpatrick v Palazzo*, 46 AD3d 1414, 1414 [4th Dept 2007]).

We further conclude that the court did not err in denying the cross-motion insofar as it sought dismissal pursuant to CPLR 3215 (c) inasmuch as Argy, who timely answered the complaint, did not default, rendering that statute inapplicable (*see Bank of N.Y. Mellon v Ingrassia*, 204 AD3d 633, 635 [2d Dept 2022]; *see also Matter of Aarismaa v Bender*, 108 AD3d 1203, 1205 [4th Dept 2013]). To the extent that Argy contends that she was entitled to dismissal under CPLR 3216, we reject that contention. Argy failed to establish that all of the requisite conditions for dismissal were met inasmuch as there is no evidence in the record that she "served a written demand by registered or certified mail requiring [plaintiff] to resume prosecution of the action and to serve and file a note of issue within [90] days after receipt of such demand" (CPLR 3216 [b] [3]; *see Hilliard v Highland Hosp.*, 88 AD3d 1291, 1292 [4th Dept 2011]).

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

1031
CA 21-01355
PRESENT: SMITH, J.P., BANNISTER, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF TIMOTHY MICHAEL HUDSON
AND KRISTINA S. HUDSON,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF ORCHARD PARK ZONING BOARD OF APPEALS,
TOWN OF ORCHARD PARK, NICHOLAS ROSSI AND
CHERYL ROSSI, RESPONDENTS-DEFENDANTS-RESPONDENTS.

HARDY MARBLE LLP, LOCKPORT (BRADLEY D. MARBLE OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, BUFFALO (COREY A. AUERBACH OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF ORCHARD PARK ZONING BOARD OF APPEALS AND TOWN OF ORCHARD PARK.

THE LAW OFFICES OF NICHOLAS L. ROSSI, ORCHARD PARK (NICHOLAS L. ROSSI OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS NICHOLAS ROSSI AND CHERYL ROSSI.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 21, 2021, in a proceeding pursuant to CPLR article 78 and action for injunctive relief and monetary damages. The judgment granted the motions of respondents-defendants to dismiss and dismissed the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying in part the motion of respondents-defendants Nicholas Rossi and Cheryl Rossi and reinstating the fourth, fifth, sixth, and seventh causes of action and as modified the judgment is affirmed without costs.

Memorandum: Petitioners-plaintiffs Timothy Michael Hudson and Kristina S. Hudson, who own residential real property adjacent to residential real property owned by respondents-defendants Nicholas Rossi and Cheryl Rossi, commenced this hybrid CPLR article 78 proceeding and action alleging, among other things, that the Rossis constructed a new driveway that encroached upon their property and violated the setback ordinance of respondent-defendant Town of Orchard Park (Town), and that respondent-defendant Town of Orchard Park Zoning Board of Appeals (ZBA) improperly granted the Rossis’ application for an area variance allowing the driveway to remain up to the property

line. In their petition-complaint, the Hudsons alleged in the first cause of action that the ZBA violated Town Law § 267-b (3) in granting the area variance, and thus that the determination should be annulled as made in violation of lawful procedure and affected by an error of law. The Hudsons alleged in the second cause of action that the ZBA's determination was arbitrary and capricious and was not supported by substantial evidence. In the third cause of action, the Hudsons sought relief in the nature of mandamus to compel the Town's code enforcement officer to, inter alia, enforce the setback ordinance against the Rossis. The Hudsons alleged in the fourth cause of action that, inter alia, they were entitled to an injunction pursuant to RPAPL 871 directing the Rossis to remove that part of the driveway that allegedly encroached on the Hudsons' property. The Hudsons further alleged in the fifth, sixth, and seventh causes of action that they were entitled to monetary damages from the Rossis for, respectively, trespass, private nuisance, and negligence.

The Rossis moved to dismiss the petition-complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7) and, in effect, based on documentary evidence pursuant to CPLR 3211 (a) (1). The Town and the ZBA moved to dismiss the petition-complaint against them, as relevant on appeal, pursuant to CPLR 3211 (a) (1) and (7) and CPLR 7804 (f). Supreme Court, without explanation, granted the motions and dismissed the petition-complaint. The Hudsons now appeal.

Preliminarily, the Hudsons contend that consideration of the pre-answer motions with respect to the first, second, and third causes of action seeking relief pursuant to CPLR article 78 is limited to determining whether, upon accepting the allegations as true and according the Hudsons every favorable inference, the petition-complaint contains cognizable legal theories. We reject that contention under the circumstances of this case.

A CPLR article 78 proceeding is a special proceeding (*see* CPLR 7804 [a]) and, as such, "may be summarily determined 'upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised' " (*Matter of Battaglia v Schuler*, 60 AD2d 759, 759 [4th Dept 1977], quoting CPLR 409 [b]; *see Matter of Buckley v Zoning Bd. of Appeals of City of Geneva*, 189 AD3d 2080, 2081 [4th Dept 2020]; *Matter of Barreca v DeSantis*, 226 AD2d 1085, 1086 [4th Dept 1996]). Consequently, even if a respondent in a CPLR article 78 proceeding "d[oes] not file an answer, where . . . 'it is clear that no dispute as to the facts exists and no prejudice will result,' [a] court can, upon a . . . motion to dismiss, decide the petition on the merits" (*Matter of Arash Real Estate & Mgt. Co. v New York City Dept. of Consumer Affairs*, 148 AD3d 1137, 1138 [2d Dept 2017], quoting *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 102 [1984]; *see Matter of 22-50 Jackson Ave. Assoc., L.P. v County of Suffolk*, 216 AD3d 939, 942 [2d Dept 2023]; *Matter of 7-Eleven, Inc. v Town of Hempstead*, 205 AD3d 909, 910 [2d Dept 2022]).

Here, given the numerous evidentiary submissions by the parties

related to the ZBA's determination, we conclude that "the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result" from a summary determination in the CPLR article 78 proceeding (*Nassau BOCES Cent. Council of Teachers*, 63 NY2d at 102; *see 22-50 Jackson Ave. Assoc., L.P.*, 216 AD3d at 942; *Fiore v Town of Whitestown*, 125 AD3d 1527, 1528 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]; *cf. Matter of Bihary v Zoning Bd. of Appeals of City of Buffalo*, 206 AD3d 1575, 1576 [4th Dept 2022]; *Matter of Mintz v City of Rochester*, 200 AD3d 1650, 1653 [4th Dept 2021]; *Matter of Town of Geneva v City of Geneva*, 63 AD3d 1544, 1544 [4th Dept 2009]).

On the merits, the Hudsons contend that the court erred in dismissing the first and second causes of action because the ZBA's determination to grant the Rossis an area variance was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, and was not supported by substantial evidence. We reject that contention.

"[Z]oning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]; *see Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]). "Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure" (*Pecoraro*, 2 NY3d at 613). "Thus, a determination of a zoning board should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence" (*Ifrah*, 98 NY2d at 308; *see Pecoraro*, 2 NY3d at 613; *Matter of Sasso v Osgood*, 86 NY2d 374, 384 n 2 [1995]).

Here, upon our review of the record, including the minutes of the ZBA's public hearing, we conclude that the ZBA made its determination after reasonably considering each of the statutory factors and weighing the benefit to the Rossis against the detriment to the health, safety, and welfare of the neighborhood or community if the variance was granted (*see* Town Law § 267-b [3] [b]; *Pecoraro*, 2 NY3d at 614; *Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1279-1280 [4th Dept 2007]; *Matter of Wilcove v Town of Pittsford Zoning Bd. of Appeals*, 306 AD2d 898, 899 [4th Dept 2003]). Contrary to the Hudsons' various assertions, the ZBA's determination is not illegal or arbitrary and capricious, and it is supported by substantial evidence (*see Pecoraro*, 2 NY3d at 614; *Conway*, 38 AD3d at 1280; *Wilcove*, 306 AD2d at 899). We also reject the Hudsons' contention that the ZBA did not grant the minimum variance necessary to meet the Rossis' needs while at the same time preserving and protecting the character of the neighborhood and the health, safety, and welfare of the community (*see* Town Law § 267-b [3] [c]; *Conway*, 38 AD3d at 1280).

Next, by failing to address in their brief the court's dismissal

of the third cause of action, seeking relief in the nature of mandamus to compel the Town’s code enforcement officer to, inter alia, enforce the setback ordinance against the Rossis, the Hudsons have abandoned any contention with respect to the dismissal of that cause of action (*see Matter of Up State Tower Co., LLC v Village of Lakewood*, 175 AD3d 972, 973 [4th Dept 2019]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). In any event, it is well established that “the decision to enforce [zoning] codes rests in the discretion of the public officials charged with enforcement . . . and is [thus] not a proper subject for relief in the nature of mandamus” (*Matter of Young v Town of Huntington*, 121 AD2d 641, 642 [2d Dept 1986]; *see Matter of Cooney v Town of Wilmington Zoning Bd. of Appeals*, 140 AD3d 1350, 1351 [3d Dept 2016]; *Manuli v Hildenbrandt*, 144 AD2d 789, 790 [3d Dept 1988]).

We agree with the Hudsons, however, that the court erred in granting the Rossis’ motion with respect to the fourth, fifth, sixth, and seventh causes of action, and we therefore modify the judgment accordingly. “ ‘In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand’ ” (*Matter of Greenberg v Assessor of Town of Scarsdale*, 121 AD3d 986, 989 [2d Dept 2014]; *see Parker v Town of Alexandria*, 138 AD3d 1467, 1468 [4th Dept 2016]). A court “ ‘may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment’ ” (*Greenberg*, 121 AD3d at 989; *see Parker*, 138 AD3d at 1468). Here, contrary to the assertions underlying the Rossis’ motion to dismiss, we conclude that the petition-complaint adequately states causes of action based on RPAPL 871, trespass, private nuisance, and negligence (*see generally* CPLR 3211 [a] [7]), and that the documentary evidence submitted in support of the Rossis’ motion fails to “utterly refute[the Hudsons’] factual allegations” and thus does not “conclusively establish[ ] a defense as a matter of law” with respect to those causes of action (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Moreover, even assuming, arguendo, that the court converted that part of the Rossis’ motion to dismiss the RPAPL 871, trespass, private nuisance, and negligence causes of action into one seeking summary judgment (*see* CPLR 3211 [c]; *Board of Trustees of Vil. of Sackets Harbor v Sackets Harbor Leasing Co.*, 2 AD3d 1351, 1352 [4th Dept 2003]), we conclude that the Rossis failed to establish their entitlement to judgment as a matter of law with respect to those causes of action and thus that the court erred in granting the motion to that extent (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sackets Harbor Leasing Co.*, 2 AD3d at 1352).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

42
CA 22-00213
PRESENT: SMITH, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

LORI ANN MITERKO, AS EXECUTOR OF THE ESTATE OF
PAUL MITERKO, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

AUTUMN VIEW HEALTH CARE FACILITY, AUTUMN VIEW
HEALTH CARE FACILITY, LLC, DEFENDANTS,
AND LEROY MCCUNE, M.D., DEFENDANT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (ANGELO S. GAMBINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered January 19, 2022. The order denied the motions of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 24, 2023,

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

67

CA 21-01624

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

WELLS FARGO BANK, NATIONAL ASSOCIATION
AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN
TRUST 2007-CPI, ASSET-BACKED CERTIFICATES,
SERIES 2007-CPI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RODNEY C. NEWHOUSE, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

MCCABE, WEISBERG & CONWAY, LLC, MELVILLE (JAMIE C. KRAPF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered October 12, 2021. The order denied the motion of plaintiff for, inter alia, summary judgment and granted that part of the cross-motion of defendant Rodney C. Newhouse seeking summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross-motion in its entirety except insofar as it sought alternative relief, reinstating the complaint against defendant Rodney C. Newhouse, and granting the motion except insofar as it sought a default judgment against the non-appearing defendants, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Chautauqua County, for further proceedings in accordance with the following memorandum: In 2006, defendant Rodney C. Newhouse borrowed a sum of money from plaintiff’s predecessor in interest and executed a note secured by a mortgage on certain real property. In May 2010, plaintiff commenced a foreclosure action (first foreclosure action). In addition to Newhouse, plaintiff named, inter alia, defendant Hudson & Keyse LLC, assignee of Fifth Third Bank (Hudson), a subordinate judgment creditor against Newhouse, as a defendant in the first foreclosure action. On September 7, 2010, Hudson filed for chapter 7 bankruptcy. As a result, plaintiff sought to withdraw its order of reference in the first foreclosure action, asserting that the action was stayed. On May 2, 2012, the bankruptcy court granted plaintiff relief and terminated the automatic stay imposed by 11 USC § 362 with respect to plaintiff and the subject property. However, the first foreclosure action was dismissed by Supreme Court (Chimes, J.) in September 2013

based on plaintiff's failure to timely file the judgment of foreclosure. Plaintiff thereafter commenced this foreclosure action. Plaintiff moved for summary judgment on its complaint and for an order striking Newhouse's answer and dismissing the affirmative defenses therein, amending the caption to remove the "John Doe" defendants therefrom, appointing a referee to compute the amount due to plaintiff, and granting plaintiff a default judgment against the remaining, non-appearing defendants. Newhouse cross-moved for summary judgment dismissing the complaint against him as time-barred and cancelling the notice of pendency, and on his counterclaim for cancellation and discharge of the mortgage, or, in the alternative, an order referring the action "back to the Foreclosure Settlement Conference Part," as well as for attorneys' fees. Supreme Court (Keane, J.) denied plaintiff's motion, granted Newhouse's cross-motion insofar as it sought summary judgment dismissing the complaint against him as time-barred and cancellation of the notice of pendency, and insofar as it sought summary judgment on his counterclaim for cancellation and discharge of the mortgage, but denied the cross-motion insofar as it sought attorneys' fees. Plaintiff now appeals.

We agree with plaintiff that the court erred in granting Newhouse's cross-motion insofar as it sought summary judgment dismissing the complaint against him as time-barred. A mortgage foreclosure action is subject to a six-year statute of limitations (*see* CPLR 213 [4]). Once a debt has been accelerated by a demand, the statute of limitations begins to run on the entire debt (*see Bradley v New Penn Fin., LLC*, 198 AD3d 1273, 1274 [4th Dept 2021]; *Federal Natl. Mtge. Assn. v Tortora*, 188 AD3d 70, 74 [4th Dept 2020]). Consequently, the primary issue on appeal is whether the automatic stay triggered in the first foreclosure action due to Hudson's bankruptcy proceeding tolled the statute of limitations pursuant to CPLR 204 (a), thus rendering the instant foreclosure action timely commenced. We conclude that it did.

Pursuant to 11 USC § 362 (a) (1), a voluntary bankruptcy petition "operates as a stay, applicable to all entities, of . . . the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." The duration of a stay under that section "is not a part of the time within which the action must be commenced" (CPLR 204 [a]; *see Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 256 [2019], *rearg denied* 34 NY3d 1149 [2020]). The plain language of 11 USC § 362 (a) (1) encompasses actions in which the debtor is a named defendant, as Hudson was in the first foreclosure action. Thus, we conclude that the first foreclosure action "was 'against the debtor' and therefore covered by [s]ection 362 (a) (1)" (*In re Fogarty*, 39 F4th 62, 72 [2d Cir 2022]). "The application of the stay to actions against non-debtors is limited, however, to actions with an adverse impact on a debtor that occurs by operation of law" (*id.* at 75 [internal quotation marks omitted]). Here, as with the bankruptcy debtor in *Fogarty*,

Hudson had an interest in the subject property by virtue of its $6,937 judgment against Newhouse, and was named as a defendant in the first foreclosure action. Once Hudson filed for bankruptcy on September 7, 2010, the automatic stay applied to the first foreclosure action and the statute of limitations was tolled (*see* CPLR 204 [a]; 11 USC § 362 [a] [1]; *see generally Fogarty*, 39 F4th at 74). Plaintiff properly sought relief from the stay, which was granted on May 2, 2012. In light of the 603 days during which the statute of limitations was tolled, plaintiff had until January 2018 to commence the instant action. Thus, the instant action, commenced in July 2016, was timely commenced and Newhouse's cross-motion insofar as it sought summary judgment dismissing the complaint as time-barred should have been denied. We therefore modify the order accordingly. In addition, inasmuch as Newhouse's cross-motion for summary judgment was based solely on his contention that the complaint was time-barred, the court should likewise have denied the cross-motion insofar as it sought cancellation of the notice of pendency and summary judgment on his counterclaim seeking cancellation and discharge of the mortgage. We therefore further modify the order accordingly, and we remit the matter to Supreme Court for a determination of the alternative relief sought by Newhouse in the cross-motion (*see generally Pick v Midrox Ins. Co.*, 186 AD3d 1079, 1080 [4th Dept 2020]; *Windnagle v Tarnacki*, 184 AD3d 1178, 1180 [4th Dept 2020]; *Stiggins v Town of N. Dansville*, 155 AD3d 1617, 1619-1620 [4th Dept 2017]).

We further agree with plaintiff that the court erred in denying its motion insofar as it sought summary judgment on the complaint against Newhouse, and insofar as it sought an order striking Newhouse's answer, dismissing the affirmative defenses therein, and appointing a referee to compute the amount due to plaintiff. Generally, in a foreclosure action, a plaintiff establishes its prima facie entitlement to summary judgment on its complaint "by submitting the note and mortgage together with an affidavit of nonpayment" (*U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1483 [4th Dept 2018] [internal quotation marks omitted]). However, where, as here, a defendant asserts affirmative defenses alleging that the plaintiff lacked standing and failed to comply with conditions precedent to a foreclosure action, e.g., as here, the failure to comply with the notice requirements of RPAPL 1304 and 1306, the plaintiff must also establish standing and "proffer sufficient evidence to establish, prima facie, that it complied with the condition[s] precedent" (*U.S. Bank N.A. v Kochhar*, 176 AD3d 1010, 1012 [2d Dept 2019]; *see Bank of Am., N.A. v Bittle*, 168 AD3d 656, 657 [2d Dept 2019]; *Bank of N.Y. Mellon v Anderson*, 151 AD3d 1926, 1927 [4th Dept 2017]). Once the plaintiff meets its burden of establishing a prima facie case, the defendant must produce "evidentiary material in admissible form demonstrating a triable issue of fact with respect to some defense to plaintiff's recovery on the note[] and [mortgage]" (*Brandywine Pavers, LLC v Bombard*, 108 AD3d 1209, 1209-1210 [4th Dept 2013] [internal quotation marks omitted]). Here, plaintiff submitted copies of the note and mortgage, and an affidavit from an authorized signatory of plaintiff's loan servicer attesting to Newhouse's default (*see Balderston*, 163 AD3d at 1483). Plaintiff established that it had

standing to foreclose on the mortgage by submitting the May 24, 2010 assignment of the note and mortgage to plaintiff (*see Hummel v Cilici, LLC*, 203 AD3d 1591, 1593 [4th Dept 2022]). In addition, plaintiff established strict compliance with RPAPL 1304 by submitting a copy of the notice, the first class and certified mail envelopes used to mail notice to Newhouse, and an affidavit of service of the requisite notice (*see generally Wells Fargo Bank, N.A. v Cascarano*, 208 AD3d 729, 730 [2d Dept 2022]; *Aurora Loan Servs., LLC v Vrionedes*, 167 AD3d 829, 831-832 [2d Dept 2018]). Furthermore, plaintiff established strict compliance with RPAPL 1306 (*see TD Bank, N.A. v Leroy*, 121 AD3d 1256, 1259-1260 [3d Dept 2014]) by submitting two proof of filing statements from the New York State Department of Financial Services containing the requisite information (*see MTGLQ Invs., L.P. v Assim*, 209 AD3d 1006, 1008 [2d Dept 2022]). Newhouse failed to raise an issue of fact in opposition to plaintiff's motion (*see Balderston*, 163 AD3d at 1483). We therefore further modify the order accordingly (*see generally Citibank, N.A. v Jones*, 207 AD3d 516, 517 [2d Dept 2022]; *U.S. Bank N.A. v Williams Family Trust*, 202 AD3d 1024, 1025-1026 [2d Dept 2022]), and we further remit the matter to Supreme Court for the appointment of a referee to compute the amount due to plaintiff on the note. In addition, we conclude that the court should have granted the motion insofar as it sought to amend the caption to remove the "John Doe" defendants therefrom (*see Wells Fargo Bank, NA v Ambrosov*, 120 AD3d 1225, 1227 [2d Dept 2014]), and we therefore further modify the order accordingly.

The court, however, properly denied plaintiff's motion insofar as it sought a default judgment against the remaining, non-appearing defendants inasmuch as plaintiff did not move for the entry of a default order of reference within one year after the non-appearing defendants' default (*see* CPLR 3215 [c]; *U.S. Bank, N.A. v Reamer*, 187 AD3d 1650, 1651 [4th Dept 2020]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

81
CA 22-00387
PRESENT: WHALEN, P.J., SMITH, CURRAN, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF ARON LAW PLLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, RESPONDENT-RESPONDENT.

ARON LAW PLLC, BROOKLYN (JOSEPH H. ARON OF COUNSEL), FOR PETITIONER-APPELLANT.

LINDA S. KINGSLEY, CORPORATION COUNSEL, ROCHESTER (ANDREW J. CREARY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered March 2, 2022, in a proceeding pursuant to CPLR article 78. The judgment denied the petition in its entirety and dismissed the proceeding with prejudice.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the petition insofar as it seeks to compel respondent to comply with that part of petitioner's request pursuant to the Freedom of Information Law for records from February 12, 2016, through September 11, 2018, and insofar as it seeks an award of fees and costs pursuant to Public Officers Law § 89 (4) (c) with respect to that part of petitioner's request and as modified the judgment is affirmed without costs and the matter is remitted to respondent in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondent to produce additional records of disability and religious accommodation requests made by respondent's employees between February 12, 2016, and February 11, 2021, as requested by petitioner under the Freedom of Information Law ([FOIL] Public Officers Law art 6). Petitioner appeals from a judgment denying the petition in its entirety and dismissing the proceeding with prejudice.

Petitioner contends that Supreme Court erred in considering certain objections in point of law asserted by respondent in its answer to the petition. That contention is not preserved for our review inasmuch as petitioner did not raise it in its reply to the answer (*see* CPLR 5501 [a] [3]; *Matter of Broach & Stulberg, LLP v New York State Dept. of Labor*, 195 AD3d 1133, 1136 n 3 [3d Dept 2021], *lv denied* 37 NY3d 914 [2021]; *Matter of Bass Pro, Inc. v Megna*, 69 AD3d 1040, 1042 [3d Dept 2010]; *see also Matter of Khan v New York State*

Dept. of Health, 96 NY2d 879, 880 [2001]).

We nevertheless agree with petitioner that the court erred in denying the petition with respect to that part of the FOIL request seeking "all documents relating to: (1) requests made for a disability or religious accommodation by City of Rochester employees [and] (2) determinations for said requests" between February 12, 2016, and September 11, 2018. "A FOIL request . . . must 'reasonably describe[ ]' the record requested (Public Officers Law § 89 [3] [a]), to enable the agency to identify and produce the record" (*Matter of Irwin v Onondaga County Resource Recovery Agency*, 72 AD3d 314, 318 [4th Dept 2010]; *see Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249 [1986]). It is the agency's burden to "establish[ ] that the descriptions [are] insufficient for purposes of locating and identifying the documents sought" (*Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 83 [1984]; *see Matter of Jewish Press, Inc. v New York City Dept. of Educ.*, 183 AD3d 731, 732 [2d Dept 2020]).

Here, respondent has not met its burden of demonstrating that petitioner's description of the records sought was insufficient to permit respondent to locate and identify those records (*see Jewish Press, Inc.*, 183 AD3d at 732; *see generally Matter of Kirsch v Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 AD3d 1218, 1219 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *Irwin,* 72 AD3d at 318). Furthermore, we agree with petitioner that records consisting of the actual accommodation requests made by respondent's employees "fall well within the scope of [petitioner's FOIL] request" (*Matter of Johnson Newspaper Corp. v Stainkamp*, 61 NY2d 958, 961 [1984]).

We therefore modify the judgment by reinstating the petition to the extent that it seeks to compel respondent to comply with petitioner's request for records from February 12, 2016, through September 11, 2018, and we remit the matter to respondent to afford it an opportunity to reconsider that part of petitioner's request and to comply with its statutory obligations (*see Matter of Forsyth v City of Rochester* [appeal No. 1], 185 AD3d 1499, 1500 [4th Dept 2020]; *see also Matter of Rhino Assets, LLC v New York City Dept. for the Aging, SCRIE Programs*, 31 AD3d 292, 294 [1st Dept 2006]). To the extent that responding to that part of the request may be burdensome or may require review of voluminous records (*see* Public Officers Law § 89 [3]), we note that, subject to certain limitations, FOIL permits respondent to recover the actual cost to it of "an amount equal to the hourly salary attributed to the lowest paid . . . employee who has the necessary skill required to prepare a copy of" the requested records (§ 87 [1] [c] [i]) or the actual cost to respondent of retaining "an outside professional service" to prepare a copy of the records sought (§ 87 [1] [c] [iii]).

Given the phrasing of petitioner's FOIL request, however, we cannot conclude that respondent's production of spreadsheets—which respondent started keeping in September 2018 to manage accommodation requests—in response to that part of the FOIL request seeking records from September 12, 2018, through February 11, 2021, constituted a

denial of access to records that would trigger a mandatory award of attorney's fees and other litigation costs (*see* Public Officers Law § 89 [4] [c] [ii]). Nor do we conclude that a permissive grant of such fees and costs pursuant to Public Officers Law § 89 (4) (c) (i) is warranted based on respondent's response to that part of the FOIL request. Further, in light of our determination, any assessment of whether petitioner is entitled to such fees and costs with respect its request for records from February 12, 2016, through September 11, 2018, is premature (*see Forsyth*, 185 AD3d at 1500-1501). We therefore further modify the judgment by reinstating the petition insofar as it seeks an award of costs and fees pursuant to Public Officers Law § 89 (4) (c) with respect to petitioner's request for records from February 12, 2016, through September 11, 2018.

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

112
CA 22-00909
PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

DIANNE VITKUS, PLAINTIFF-RESPONDENT,

V ORDER

CREEKWALK HOUSING, LLC AND SUTTON REAL ESTATE
COMPANY, LLC, DEFENDANTS-APPELLANTS.

RUPP PFALZGRAF LLC, BUFFALO (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT CREEKWALK HOUSING, LLC.

LAW OFFICE OF JOHN WALLACE, BUFFALO (JOHN WALLACE OF COUNSEL), FOR DEFENDANT-APPELLANT SUTTON REAL ESTATE COMPANY, LLC.

LYNN LAW FIRM, LLP, SYRACUSE (WALTER F. BENSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered June 6, 2022. The order denied the motions of defendants for summary judgment dismissing the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on April 11, 2023, and filed in the Onondaga County Clerk's Office on April 12, 2023,

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

119
KA 21-00198
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN M. THORPE, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered March 13, 2020. The judgment convicted defendant, upon a jury verdict, of aggravated family offense, aggravated harassment in the second degree, burglary in the third degree, grand larceny in the fourth degree and grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice and on the law by reversing those parts convicting defendant of aggravated family offense and aggravated harassment in the second degree and dismissing counts one and two of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of aggravated family offense (Penal Law § 240.75), aggravated harassment in the second degree (§ 240.30 [4]), burglary in the third degree (§ 140.20), grand larceny in the fourth degree (§ 155.30 [8]), and grand larceny in the third degree (§ 155.35 [1]).

Defendant contends that County Court erred in denying defense counsel's request for an examination of defendant pursuant to CPL 730.30. A court must issue an order of examination "when it is of the opinion that the defendant may be an incapacitated person" (CPL 730.30 [1]). The determination whether to order a competency examination, either sua sponte or upon defense counsel's request, lies within the sound discretion of the court (*see People v Morgan*, 87 NY2d 878, 879-880 [1995]). Here, we conclude that the court did not abuse its discretion in denying the request (*see People v Watson*, 45 AD3d 1342, 1344 [4th Dept 2007], *lv denied* 10 NY3d 818 [2008]; *People v Flagg*, 17 AD3d 1085, 1085 [4th Dept 2005], *lv denied* 5 NY3d 852 [2005]). The court had ample opportunity to observe defendant prior to that

request, and the record supports its determination that defendant demonstrated an understanding of the proceedings and had the ability to assist in his own defense, and that his refusal to talk to defense counsel on two occasions was indicative of obstinance rather than incompetency (*see People v Estruch*, 164 AD3d 1632, 1633 [4th Dept 2018], *lv denied* 32 NY3d 1171 [2019]; *People v Yu-Jen Chang*, 92 AD3d 1132, 1135 [3d Dept 2012]; *see generally People v Tortorici*, 92 NY2d 757, 765 [1999], *cert denied* 528 US 834 [1999]; *People v Russell*, 74 NY2d 901, 902 [1989]). To the extent defendant contends that the court abused its discretion in failing, sua sponte, to order a competency examination at some point after defense counsel's request, we reject that contention (*see Estruch*, 164 AD3d at 1633).

Defendant next contends that the court erred in denying defense counsel's requests to be relieved of her assignment. That contention is not preserved for our review inasmuch as defendant did not join in defense counsel's requests (*see People v Nwajei*, 151 AD3d 1963, 1963 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]; *People v Youngblood*, 294 AD2d 954, 955 [4th Dept 2002], *lv denied* 98 NY2d 704 [2002]). In any event, we conclude that the court did not abuse its discretion in denying the requests inasmuch as the record failed to establish the requisite "good cause for substitution" (*People v Sides*, 75 NY2d 822, 824 [1990]). Contrary to defendant's assertion, the record does not establish that there was a complete breakdown in communication between defendant and defense counsel (*see People v Botting*, 8 AD3d 1064, 1065 [4th Dept 2004], *lv denied* 3 NY3d 671 [2004]; *cf. Sides*, 75 NY2d at 824-825).

Defendant contends that the court erred in permitting the People to introduce *Molineux* evidence related to certain prior incidents of domestic violence between him and the victim. We reject that contention. The evidence "provided necessary background information on the nature of the relationship and placed the charged conduct in context" (*People v Dorm*, 12 NY3d 16, 19 [2009]; *see People v Swift*, 195 AD3d 1496, 1499 [4th Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *see generally People v Frankline*, 27 NY3d 1113, 1115 [2016]), and was relevant to the issue of defendant's motive and intent (*see Frankline*, 27 NY3d at 1115-1116; *Dorm*, 12 NY3d at 19). We further conclude that the court did not abuse its discretion in determining that the probative value of the evidence outweighed its potential for prejudice to defendant (*see Dorm*, 12 NY3d at 19; *see generally People v Alvino*, 71 NY2d 233, 242 [1987]). The court minimized the potential prejudice to defendant by limiting the evidence to certain prior incidents, rather than the number of incidents concerning which the People sought to introduce evidence (*see People v Edmead*, 197 AD3d 937, 941 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1160 [2022]), and by repeatedly providing limiting instructions (*see People v Burney*, 204 AD3d 1473, 1477 [4th Dept 2022]; *Edmead*, 197 AD3d at 941).

Defendant's further contention that testimony regarding additional prior bad acts deprived him of a fair trial is, for the most part, unpreserved for our review (*see People v Malone*, 196 AD3d

1054, 1055 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]; *People v Finch*, 180 AD3d 1362, 1363 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020]; *see also People v Cirino*, 203 AD3d 1661, 1663 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]). To the extent defendant's contention is preserved for our review, we conclude that the court's prompt curative and limiting instructions to the jury alleviated any prejudice (*see People v Allen*, 78 AD3d 1521, 1521 [4th Dept 2010], *lv denied* 16 NY3d 827 [2011]).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of aggravated family offense and aggravated harassment in the second degree because he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Gibson*, 134 AD3d 1512, 1514 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we agree with defendant that the evidence of physical injury is legally insufficient to support the conviction with respect to those offenses. As relevant to the offenses charged here, a person commits aggravated harassment in the second degree (Penal Law § 240.30 [4]), which was also charged as the specified offense supporting the aggravated family offense count (§ 240.75 [1], [2]), when that person, "[w]ith the intent to harass, annoy, threaten or alarm another person, . . . strikes, shoves, kicks or otherwise subjects [the other] person to physical contact thereby causing physical injury to such [other] person" (§ 240.30 [4]). " 'Physical injury' means impairment of physical condition or substantial pain" (§ 10.00 [9]). Although " 'substantial pain' cannot be defined precisely, . . . it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). "Pain is, of course, a subjective matter," but the Court of Appeals has cautioned that "the Legislature did not intend a wholly subjective criterion to govern" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]; *see People v Bunton*, 206 AD3d 1724, 1725 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]). "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and [their] pain, whether the victim sought medical treatment, and the motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]; *see Chiddick*, 8 NY3d at 447-448).

Here, the victim testified that defendant bit her on the arm and that, at the time of the incident, the bite was "painful" and her pain level was an 8 out of 10. Although being bitten on the arm may be "an experience that would normally be expected to bring with it more than a little pain" (*Chiddick*, 8 NY3d at 447; *see People v Dowdell*, 214 AD3d 1363, 1365 [4th Dept 2023]), the evidence of the injury inflicted here, viewed objectively, established only that the victim sustained a bruise that hurt for just two or three days at a pain level of 6 out of 10, without any broken skin or bleeding (*see Dowdell*, 214 AD3d at 1365; *People v Lunetta*, 38 AD3d 1303, 1304-1305 [4th Dept 2007], *lv*

denied 8 NY3d 987 [2007]; *cf. Chiddick*, 8 NY3d at 446-448; *People v Montgomery*, 173 AD3d 627, 628 [1st Dept 2019], *lv denied* 34 NY3d 935 [2019]). The victim did not seek medical attention (*see People v Coleman*, 134 AD3d 1555, 1556 [4th Dept 2015], *lv denied* 27 NY3d 963 [2016]; *cf. People v Soto*, 170 AD2d 705, 705 [2d Dept 1991], *lv denied* 77 NY2d 967 [1991]), there was "no testimony that the [victim] took any pain medication for the injury" (*Bunton*, 206 AD3d at 1725; *cf. People v Hill*, 164 AD3d 1651, 1652 [4th Dept 2018], *lv denied* 32 NY3d 1126 [2018]; *People v Talbott*, 158 AD3d 1053, 1054 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]), and the victim did not testify that she missed any work or that she was unable to perform any activities because of the pain (*see Bunton*, 206 AD3d at 1725; *People v Bruce*, 162 AD2d 604, 606 [2d Dept 1990], *lv denied* 76 NY2d 853 [1990]). The evidence thus failed to establish that the victim suffered substantial pain (*see Dowdell*, 214 AD3d at 1365-1366). Further, "the record lacks evidentiary support for a conclusion that the physical condition of the victim was impaired because of the injuries sustained in the incident" (*People v Rankin*, 155 AD2d 977, 977-978 [4th Dept 1989], *lv denied* 75 NY2d 816 [1990]; *cf. People v Moore*, 47 AD3d 403, 404 [1st Dept 2008], *lv denied* 10 NY3d 867 [2008]; *People v Maturevitz*, 149 AD2d 908, 909 [4th Dept 1989]). Thus, viewing the evidence in the light most favorable to the People (*see People v Allen*, 36 NY3d 1033, 1034 [2021]), we conclude that it is legally insufficient to establish that the victim sustained physical injury (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We therefore modify the judgment by reversing those parts convicting defendant of aggravated family offense and aggravated harassment in the second degree and dismissing counts one and two of the indictment.

Defendant also failed to preserve for our review his challenges to the legal sufficiency of the evidence with respect to the remaining counts (*see Gray*, 86 NY2d at 19). Contrary to his further contention, viewing the evidence in light of the elements of burglary in the third degree, grand larceny in the fourth degree, and grand larceny in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those counts of the indictment is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that the grand larceny in the fourth degree count should be dismissed because it is an inclusory concurrent count of the grand larceny in the third degree count. We reject that contention. Grand larceny in the fourth degree under subdivision 8 of Penal Law § 155.30 is not a lesser included offense of grand larceny in the third degree under subdivision 1 of section 155.35 " 'because one may steal property, other than a motor vehicle, worth more than $3,000 without concomitantly committing the crime of grand larceny in the fourth degree under Penal Law § 155.30 (8)' " (*People v Williams*, 295 AD2d 968, 968 [4th Dept 2002], *lv denied* 98 NY2d 714 [2002]; *see People v McClusky*, 12 AD3d 1174, 1175 [4th Dept 2004], *lv denied* 4 NY3d 765 [2005]).

We reject defendant's contention that he was denied effective

assistance of counsel. Viewing the evidence, the law, and the circumstances in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's further contention, we conclude that the sentence is not unduly harsh or severe. Finally, we note that the uniform sentence and commitment form erroneously states that defendant was convicted of grand larceny in the fourth degree under Penal Law § 155.30 (4), and it must be amended to correctly reflect that defendant was convicted of that offense under Penal Law § 155.30 (8) (*see generally People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2022]).

All concur except OGDEN, J., who dissents in part and votes to reverse in accordance with the following memorandum: I respectfully disagree with the majority's conclusion that County Court did not abuse its discretion in denying defense counsel's request for an examination of defendant pursuant to CPL 730.30 under the circumstances herein. A court must issue an order of examination "when it is of the opinion that the defendant may be an incapacitated person" (CPL 730.30 [1]). Although the determination whether to order a CPL article 730 examination, either sua sponte or upon defense counsel's request, lies within the sound discretion of the court (*see People v Morgan*, 87 NY2d 878, 879-880 [1995]), the determination should be balanced with the defendant's fundamental right to due process inasmuch as defendants who lack the mental capacity to stand trial and to aid in their defense cannot be convicted without violating due process (*see Pate v Robinson*, 383 US 375, 378 [1966]).

In my view, defendant was convicted despite clear indications that a CPL article 730 examination into his mental capacity to stand trial was required. Therefore, although I agree with the majority's determination to reverse those parts of the judgment convicting defendant of aggravated family offense and aggravated harassment in the second degree and to dismiss counts one and two of the indictment, I dissent in part and would also reverse the remaining parts of the judgment and remit the matter to County Court for further proceedings before a different judge on the remaining counts of the indictment, including an examination pursuant to CPL article 730 to determine whether defendant is fit to proceed (*see People v Peterson*, 40 NY2d 1014, 1015 [1976]; *People v Armlin*, 37 NY2d 167, 173 [1975]; *People v Byron*, 175 AD2d 728, 729 [1st Dept 1991], *lv denied* 79 NY2d 854 [1992]).

A court is under no obligation to issue an order of examination pursuant to CPL 730.30 (1) unless it has "reasonable ground . . . to believe that the defendant was an incapacitated person" (*Armlin*, 37 NY2d at 168). "The key inquiry in determining whether . . . criminal defendant[s are] fit for trial is 'whether [they] ha[ve] sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding—and whether [they] ha[ve] a rational as well as factual understanding of the proceedings against [them]' "

(*People v Phillips*, 16 NY3d 510, 516 [2011], quoting *Dusky v United States*, 362 US 402, 402 [1960]; *see generally* CPL 730.10 [1]; *Morgan*, 87 NY2d at 880). In determining whether a trial court should invoke the procedures of CPL article 730 and direct an examination on defendant's competency, the focus is on what the trial court did in light of what it knew or should have known of the defendant at any time before final judgment (*see Armlin*, 37 NY2d at 171; *People v Harris*, 109 AD2d 351, 355 [2d Dept 1985], *lv denied* 66 NY2d 919 [1985]).

Based on those well-settled authorities and the record of this case, I conclude that the court abused its discretion in failing to order an examination of defendant upon the request of defense counsel or, later, sua sponte.

Approximately one month prior to trial, defendant's newly appointed counsel asked the court, via email, for an order of examination of her client pursuant to CPL article 730. At an appearance on November 25, 2019, defense counsel explained, in support of her request, that defendant "refused to speak one word" to her on two separate occasions during her jail visits to defendant. The court denied the request, explaining that defendant's behavior did not demonstrate incompetence but instead petulance and obstinance. Defense counsel further argued that she could not effectively represent defendant under those circumstances. The court ultimately responded by asserting that "the choice to communicate or not to communicate with you is his. I'm not going to relieve you. I understand that it may make your job more difficult, but we're on the eve of trial, so as I said . . . , you can either cooperate with your attorney or not, but it's not going to be a basis for delaying this trial." The jury trial commenced on December 9, 2019, less than one month later.

The record further establishes that defendant had filed a complaint against his prior defense counsel, prompting the court to reluctantly grant defendant's request for new counsel, made several bizarre allegations concerning the court and the court's relation to the case, told the court that he would rather go to prison for life than for two to four years, exhibited bizarre behavior as the case progressed and discharged his newly assigned defense counsel at the onset of the jury trial, prompting the court to permit defendant to proceed pro se with counsel serving as stand by counsel. Defendant also informed the court, at the onset of the trial and prior to opening statements, that he previously received mental health treatment and was currently prescribed Effexor, Remeron, Vistaril and Gabapentin for mental health treatment.

During the trial, defendant repeatedly changed his mind about defense counsel's role and representation. At one point defendant allowed defense counsel to resume representing him and at another point he did not want counsel's assistance. This prompted defense counsel to, again, ask the court to replace her based on the inability to communicate effectively with defendant. Defense counsel's request

was denied.

Although the court characterized defendant as "petulant and obstinate," and the majority also characterizes defendant's conduct as "obstinance," in my view, the behavior by defendant illustrates that he may have been an incapacitated person (*see Peterson*, 40 NY2d at 1015). Defendant's history of mental health issues, defense counsel's statements describing her experiences with defendant, and defendant's bizarre claims and preferences, when objectively considered, should have reasonably raised a doubt about defendant's competency, i.e., defendant's ability to rationally aid his attorney in his defense, thereby prompting the court to order a CPL article 730 examination.

"[A] criminal defendant may not be prosecuted unless competent to stand trial" (*People v Stone*, 22 NY3d 520, 524 [2014]). We have a robust process under article 730 of the Criminal Procedure Law, which "prescribes the procedures that trial courts of this State must adhere to in determining a defendant's legal competency for trial" (*Phillips*, 16 NY3d at 516). The court's refusal to make use of that process and instead summarily determine that defendant was "obstinate" without further review threatened the protections guaranteed under the Fourteenth Amendment of the United States Constitution as well as the New York State Constitution.

Entered: July 28, 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 22-00155

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

BRANDON P. ELLIS, AS GUARDIAN OF THE PERSON AND
PROPERTY OF CHELSEA L. ELLIS, AN INCAPACITATED
INDIVIDUAL, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT,
BRANDEN D. LOWE, DEFENDANTS-RESPONDENTS-APPELLANTS,
AND JYIRAH C. BAILEY, DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

KARLEY A.G. MUELLER,
PLAINTIFF-APPELLANT-RESPONDENT,

V

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT,
BRANDEN D. LOWE,
DEFENDANTS-RESPONDENTS-APPELLANTS,
ET AL., DEFENDANT.
(ACTION NO. 2.)

JYIRAH C. BAILEY, PLAINTIFF-APPELLANT-RESPONDENT,

V

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT AND
BRANDEN D. LOWE, DEFENDANTS-RESPONDENTS-APPELLANTS.
(ACTION NO. 3.)

JAMES BARCLAY, IV, PLAINTIFF-APPELLANT-RESPONDENT,

V

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT,
BRANDEN D. LOWE, DEFENDANTS-RESPONDENTS-APPELLANTS,
ET AL., DEFENDANT.
(ACTION NO. 4.)

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
AS SUBROGEE OF CHELSEA ELLIS, PLAINTIFF-RESPONDENT,

V

CITY OF BUFFALO, BRANDEN D. LOWE,

DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.
(ACTION NO. 5.)

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT IN ACTION NO. 1.

DOLCE PANEPINTO, P.C., BUFFALO (EDWARD L. SMITH, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT IN ACTION NO. 3.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (CHARLES S. DESMOND, II, OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT IN ACTION NO. 2.

STEINER & BLOTNIK, BUFFALO (M. KREAG FERULLO OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT IN ACTION NO. 4.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT, AND BRANDEN D. LOWE.

Appeals and cross-appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered January 7, 2022. The order, among other things, denied those parts of the motions of plaintiffs in action Nos. 1 and 3 and the cross-motions of plaintiffs in action Nos. 2 and 4 for summary judgment on the issue of the negligence of defendant Branden D. Lowe and determined that the reckless disregard standard applies, denied those parts of those motions and cross-motions of those plaintiffs for summary judgment dismissing the affirmative defenses of the reckless disregard exemption and the emergency doctrine as asserted by Lowe and defendants City of Buffalo and Buffalo Police Department, granted those parts of the cross-motions of those defendants to remove Buffalo Police Department as a named defendant in action Nos. 1 through 4, and denied those parts of the cross-motions of those defendants to dismiss the complaints against Lowe and the City of Buffalo.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motions of plaintiffs in action Nos. 1 and 3 and the cross-motions of plaintiffs in action Nos. 2 and 4 seeking partial summary judgment against defendants City of Buffalo and Branden D. Lowe on the issue of their liability based on Lowe’s operation of his vehicle with reckless disregard for the safety of others and partial summary judgment dismissing those defendants’ first and second affirmative defenses in action Nos. 1 through 4, and as modified the order is affirmed without costs.

Memorandum: In the early afternoon on a weekday in 2020, defendant Branden D. Lowe, a police officer with defendant Buffalo Police Department (BPD), responded to a call concerning an alleged domestic violence incident involving a knife. Alone in his marked

police vehicle, Lowe drove in a southbound direction in the northbound lanes of a four-lane street in a residential area, reaching speeds of up to 80 miles per hour (mph). At an intersection, Lowe's vehicle struck a vehicle owned and operated by Jyirah C. Bailey, plaintiff in action No. 3 and a defendant in the other actions. As a result of that collision, the police vehicle went off the road and struck two pedestrians on a sidewalk, Chelsea L. Ellis and plaintiff in action No. 2, Karley A.G. Mueller. Due to the extensive injuries that Chelsea L. Ellis sustained, Brandon P. Ellis (Ellis), plaintiff in action No. 1, was appointed to be the guardian of her person and property. James Barclay, IV, plaintiff in action No. 4, was a passenger in Bailey's vehicle.

Ellis, Mueller, Bailey, and Barclay (collectively, personal injury plaintiffs) commenced action Nos. 1 through 4, respectively, seeking to recover damages for the injuries sustained as a result of the accident. New York Central Mutual Fire Insurance Company, plaintiff in action No. 5, commenced that action as a subrogee of Chelsea Ellis. The five actions were consolidated. Following discovery, Ellis and Bailey filed motions, and Mueller and Barclay filed cross-motions, for partial summary judgment on, inter alia, the issue of the liability of City of Buffalo (City), BPD, and Lowe and dismissing those defendants' first and second affirmative defenses, which asserted immunity under Vehicle and Traffic Law § 1104 and the emergency doctrine. In all five actions, the City, BPD, and Lowe filed cross-motions for summary judgment dismissing the complaints against them.

In action Nos. 1 through 5, Supreme Court denied the cross-motions for summary judgment dismissing the complaints but dismissed the actions against BPD, leaving only the City and Lowe (collectively, City defendants) as municipal defendants. The court also determined that the reckless disregard standard of Vehicle and Traffic Law § 1104 (e) applied to Lowe's conduct, rejecting the personal injury plaintiffs' contentions that his conduct should be viewed under a negligence standard. The court denied the personal injury plaintiffs' motions and cross-motions insofar as they sought summary judgment with respect to the issue of the City defendants' liability on the basis that Lowe had operated his vehicle with reckless disregard for the safety of others (Vehicle and Traffic Law § 1104 [e]). The court also denied those motions and cross-motions insofar as they sought dismissal of the first and second affirmative defenses. The court did not address that part of Bailey's motion seeking summary judgment determining as a matter of law that she was not liable.

The personal injury plaintiffs appeal in action Nos. 1 through 4, respectively, and the City defendants and BPD cross-appeal in action Nos. 1 through 5. We now modify the order by granting those parts of the personal injury plaintiffs' motions and cross-motions seeking partial summary judgment against the City defendants on the issue of their liability based on Lowe's operation of his vehicle with reckless disregard for the safety of others and partial summary judgment dismissing the City defendants' first and second affirmative defenses.

Preliminarily, we note that the court's failure to rule on that part of Bailey's motion in action No. 3 seeking summary judgment determining as a matter of law that she was not liable "is deemed a denial thereof" (*Utility Servs. Contr., Inc. v Monroe County Water Auth.*, 90 AD3d 1661, 1662 [4th Dept 2011], *lv denied* 19 NY3d 803 [2012]; *see Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864 [4th Dept 1993]). Inasmuch as Bailey has not addressed that part of her motion on this appeal, we deem any challenge to the court's implicit denial of that part of her motion abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Contrary to the contention of the personal injury plaintiffs on their appeals, the court properly denied their motions and cross-motions to the extent that they sought a determination that the ordinary negligence standard applies to Lowe's conduct (*see generally Kabir v County of Monroe*, 16 NY3d 217, 220, 230-231 [2011]). The undisputed evidence established as a matter of law that Lowe was operating an authorized emergency vehicle at the time of the accident (*see* Vehicle and Traffic Law § 101) and that he was involved in an emergency operation as contemplated by Vehicle and Traffic Law § 114-b (*see Criscione v City of New York*, 97 NY2d 152, 158 [2001]; *Lacey v City of Syracuse*, 144 AD3d 1665, 1666 [4th Dept 2016], *lv denied* 32 NY3d 913 [2019]). Moreover, we conclude that the "injury-causing conduct" (*Kabir*, 16 NY3d at 224), i.e., exceeding the maximum speed limit and disregarding regulations concerning directions of movement, was privileged conduct (*see* § 1104 [a], [b] [3], [4]; *cf. McLoughlin v City of Syracuse*, 206 AD3d 1600, 1601-1602 [4th Dept 2022]; *Oddo v City of Buffalo*, 159 AD3d 1519, 1521-1522 [4th Dept 2018]). Thus, "the applicable standard of liability is reckless disregard for the safety of others rather than ordinary negligence" (*Lacey*, 144 AD3d at 1666; *see Kabir*, 16 NY3d at 220).

Although we reject the personal injury plaintiffs' contention on their appeals that Lowe's actions should be judged under a negligence standard, we agree with them that they established as a matter of law that Lowe acted with reckless disregard for the safety of others (*see* Vehicle and Traffic Law § 1104 [e]). We conclude that the personal injury plaintiffs are entitled to summary judgment on the issue of the City defendants' liability on that basis, regardless of any potential fault of Bailey (*see Rodriguez v City of New York*, 31 NY3d 312, 324 [2018]; *Pachan v Brown*, 204 AD3d 1435, 1436-1437 [4th Dept 2022]).

It is well settled that "Vehicle and Traffic Law § 1104 . . . permits the driver of an 'authorized emergency vehicle' . . . to proceed past red traffic lights and stops signs, exceed the speed limit and disregard regulations regarding the direction of traffic, *as long as certain safety precautions are observed*" (*Saarinen v Kerr*, 84 NY2d 494, 499 [1994] [emphasis added]). The law is intended to "accommodate[ ] the realities of the dangerous conditions encountered by officers in performing their municipal duties with necessary dispatch and dispensation from ordinary care" (*Campbell v City of Elmira*, 84 NY2d 505, 512 [1994]), but it is also intended to "protect[ ] innocent victims and the general public by expressly not

relieving emergency operators and their municipal employers of all reasonable care" (*id.* at 513). In other words, emergency personnel will be liable for "disproportionate, overreactive conduct" (*id.* at 512).

The Court of Appeals has explained that, in order "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 unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*Frezzell v City of New York*, 24 NY3d 213, 217 [2014] [internal quotation marks omitted]; *see Levere v City of Syracuse*, 173 AD3d 1702, 1704 [4th Dept 2019]). The analysis of whether the reckless disregard standard has been met "is a fact-specific inquiry and our analysis is focused on the *precautionary measures* taken by [the emergency responder] to avoid causing harm to the general public weighed against [the emergency responder's] duty to respond to an urgent emergency situation" (*Frezzell*, 24 NY3d at 217-218 [emphasis added]; *see McElhinney v Fitzpatrick*, 193 AD3d 1409, 1409-1410 [4th Dept 2021]).

The evidence submitted by the personal injury plaintiffs established that Lowe was responding to a call in an area outside of his geographic assignment and that he was aware that 8 to 10 other officers were responding to that call. Additional evidence, including video surveillance footage from various cameras and black box data from the police vehicle and Bailey's vehicle, established that Lowe was traveling southbound at speeds of up to 80 mph on a four-lane street in a residential area, where the speed limit is 30 mph. At one point, Lowe drove into the northbound lanes of travel, which are separated from the southbound lanes by a raised concrete median except at intersections, so that he was effectively speeding the wrong way on a one-way residential street during the afternoon on a weekday when his vehicle struck Bailey's vehicle. The video evidence and black box data also established that Lowe failed to slow before crossing any intersections, i.e., he failed to take "nonreckless safety and due care precautions for others" as required by Vehicle and Traffic Law § 1104 (*Campbell*, 84 NY2d at 511). Indeed, rather than slow down, Lowe continued to accelerate, even though he testified at his deposition that he knew of the risks associated with traveling at excessive speeds and failing to slow or stop for intersections. The data from the black box of his vehicle establishes that he did not begin braking until two seconds before impact, while he was traveling 78 mph, and was only able to slow down to 49 mph by the moment of impact with Bailey's vehicle. As a result, we conclude that the personal injury plaintiffs established that Lowe's conduct in braking prior to the collision was merely reactionary and not precautionary (*cf. Levere*, 173 AD3d at 1704; *Martinez v City of Rochester*, 164 AD3d 1655, 1656 [4th Dept 2018]; *Williams v Fassinger*, 119 AD3d 1368, 1369 [4th Dept 2014], *lv denied* 24 NY3d 912 [2014]).

The personal injury plaintiffs submitted numerous expert affidavits from former law enforcement officers and investigators opining that Lowe acted with reckless disregard in the manner that he

operated his vehicle, with two of those experts stating that his conduct “was one of the most egregious and reckless instances of police driving [that they had] ever seen or been asked to evaluate.” Under these circumstances, we conclude that Lowe’s response to a call to which 8 to 10 other officers were responding was so “disproportionate [and] overreactive” as to amount to reckless disregard for the safety of others as a matter of law (*Campbell*, 84 NY2d at 512; *cf. Frezzell*, 24 NY3d at 218). Moreover, Lowe’s deposition testimony supports our conclusion that he acted with conscious indifference to the results of his conduct. He testified at his deposition, which was submitted or incorporated by the personal injury plaintiffs in support of their motions and cross-motions, that he did not think he had done anything wrong, and that he would do it all over again. He testified: “there is nothing about this situation that I would ever change.” He further testified that he did not see the plaintiff pedestrians until immediately before he struck them, but that he would not have operated his vehicle differently even if he had seen the pedestrians earlier.

We thus conclude that the personal injury plaintiffs met their respective initial burdens of establishing as a matter of law that Lowe’s conduct prior to the collision was “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 that he acted “with conscious indifference to the outcome” (*Frezzell*, 24 NY3d at 217 [internal quotation marks omitted]; *see generally Ruiz v Cope*, 119 AD3d 1333, 1333-1334 [4th Dept 2014]). The City defendants did not submit any expert evidence, and failed to raise triable issues of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

For those reasons, we conclude that the court erred in denying those parts of the personal injury plaintiffs’ motions and cross-motions seeking partial summary judgment on liability, based on Lowe’s operation of his vehicle with reckless disregard for the safety of others, and dismissal of the City defendants’ first affirmative defense in their answers in action Nos. 1 through 4, asserting immunity under Vehicle and Traffic Law § 1104.

With respect to the City defendants’ second affirmative defense in their answers in action Nos. 1 through 4, concerning the application of the emergency doctrine, we conclude that the personal injury plaintiffs established as a matter of law that the emergency doctrine does not apply. The emergency doctrine “recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context” (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991], *rearg denied* 77 NY2d 990 [1991]; *see Miller v Silvarole Trucking Inc.*, 211 AD3d 1544, 1545 [4th Dept 2022]). However, “ ‘[t]he emergency doctrine is only applicable when a party is confronted by [a] sudden, unforeseeable occurrence not

of their own making' " (*Miller*, 211 AD3d at 1545), and it " 'has no application where[, as here,] the party seeking to invoke it has created or contributed to the emergency' " (*id.*). Although Lowe was *responding* to an emergency, the separate emergency involved in the motor vehicle accident was of his own making, i.e., driving the wrong way on a residential street at reckless speeds in the middle of the day. We therefore conclude that the court also erred in denying those parts of the personal injury plaintiffs' motions and cross-motions seeking partial summary judgment dismissing the City defendants' second affirmative defense.

For all of the same reasons, we reject the City defendants' contention on their cross-appeal that the court erred in denying their cross-motions for summary judgment dismissing the complaints.

Finally, we note that our ruling resolves only the issues of the City defendants' liability. A "jury must still determine whether [Bailey] was negligent and whether such negligence was a substantial factor in causing [any of the relevant] injuries. If so, the comparative fault of each party is then apportioned by the jury. Therefore, the jury is still tasked with considering [Bailey's] and [the City defendants'] culpability together" (*Rodriguez*, 31 NY3d at 324).

Entered: July 28, 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 22-01055

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

WALTER H. WHITLOCK, PERSONALLY AND AS ADMINISTRATOR OF THE ESTATE OF STEPHEN E. WHITLOCK, DECEASED, PETER C. WHITLOCK, DAVID R. WHITLOCK, MARTHA W. KOLIOS AND JONATHAN B. WHITLOCK, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN OF ROMULUS, BARRY A. SCHNOLL, BETH E. MOSKOW AND CAYUGA EXCAVATING, INC., DEFENDANTS-RESPONDENTS.

LACY KATZEN LLP, ROCHESTER (JAMES HAROLD KIEBURTZ OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THE CROSSMORE LAW OFFICE, ITHACA (EDWARD Y. CROSSMORE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BARRY A. SCHNOLL AND BETH E. MOSKOW.

LIPPMAN O'CONNOR, BUFFALO (MATTHEW J. DUGGAN OF COUNSEL), FOR DEFENDANT-RESPONDENT CAYUGA EXCAVATING, INC.

Appeal from an order of the Supreme Court, Seneca County (Jason L. Cook, A.J.), entered May 18, 2022. The order denied the motion of plaintiffs for summary judgment on liability and for injunctive relief.

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

Memorandum: Plaintiffs and defendants Barry A. Schnoll and Beth E. Moskow own adjoining parcels of lakefront property. Prior to 2016, surface water was discharged across those two properties, from the area above them and down to the lake, in two ways that are presently relevant. One path led surface water through a culvert that ran underneath a cottage on the Schnoll/Moskow property. Another led surface water through a pipe and into a ditch, which was situated near the property line and at least in part on plaintiffs' property.

Although the record is not perfectly clear, in 2016, it appears that defendant Town of Romulus, with some degree of assistance from defendant Cayuga Excavating, Inc. (Cayuga Excavating), capped the culvert running underneath the Schnoll/Moskow cottage and installed a new pipe designed to direct the water that previously ran under the cottage into the ditch near the property line. Cayuga Excavating had

initially been hired by Schnoll to perform work unrelated to the culvert under his cottage.

Plaintiffs commenced this action sounding in trespass seeking, inter alia, injunctive relief and damages for the increased water flow in the ditch, which they alleged had caused flooding on plaintiffs' property. Plaintiffs thereafter moved for summary judgment on liability and for injunctive relief. Supreme Court denied the motion, concluding that plaintiffs failed to meet their initial burden on the motion. Plaintiffs appeal, and we affirm.

As an initial matter, by agreeing to withdraw certain photographs attached to the attorney affirmation submitted with their motion papers and the references thereto in the affirmation itself, plaintiffs waived any contention that the court erred in failing to consider those submissions (*see generally Lahren v Boehmer Transp. Corp.*, 49 AD3d 1186, 1187 [4th Dept 2008]). Based on the content of the order on appeal, it appears that the court properly considered the remainder of the submissions in support of plaintiffs' motion and, in any event, we have considered the remainder of those submissions on this appeal.

We reject plaintiffs' contention, however, that the court erred in its determination that they failed to meet their initial burden on that part of the motion for summary judgment on liability. A party " 'seeking to recover [from an abutting property owner for the flow of surface water] must establish that . . . improvements on the [abutting property owner's] land caused the surface water to be diverted, that damages resulted[,] and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the [abutting owner's] property' " (*Hanley v State of New York*, 193 AD3d 1397, 1397 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]; *see Prachel v Town of Webster*, 96 AD3d 1365, 1366 [4th Dept 2012]; *DiMarzo v Fast Trak Structures*, 298 AD2d 909, 910 [4th Dept 2002]). We conclude that plaintiffs' own submissions raised triable issues of fact whether the installation of the new pipe caused the damages alleged, which defendants installed any portion of the pipe constituting the alleged trespass, and whether any defendant physically trespassed on plaintiffs' property by installing the pipe (*see generally Bono v Town of Humphrey*, 188 AD3d 1744, 1745 [4th Dept 2020]; *Krossber v Cherniss*, 125 AD3d 1274, 1275 [4th Dept 2015]). Because plaintiffs failed to meet their initial burden on the issue of liability, the court properly denied that part of the motion with respect to all defendants " 'regardless of the sufficiency of the opposing papers' " (*Paul v Cooper*, 45 AD3d 1485, 1486 [4th Dept 2007]; *see generally Steven Mueller Motors, Inc. v Hickey*, 134 AD3d 1467, 1468 [4th Dept 2015]). Plaintiffs also failed to establish "irreparable injury and an inadequate remedy at law," and we therefore reject plaintiffs' further contention that the court erred in denying the motion insofar as it sought injunctive relief

(*DiMarzo*, 298 AD2d at 910-911).

Entered: July 28, 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 22-00289

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

BARBARA HART, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND ERIE COUNTY, DEFENDANT-RESPONDENT.

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

JEREMY C. TOTH, COUNTY ATTORNEY, BUFFALO (ERIN E. MOLISANI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 20, 2022. The order, insofar as appealed from, granted the motion of defendant Erie County for summary judgment, dismissed the complaint and all cross-claims against that defendant, and denied plaintiff's motion for an extension of time to provide a counter statement of undisputed facts and for leave to amend her bill of particulars.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law and in the exercise of discretion without costs, defendant Erie County's motion is denied, the complaint and any cross-claims are reinstated against that defendant, and plaintiff's motion is granted in part in accordance with the following memorandum: Plaintiff was returning to work at a courthouse owned by defendant Erie County (County) and located within defendant City of Buffalo when, on a sidewalk adjacent to the courthouse along a public street, her right foot went into a hole of deteriorated concrete in the sidewalk next to a metal air intake grate for the courthouse, which caused her to fall onto the grate and allegedly sustain injuries. Plaintiff timely served a notice of claim against the County, among others, and thereafter commenced this negligence action against several defendants, including the County. In its answer, the County, among other things, asserted that it did not receive prior written notice of the alleged defective condition as required by Local Law No. 3-2004 of the County of Erie. Following an exchange of bills of particulars and discovery, the County moved, in pertinent part, for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it. Plaintiff opposed the motion and moved for an order pursuant to CPLR 2004 granting an extension of time to provide a counter statement of undisputed facts and, if necessary, an order pursuant to CPLR 3025 (b) granting leave to amend her bill of

particulars. Supreme Court, inter alia, granted the County's motion insofar as it sought summary judgment dismissing the complaint and all cross-claims against it and denied plaintiff's motion, and plaintiff now appeals from the order to that extent.

Plaintiff contends that the court erred in concluding that she was obligated to establish, as a condition precedent to suit, that the County received prior written notice of the defective sidewalk because, contrary to the court's determination and the County's assertion, pursuant to Highway Law § 139 (2) and the governing case law, Local Law No. 3-2004 must be deemed to incorporate a provision allowing an action to proceed, even in the absence of prior written notice, if the County had constructive notice of the defect. We agree.

Highway Law § 139 (2) provides, in relevant part, that notwithstanding the provisions in subdivision one of the statute imposing liability on a county for injuries caused by a defective condition existing because of the county's negligence in a road or highway for which the county is responsible, "a county may, by local law duly enacted, provide that no civil action shall be maintained against such county for damages or injuries to person or property sustained by reason of any highway . . . being defective . . . unless written notice of such defective . . . condition was actually given to the clerk of the governing body of such county or the county highway superintendent; and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, *or, in the absence of such notice, unless such defective . . . condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence*" (emphasis added). In the time since the legislature amended Highway Law § 139 to include subdivision two (*see* L 1982, ch 722, § 1; *see also* Senate-Assembly Mem in Support, Bill Jacket, L 1982, ch 722; Governor's Approval Mem, Bill Jacket, L 1982, ch 722), it has become "well established that a county's local law containing a notice requirement 'must be interpreted in conjunction with Highway Law § 139 (2) to permit an action against the [c]ounty based on constructive notice of a dangerous highway condition' " (*Horan v Town of Tonawanda*, 83 AD3d 1565, 1566 [4th Dept 2011]; *see Pasternak v County of Chenango*, 156 AD3d 1007, 1008 [3d Dept 2017]; *Rauschenbach v County of Nassau*, 128 AD3d 661, 662 [2d Dept 2015]; *Napolitano v Suffolk County Dept. of Pub. Works*, 65 AD3d 676, 677 [2d Dept 2009]; *DeHoust v Aakjar*, 290 AD2d 927, 927-928 [3d Dept 2002], *lv dismissed* 98 NY2d 692 [2002]; *Tanner W. v County of Onondaga*, 225 AD2d 1074, 1074 [4th Dept 1996]; *Carlino v City of Albany*, 118 AD2d 928, 929-930 [3d Dept 1986], *lv denied* 68 NY2d 606 [1986]; *see also* 1B NY PJI3d 2:225A at 683-684 [2023]). "The rationale underlying th[e] case[law] is that a county's local law cannot supersede a general state law" such as Highway Law § 139 (2) (*Horan*, 83 AD3d at 1566; *cf.* Municipal Home Rule Law § 10 [1] [ii] [d] [3]). Consequently, "where Highway Law § 139 is applicable[,] . . . [e]ven if a local law exists requiring prior written notice of a defect, a civil action may be commenced absent such notice against a [county] for injuries resulting from a defect in

a highway under its care if the defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence" (*Pasternak*, 156 AD3d at 1007-1008 [internal quotation marks omitted]).

Here, the County's prior written notice law provides, in pertinent part, that "[n]o civil action shall be maintained against the County . . . for damages, injuries or death to person or property sustained by reason of any street, highway, bridge, culvert, sidewalk, crosswalk, or highway marking, owned, operated or maintained by [the] County, being defective . . . unless written notice is given to the Erie County Commissioner of Public Works of such defective . . . condition[,] . . . and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect . . . complained of" (Local Law No. 3-2004 [3]). Although Local Law No. 3-2004 does not, by its terms, allow a plaintiff to maintain an action in the absence of written notice where the County had constructive notice of the defect, "[t]he local law . . . must be interpreted in conjunction with Highway Law § 139 (2) to permit an action against the County based on constructive notice of a dangerous highway condition" (*Tanner W.*, 225 AD2d at 1074).

Nonetheless, while Highway Law § 139 (2) "provides that, as a matter of law, constructive notice of a highway defect . . . is an exception to a[ ] . . . prior written notice requirement" (*Napolitano*, 65 AD3d at 677), the statute must still apply to the facts of the case in order for an injured party to effectively invoke that exception (*see generally Pasternak*, 156 AD3d at 1007-1008). In recognition thereof, plaintiff contends that the constructive notice provision of Highway Law § 139 (2) applies here because the term "highway" as used in the statute includes sidewalks. We again agree with plaintiff.

"It is well settled that, [w]hen presented with a question of statutory interpretation, [a court's] primary consideration is to ascertain and give effect to the intention of the [l]egislature" (*Matter of Estate of Youngjohn v Berry Plastics Corp.*, 36 NY3d 595, 603 [2021] [internal quotation marks omitted]; *see Samiento v World Yacht Inc.*, 10 NY3d 70, 77-78 [2008]; *Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]). " 'As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof' " (*Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 56 [2011], quoting *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]; *see CIT Bank N.A. v Schiffman*, 36 NY3d 550, 559 [2021]; *Estate of Youngjohn*, 36 NY3d at 603). Nonetheless, "[a]lthough the statutory language is generally the best indication of the legislature's intent, the legislative history of an enactment may also be relevant and is not to be ignored, even if words be clear" (*Altman v 285 W. Fourth LLC*, 31 NY3d 178, 185 [2018], *rearg denied* 31 NY3d 1136 [2018] [internal quotation marks omitted]; *see CIT Bank N.A.*, 36 NY3d at 559; *Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]; *Riley v County of Broome*, 95 NY2d 455, 463 [2000]). Thus, "inquiry should be made into the spirit and

purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history" (*Nostrom*, 15 NY3d at 507 [internal quotation marks omitted]; *see CIT Bank N.A.*, 36 NY3d at 559). In all events, "[c]ourts are guided in [their] analysis by the familiar principle that a statute . . . must be construed as a whole and that its various sections must be considered together and with reference to each other" (*Estate of Youngjohn*, 36 NY3d at 603 [internal quotation marks omitted]). "Courts should 'give [a] statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions' " (*id.* at 603-604).

Here, starting with the statutory text, Highway Law § 139 (1) imposes liability on a county for injuries arising from defective or dangerous conditions on, inter alia, any "highway" for which it has a duty to repair or maintain, and Highway Law § 139 (2) further provides in relevant part that, even in the absence of prior written notice of the defective or dangerous "highway" condition, an action may be maintained if the county had constructive notice of the condition. In terms of statutory definition, the Highway Law provides, with one further specific addition lacking any particular relevance here, that the word "highway" within the meaning of the statute "shall be deemed to include necessary sluices, drains, ditches, waterways, embankments, retaining walls and culverts having a [particular] width . . . , and also the approaches of any bridge or culvert beginning at the back of the abutments" (§ 2 [4]). The definitional provision, by employing the word "include" and then referring to water-related items, clearly does not limit the meaning of the term "highway" and instead simply ensures that abutting property related to water management would be included in the definition (*see generally American Surety Co. of N. Y. v Marotta*, 287 US 513, 517 [1933]). Moreover, "where the legislature includes particular language in one section of a statute but omits it in another section of the same [statute], it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion" (*Rivers v Birnbaum*, 102 AD3d 26, 36 [2d Dept 2012] [internal quotation marks omitted]; *see INS v Cardoza-Fonseca*, 480 US 421, 432 [1987]). The legislature did precisely that here inasmuch as, in a separate article of the Highway Law dealing with town highway improvement programs, the legislature specifically *excluded sidewalks* from a nearly identical definition of the term "highway" for purposes of that article (*see* § 219 [8]). The fact that the legislature did not similarly make the same exclusion with respect to the article of the Highway Law related to counties implicated here (*see* §§ 2, 110) indicates that the legislature did not intend to exclude sidewalks from the definition of the term "highway" for purposes of Highway Law § 139.

Additional principles of statutory interpretation and related case law demonstrate that the term "highway" affirmatively includes sidewalks for purposes of Highway Law § 139. As plaintiff correctly points out, the legislature is "presumed to be aware of the decisional and statute law in existence at the time of an enactment" (*Arbegast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 169

[1985]). At the time the legislature enacted Highway Law § 139 (2), decisional law was clear that " '[a] highway is not limited to that portion traveled by vehicles, but also includes a sidewalk' " (*Donnelly v Village of Perry*, 88 AD2d 764, 765 [4th Dept 1982], quoting *Williams v State of New York*, 34 AD2d 101, 104 [3d Dept 1970]). Subsequent case law has confirmed that understanding of the term "highway." For example, where a local prior written notice ordinance listed a "highway" as covered by the ordinance but omitted the word "sidewalk," we rejected the argument that the ordinance excluded sidewalks by reasoning, in part, that "[t]he courts consistently have held, in this and analogous contexts, that the terms 'highway' and 'street' include sidewalks" (*Scarsone v Village of Celoron*, 236 AD2d 870, 870 [4th Dept 1997]; *see also Ernest v Red Cr. Cent. School Dist.*, 251 AD2d 992, 993 [4th Dept 1998], *mod on other grounds* 93 NY2d 664 [1999], *rearg denied* 93 NY2d 1042 [1999]).

Based on the foregoing, we conclude that the constructive notice provision of Highway Law § 139 (2) necessarily extends to sidewalk defects. We decline to follow the contrary interpretation advanced by the Second Department because, in our view, that interpretation is not persuasive (*cf. Zash v County of Nassau*, 171 AD2d 743, 744 [2d Dept 1991]). The Second Department reasoned that the omission of the word "sidewalk" from Highway Law § 139 (2) meant that the legislature did not intend to extend a county's liability for injuries resulting from defective sidewalks by allowing for constructive notice thereof. However, as previously discussed, that view of the statute is unwarranted because, at the time the legislature enacted Highway Law § 139 (2), it was established in decisional law—of which the legislature was presumed to be aware—that the generic term "highway" included sidewalks. Thus, there was no need for the legislature to alter the retained language of Highway Law § 139 in order to cover sidewalks. Moreover, the Second Department's view that the legislature intended to make a distinction between the law applicable to counties and that applicable to cities, towns, and villages (*see Zash*, 171 AD2d at 744) is belied by the legislative history establishing that the legislature intended to give the *same* powers and responsibilities to counties that were then provided to cities, towns, and villages (*see* Senate-Assembly Mem in Support, Bill Jacket, L 1982, ch 722). Lastly on this point, we note that if the term "highway" does not include sidewalks for purposes of the statute, then local county laws like Local Law No. 3-2004 that expressly require prior written notice of defective sidewalk conditions would arguably be inconsistent with the general law embodied in Highway Law § 139 (2), which, by its terms, authorizes counties to enact prior written notice requirements only with respect to defects in a "road, highway, bridge, or culvert" (*see generally* NY Const, art IX, § 2 [c]; *Holt v County of Tioga*, 56 NY2d 414, 418 [1982]). Stated conversely, if the term "highway" is broad enough to include sidewalks for purposes of authorizing counties to limit their liability through prior written notice laws, the term must apply equally to the legislature's imposition of liability for defects of which counties have constructive notice.

The County nonetheless contends that, notwithstanding the case

law establishing that the term "highway" encompasses sidewalks, Highway Law § 139 is not implicated at all in this case because there is no evidentiary showing in the record that the County is responsible for maintenance of the street abutting the sidewalk upon which plaintiff was allegedly injured. That alternative ground for affirmance, however, is not properly before us inasmuch as the County raises it for the first time on appeal (*see Canandaigua Natl. Bank & Trust Co. v Acquest S. Park, LLC*, 178 AD3d 1374, 1375-1376 [4th Dept 2019]; *Breau v Burdick*, 166 AD3d 1545, 1549 [4th Dept 2018]; *Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182 [4th Dept 2017]; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]).

Given that Highway Law § 139 (2) applies to sidewalks, and that the Charter of the City of Buffalo (Charter) § 413-50 (A) charges an owner of premises abutting a public street with the duty to maintain and repair the sidewalk (*see Capretto v City of Buffalo*, 124 AD3d 1304, 1309 [4th Dept 2015]), we conclude that the County, in order to establish its entitlement to summary judgment, was required to show that it had no constructive notice of the alleged sidewalk defect at issue here (*see Pasternak*, 156 AD3d at 1008). The County failed to meet that burden. Instead, the County contended—and the court subsequently agreed—that its submissions established that it had not received prior written notice and that any constructive notice of the sidewalk defect was simply irrelevant as a matter of law. Thus, "while the [County] established [its] entitlement to summary judgment on the issue of prior written notice by submitting evidence that [it] had no prior written notice of the [sidewalk] defect that allegedly caused the accident, [it] failed to submit any admissible evidence [to establish that it lacked] constructive notice of the alleged defect" (*Napolitano*, 65 AD3d at 677-678). To the contrary, the County's own submissions suggest that the alleged sidewalk defect "existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence" (Highway Law § 139 [2]) inasmuch as its expert architect opined that the deterioration of the sidewalk occurred over time from public use. In any event, even if the burden shifted to plaintiff, her submissions would be adequate to raise an issue of fact based on the testimony of the County's employees regarding the extent and duration of the sidewalk deterioration and the affidavit of plaintiff's expert architect, who opined that the concrete deteriorated over a period of time due to various physical factors and that the defect was present for a sufficient length of time for the County to have been aware of and remedy it (*see Rauschenbach*, 128 AD3d at 662).

In a final attempt to avoid reversal on that issue, the County asserts that plaintiff was required, and failed, to allege a "violation" of Highway Law § 139 in her bill of particulars, and thus she could not properly raise that statute in opposition to the County's motion. We agree with plaintiff, however, that she was not required to include Highway Law § 139 in her bill of particulars. As demonstrated above, it is well established that a county's local law containing a prior written notice requirement must be interpreted in conjunction with Highway Law § 139 (2) to permit an action against the

county based on constructive notice, and therefore a constructive notice provision is deemed, *as a matter of law*, to be part of the County's Local Law No. 3-2004 (*see e.g. Horan*, 83 AD3d at 1566; *Napolitano*, 65 AD3d at 677). Here, plaintiff appropriately alleged in her bill of particulars that the County was negligent in allowing the dangerous condition to exist when, in the exercise of reasonable care, it could and should have had knowledge of the condition. Plaintiff further alleged that, although she did not believe that notice was a prerequisite to liability, the alleged sidewalk defect existed for a sufficient length of time to give the County constructive notice thereof. We thus conclude that, by specifically alleging that the County's liability was premised on its constructive notice of the sidewalk defect, plaintiff's response to the County's demand "satisfied the purpose of the bill of particulars, i.e., to amplify the pleadings, limit proof, and prevent surprise at trial" (*Stidham v Clerk*, 57 AD3d 1369, 1370 [4th Dept 2008] [internal quotation marks omitted]).

Plaintiff further contends that, independent of the exception for constructive notice, the lack of prior written notice does not entitle the County to summary judgment because there is a question of fact whether the special use exception applies. Once again, we agree with plaintiff.

" 'Prior written notice of a defective or unsafe condition of a road or [sidewalk] is a condition precedent to an action against a municipality that has enacted a prior notification law' " (*Horst v City of Syracuse*, 191 AD3d 1297, 1297 [4th Dept 2021]; *see Gorman v Town of Huntington*, 12 NY3d 275, 279 [2009]; *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Katz v City of New York*, 87 NY2d 241, 243 [1995]). "Such laws reflect a legislative judgment to modify the duty of care owed by a locality in order to address 'the vexing problem of municipal street and sidewalk liability' " (*Amabile*, 93 NY2d at 473, quoting *Barry v Niagara Frontier Tr. Sys.*, 35 NY2d 629, 633 [1974]). Consequently, "[u]nless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within a reasonable time after receipt of written notice, a municipality is excused from liability absent proof of prior written notice or an exception thereto" (*Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]; *see Barry*, 35 NY2d at 632-633).

"With respect to the parties' respective burdens on a municipal defendant's motion for summary judgment asserting the absence of the subject condition precedent, the Court of Appeals has made clear that '[w]here the [municipality] establishes that it lacked prior written notice under [a prior notification law], the burden shifts to the plaintiff to demonstrate [the existence of a triable issue of fact as to the requisite written notice or] 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' " (*Horst*, 191 AD3d at 1297-1298, quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Groninger v Village of Mamaroneck*, 17 NY3d 125, 129 [2011]). Stated differently, "[i]f the municipality establishes

its prima facie entitlement to summary judgment based on the lack of prior written notice, the burden shifts to the plaintiff to come forward with evidentiary proof in admissible form demonstrating the existence of material issues of fact which require a trial of the action" (*Horst*, 191 AD3d at 1298-1299 [internal quotation marks omitted]). "Such material issues of fact could relate to receipt of the requisite written notice itself or to the applicability of either of the judicially recognized exceptions to the statutory protection afforded to the municipality by the prior notification law" (*id.*; *see Groninger*, 17 NY3d at 129; *Yarborough*, 10 NY3d at 728; *Amabile*, 93 NY2d at 474-476).

The threshold issue here is whether, as the court held, plaintiff is precluded from raising the special use exception in opposition to the County's motion for summary judgment premised on lack of prior written notice because plaintiff did not plead that "theory of liability" in her notice of claim, complaint, or bill of particulars. Although we have case law standing for the proposition that a plaintiff cannot raise the exceptions to a prior written notice requirement in opposition to a defendant's motion for summary judgment where, as here, neither ostensible "theory of liability" is included in the plaintiff's pleadings (*see Scovazzo v Town of Tonawanda*, 83 AD3d 1600, 1601 [4th Dept 2011]; *Keeler v City of Syracuse*, 143 AD2d 518, 518-519 [4th Dept 1988]), we now conclude that those cases were wrongly decided and should no longer be followed to that extent.

The abovementioned cases were premised on the incorrect assumption that invocation of the exceptions to a prior written notice requirement in opposition to a motion for summary judgment constitutes the assertion of new theories of liability, which cannot defeat an otherwise proper motion for summary judgment (*see generally Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]; *Walker v Caruana*, 175 AD3d 1807, 1807-1808 [4th Dept 2019]). Such an assumption is not valid because, irrespective of a prior written notice requirement, the underlying theory of liability remains unchanged, i.e., the municipality's alleged breach of its duty to maintain the subject premises in a reasonably safe condition (*see Kiernan v Thompson*, 73 NY2d 840, 842 [1988]). While a prior written notice requirement is "an essential element of [a] plaintiff['s] cause of action" against a municipality that has enacted such a law (*Scarsone*, 236 AD2d at 870; *see* 1B NY PJI3d 2:225A at 684 [2023]) inasmuch as no "duty will arise with respect to a defective sidewalk or street condition" absent "prior written notice of the defect or condition" (*Barry*, 35 NY2d at 633), the exceptions to the prior written notice requirement "obviate the necessity of pleading and proving" that element (*Gorman v Ravesi*, 256 AD2d 1134, 1135 [4th Dept 1998]; *see Groninger*, 17 NY3d at 127-128; *Kiernan*, 73 NY2d at 842) because, in such circumstances, a municipality's duty with respect to the subject premises arises from its affirmative creation of a defect through an act of negligence or its special use of the premises that confers a special benefit upon the municipality (*see Poirier*, 85 NY2d at 315; *Kiernan*, 73 NY2d at 842). The exceptions are thus not new theories of liability inasmuch as the cause of action remains based on

the municipality's alleged breach of its duty to maintain the subject premises in a reasonably safe condition. Consequently, we conclude that where, as here, a municipal defendant's motion for summary judgment is premised on the absence of prior written notice, a plaintiff is entitled to defeat the motion by raising one or both of the judicially recognized exceptions to the prior written notice requirement, regardless of whether either of those exceptions is contained in the pleadings.

Next, the court determined here that, if plaintiff was permitted to raise the special use exception, the County's motion would be denied because there is evidence that the County made special use of the sidewalk. Although the County was not aggrieved by the order and thus could not have cross-appealed (*see Cleary v Walden Galleria LLC*, 145 AD3d 1524, 1526 [4th Dept 2016]; *Matter of Tehan [Tehan's Catalog Showrooms, Inc.]* [appeal No. 2], 144 AD3d 1530, 1531 [4th Dept 2016]), the County could properly have raised as an alternative ground for affirmance that the special use exception does not apply (*see Cleary*, 145 AD3d at 1526; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]). The County does not appear to have done so, and thus there is no challenge before us on appeal regarding the court's determination that the County's motion should be denied based on plaintiff's invocation of the special use exception (*see generally Huen N.Y., Inc. v Board of Educ. Clinton Cent. Sch. Dist.*, 67 AD3d 1337, 1337-1338 [4th Dept 2009]).

Even assuming, arguendo, that the County's brief can be read as challenging the applicability of the special use exception, we conclude that such a challenge lacks merit. "The special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use, and is therefore required to maintain a portion of that property" (*Poirier*, 85 NY2d at 315). "A special use is typically characterized by the installation of some object in the sidewalk or street or some variance in the construction thereof" (*Zarnoch v Williams*, 83 AD3d 1373, 1374 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011] [internal quotation marks omitted]). Here, plaintiff raised an issue of fact in that regard inasmuch as the submissions tend to establish that the County's installation of the metal grate in the subject sidewalk was unrelated to pedestrian use of the sidewalk and instead provided the County a special benefit in the form of air intake for its courthouse (*see e.g. Ferguson v Mantell*, 216 AD2d 160, 161 [1st Dept 1995]; *Karr v City of New York*, 161 AD2d 449, 450 [1st Dept 1990]).

To the extent that the court granted the County's motion based on its determination that it was compelled to deem admitted the assertions set forth in the County's statement of material facts because plaintiff failed to promptly submit a counter statement of undisputed facts pursuant to the Uniform Rules for the New York State Trial Courts (*see* 22 NYCRR 202.8-g [b], [former (c)]), that was error (*see On the Water Prods., LLC v Glynos*, 211 AD3d 1480, 1481 [4th Dept 2022]; *see also Montgomery v Burlington Coat Factory of Texas, Inc.*, — AD3d —, —, 2023 NY Slip Op 03127, *1 [4th Dept 2023]). "Although

the court had discretion under section 202.8-g (former [c]) to deem the assertions in [the County's] statement of material facts admitted, it was not required to do so" (*On the Water Prods., LLC*, 211 AD3d at 1481). "[B]lind adherence to the procedure set forth in 22 NYCRR 202.8-g was not mandated" (*id.* [internal quotation marks omitted]). Here, considering that plaintiff's attorney represented that the initial failure to respond to the County's statement of material facts was an inadvertent oversight and provided a proposed counter statement of undisputed facts we conclude that, although it would have been better practice for plaintiff to promptly submit a paragraph-by-paragraph response to the County's statement, the court abused its discretion in deeming the County's entire statement admitted (*see id.* at 1481-1482). In any event, even in the absence of an abuse of discretion, we substitute our discretion to deem plaintiff's mistake corrected by her late filing (*see* CPLR 2001; *Smith v MDA Consulting Engrs., PLLC*, 210 AD3d 1448, 1448-1449 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023]). As plaintiff asserts, "the affidavit of [her] attorney [in opposition to the motion] was the functional equivalent of a statement of material facts, there was no prejudice to [the County], and [plaintiff attempted to] rectifi[y her] omission in a timely manner" (*Smith*, 210 AD3d at 1449).

Finally, assuming, arguendo, that plaintiff's motion is not superfluous, we conclude that the court abused its discretion in denying that part of plaintiff's motion seeking leave to amend her bill of particulars to allege that the County made special use of the subject sidewalk and was liable under Highway Law § 139 and Charter § 413-50 (A). "Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Uhteg v Kendra*, 200 AD3d 1695, 1699 [4th Dept 2021] [internal quotation marks omitted]; *see* CPLR 3025 [b]; *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]). Here, plaintiff's proposed amendment is not patently lacking in merit, and the record is devoid of any prejudice flowing from the proposed amendment inasmuch as the County was undoubtably aware of its particularized installation and use of the metal grate in the sidewalk and its responsibility for maintenance of the sidewalk and, even in the absence of reference to Highway Law § 139, plaintiff has already adequately pleaded that the County was subject to liability based on its constructive notice of the sidewalk defect (*see Uhteg*, 200 AD3d at 1699).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

197
KA 10-01373
PRESENT: SMITH, J.P., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN J. LANE, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DONALD M. THOMPSON 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 (John J. Connell, J.), rendered July 10, 2009. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury 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]). The conviction arose from the shooting death of the victim—i.e., the brother of a man who defendant maintained had murdered two of defendant's friends—during a confrontation outside a store. We affirm.

Defendant contends that he received ineffective assistance of counsel because defense counsel answered in the negative when County Court asked whether she wanted the court to charge itself on the affirmative defense of extreme emotional disturbance (EED), and defense counsel failed to request a charge on justification. We reject that contention.

Initially, we note that neither EED nor justification is a defense to criminal possession of a weapon in the second degree (*see People v Pons*, 68 NY2d 264, 267 [1986]; *People v Pilato*, 145 AD3d 1593, 1593 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017]), and thus defense counsel was not ineffective for failing to request that the court charge itself on those defenses with respect to that count (*see generally People v Caban*, 5 NY3d 143, 152 [2005]).

Although the affirmative defense of EED is available with respect

to the count of murder in the second degree (*see* Penal Law § 125.25 [1] [a] [i]), that defense would have required that defendant establish that he "suffered from a mental infirmity not rising to the level of insanity at the time of the homicide, typically manifested by a loss of self-control" (*People v Roche*, 98 NY2d 70, 75 [2002]; see *People v Schumaker*, 136 AD3d 1369, 1372 [4th Dept 2016], *lv denied* 27 NY3d 1075 [2016], *reconsideration denied* 28 NY3d 974 [2016]). Here, we conclude that "proof of the objective element [of the defense] is lacking . . . , inasmuch as defendant's behavior immediately before and after the killing was inconsistent with the loss of control associated with the affirmative defense" (*People v Mohamud*, 115 AD3d 1227, 1228 [4th Dept 2014], *lv denied* 23 NY3d 965 [2014] [internal quotation marks omitted]; *see Schumaker*, 136 AD3d at 1372). Defense counsel was therefore not ineffective by failing to request that the court charge itself on the EED defense with respect to the second-degree murder count inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*Caban*, 5 NY3d at 152; *see Schumaker*, 136 AD3d at 1372). Similarly, contrary to defendant's assertion, he was not denied effective assistance of counsel based on defense counsel's failure to request a justification charge because there was no reasonable view of the evidence that would have permitted the court to find that defendant's use of deadly physical force was justified (*see* Penal Law § 35.15 [2] [a]; *People v Johnson*, 136 AD3d 1338, 1339 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]). Moreover, we conclude that defendant has failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's failure to request an EED defense or justification charge (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Lasher*, 163 AD3d 1424, 1425 [4th Dept 2018], *lv denied* 32 NY3d 1005 [2018]; *Johnson*, 136 AD3d at 1339).

Next, inasmuch as defendant " 'failed to object at the time of sentencing, the claim that the court considered improper factors in imposing the sentence is unpreserved for [our] review' " (*People v Colome-Rodriguez*, 120 AD3d 1525, 1525-1526 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]; *see* CPL 470.05 [2]), and we decline to exercise our power to review that claim as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Colome-Rodriguez*, 120 AD3d at 1526).

Defendant also contends that he was denied effective assistance of counsel at sentencing. We reject that contention. Contrary to defendant's assertion, the record establishes that, although a new attorney had only recently taken over the case, he " 'was sufficiently familiar with the case and defendant's background to provide meaningful representation at sentencing' and appropriately advocated for defendant at sentencing" (*People v Seymore*, 188 AD3d 1767, 1770 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *see People v Saladeen*, 12 AD3d 1179, 1180 [4th Dept 2004], *lv denied* 4 NY3d 767 [2005]). We have reviewed defendant's further assertion regarding the new attorney's other alleged shortcoming, and we conclude that " 'the evidence, the law, and the circumstances of [this] particular case,

viewed in totality and as of the time of the representation, reveal that the [new] attorney provided meaningful representation' " with respect to sentencing (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Peters*, 213 AD3d 1359, 1359 [4th Dept 2023], *lv denied* 39 NY3d 1143 [2023]).

Finally, defendant contends that the sentence should be reduced based on his post-conviction conduct while incarcerated, and he has attached various unsworn letters, memoranda, and reports to his brief in support thereof. We conclude, however, that "[b]ecause the documents in the appendix to defendant's brief are dehors the record and do not come within an exception to the general rule, they may not be considered on appeal" (*People v Wilson*, 227 AD2d 994, 994 [4th Dept 1996]), and we note that there is no indication that defendant sought to properly include the documents as part of the record on appeal (*cf.* 22 NYCRR 1250.7 [d] [3]; *People v Chen*, 176 AD2d 628, 628 [1st Dept 1991]). Based on the record before us, we conclude that the sentence is not unduly harsh or severe.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

223
KA 19-01653
PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMON MADDOX, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered July 9, 2019. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a bench trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that Penal Law § 265.03 is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). Inasmuch as defendant failed to raise a constitutional challenge during the proceedings in Supreme Court, any such challenge is not preserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]). Contrary to defendant's contention, his "challenge to the constitutionality of a statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]).

Contrary to defendant's further contention, the grand jury proceedings were not rendered defective by the testimony of two police officers who identified defendant as the individual depicted in certain video footage. "A lay witness may give an opinion concerning the identity of a person depicted in a surveillance [video] if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury" (*People v Mosley*, 200 AD3d 1658, 1659 [4th Dept 2021] [internal

quotation marks omitted]; *see People v Castro*, 207 AD3d 1027, 1029 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]). Here, we conclude that both officers testified to sufficient recent encounters with defendant to provide "some basis for concluding that the [officers were] more likely to identify defendant than was the [grand] jury" (*Mosley*, 200 AD3d at 1659).

Defendant also contends that the court erred in admitting in evidence certain audio recordings because the testifying officer lacked sufficient familiarity with defendant's voice to identify the voice on the recordings as belonging to defendant. We reject that contention. The record establishes that the officer had personal experience with defendant and had interviewed him as part of the investigation of this case (*see People v Johnson*, 184 AD3d 1102, 1103-1104 [4th Dept 2020], *lv denied* 36 NY3d 929 [2020]).

Contrary to defendant's final contention, the warrant to search defendant's cell phone was issued upon probable cause. Probable cause to support a search warrant "merely [requires] information sufficient to support a reasonable belief that . . . evidence of a crime may be found in a certain place" (*People v Conley*, 192 AD3d 1616, 1617 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021] [internal quotation marks omitted]). Here, among other things, the affidavit in support of the warrant application stated that surveillance footage showed defendant standing among a group of people and using his cell phone just before a physical altercation broke out. The affidavit further stated that the surveillance footage also showed defendant firing a handgun down a crowded street shortly after the altercation. According "great deference to the issuing Judge" (*People v Harper*, 236 AD2d 822, 823 [4th Dept 1997], *lv denied* 89 NY2d 1094 [1997]), we conclude that the court properly determined that there was sufficient information in the warrant application to support a reasonable belief that evidence of a crime might be found on defendant's cell phone (*see Conley*, 192 AD3d at 1618).

Entered: July 28, 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 22-01218

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

GRETCHEN GRECO, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SYRACUSE ASC, LLC, DOING BUSINESS AS SPECIALTY
SURGERY CENTER OF CENTRAL NEW YORK,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, WHITE PLAINS (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANT-APPELLANT.

FINKELSTEIN, BLANKENSHIP, FREI-PEARSON & GARBER, LLP, WHITE PLAINS (DOUGLAS G. BLANKENSHIP OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 28, 2022. The order, insofar as appealed from, denied the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this putative class action seeking to recover damages allegedly arising when an unknown third party gained unauthorized access to certain personal information belonging to plaintiff and others, which was stored on defendant's computer system. Defendant moved to dismiss the complaint on the ground that, inter alia, plaintiff lacked standing to bring the action because she had not alleged an injury-in-fact. In appeal No. 1, defendant appeals, as limited by its brief, from that part of an order denying its motion to dismiss the complaint. In appeal No. 2, defendant appeals from a subsequent order denying its motion to stay all proceedings pending this Court's resolution of appeal No. 1.

In appeal No. 1, we agree with defendant that Supreme Court erred in denying its motion to dismiss the complaint. In order to possess standing, plaintiff was required, inter alia, to have suffered "an injury-in-fact" (*Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6 [2014]; *see Matter of Sheive v Holley Volunteer Fire Co., Inc.*, 170 AD3d 1589,

1590 [4th Dept 2019]). The injury-in-fact requirement necessitates a showing that the party has "an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]; *see Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 [2019]) and that the party has suffered a cognizable harm that is not " 'tenuous,' 'ephemeral,' or 'conjectural,' " but is, instead, "sufficiently concrete and particularized to warrant judicial intervention" (*Daniels*, 33 NY3d at 50; *see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211, 214 [2004]; *Matter of Festa v Town of Oyster Bay*, 210 AD3d 678, 679-680 [2d Dept 2022]). An alleged injury will not confer standing if it is based on speculation about what might occur in the future or what future harm might be incurred (*see Frankel v J.P. Morgan Chase & Co.*, 193 AD3d 689, 690 [2d Dept 2021]; *Matter of Niagara County v Power Auth. of State of N.Y.*, 82 AD3d 1597, 1599 [4th Dept 2011], *lv dismissed in part & denied in part* 17 NY3d 838 [2011]; *Matter of Brewster v Wright*, 45 AD3d 1369, 1370 [4th Dept 2007]).

The parties correctly note that this is the first time the Appellate Division has been asked to address the issue of standing in this context, i.e., in a case brought by an individual whose information was involved in a larger electronic data breach or whose personal data was otherwise involved in the unauthorized access of electronic files stored on a computer system. Although the rise of unauthorized access to secure electronic systems, resulting in third parties obtaining the information stored thereon, is a relatively modern issue, the injury-in-fact requirement recognized in other contexts applies equally here. Thus, the novel issue presented is simply what circumstances, specific to this context, create an injury that is "sufficiently concrete" and non-speculative to constitute an injury-in-fact (*Daniels*, 33 NY3d at 50).

Analyzing similar issues, New York trial courts have looked to certain considerations, such as the type of personal information that was compromised; whether hackers or cybercriminals were involved and whether the attack was targeted; whether personal information was exfiltrated, published, or otherwise disseminated; whether the data has actually been misused; and the length of time that has elapsed since the data breach without misuse of the personal information at issue (*see Keach v BST & Co. CPAs, LLP*, 71 Misc 3d 1204[A], 2021 NY Slip Op 50273[U], *4 [Sup Ct, Albany County 2021]; *see also Smahaj v Retrieval-Masters Creditors Bur., Inc.*, 69 Misc 3d 597, 602-604 [Sup Ct, Westchester County 2020]; *Lynch v Johnson*, 2018 NY Slip Op 32962 [U], *3-4 [Sup Ct, NY County 2018]; *Manning v Pioneer Sav. Bank*, 56 Misc 3d 790, 796-797 [Sup Ct, Rensselaer County 2016]). Addressing the issue under the distinct Federal standing analysis (*see Society of Plastics*, 77 NY2d at 772), the Second Circuit has looked to conceptually similar considerations, such as whether the data was accessed via a targeted attack or an inadvertent disclosure, whether some of the data accessed has actually been misused even if plaintiff's data has not yet been specifically misused, and whether the type of data at issue has exposed plaintiff to a greater risk (*see McMorris v Carlos Lopez & Assocs., LLC*, 995 F3d 295, 301-302 [2d Cir

2021]). Given the numerous circumstances under which such data breaches may occur, many of those considerations may not apply in all cases and additional considerations may become relevant. Nevertheless, the core of the analysis remains the same: whether plaintiff has suffered a "sufficiently concrete" and non-speculative injury to satisfy the injury-in-fact requirement (*Daniels*, 33 NY3d at 50).

Here, having considered all relevant circumstances as alleged in the complaint, we conclude that plaintiff has not alleged an injury-in-fact and thus lacks standing. Perhaps most importantly, plaintiff has not alleged that any of the information purportedly accessed by the unknown third party has actually been misused. Plaintiff has not alleged that her own information has been misused or that the data of any similarly situated person has been misused in the over one-year period between the alleged data breach and the issuance of the trial court's decision. Further, the complaint itself alleges that a third party accessed health information only. It does not allege that a third party accessed data more readily used for financial crimes such as dates of birth, credit card numbers, or social security numbers. Indeed, other than a general concern that certain of plaintiff's health information may have been illegally accessed by a third party, plaintiff does not allege any direct harm flowing from the breach of defendant's electronic system. We conclude that plaintiff failed to allege an injury-in-fact inasmuch as the potential for future misuse of her data and possible economic harm is too "conjectural, tenuous [and] hypothesized" to constitute an interest that is sufficiently concrete to confer standing (*Niagara County*, 82 AD3d at 1599; *see Daniels*, 33 NY3d at 50). To the extent that plaintiff also contends that she established an injury-in-fact by virtue of the cost of identity protection and other mitigation efforts, we conclude that such mitigation efforts cannot confer standing absent a sufficiently concrete injury-in-fact legitimizing or warranting such efforts. A plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending" (*Matter of Practicefirst Data Breach Litig.*, 2022 WL 354544 at *4 [WDNY 2022]). Reviewing the complaint, we conclude that plaintiff has not otherwise alleged an injury-in-fact that would confer standing to bring this action.

In light of our determination, we do not address defendant's remaining contentions in appeal No. 1.

The appeal from the order in appeal No. 2 is dismissed because it has been rendered moot by our determination in appeal No. 1 (*see Fasano v J.C. Penney Corp.*, 59 AD3d 1103, 1103 [4th Dept 2009]; *Mercer v Pal Energy Corp.*, 280 AD2d 896, 897 [4th Dept 2001]).

Entered: July 28, 2023 Ann Dillon Flynn
Clerk of the Court

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

229

CA 22-01688

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

GRETCHEN GRECO, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SYRACUSE ASC, LLC, DOING BUSINESS AS SPECIALTY
SURGERY CENTER OF CENTRAL NEW YORK,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, WHITE PLAINS (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANT-APPELLANT.

FINKELSTEIN, BLANKENSHIP, FREI-PEARSON & GARBER, LLP, WHITE PLAINS (DOUGLAS G. BLANKENSHIP OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 22, 2022. The order denied the motion of defendant for a stay of all proceedings pending appeal.

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

Same memorandum as in *Greco v Syracuse ASC, LLC* ([appeal No. 1] — AD3d — [July 28, 2023] [4th Dept 2023]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

231

CA 22-00300

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

DAVID BARKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY V. GERVERA, AMANDA D. GERVERA AND
FARM CREDIT EAST, ACA, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (MATTHEW W. O'NEIL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ANTHONY V. GERVERA AND AMANDA D. GERVERA.

HANCOCK & ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT FARM CREDIT EAST, ACA.

Appeal from an order of the Supreme Court, Oswego County (James P. McClusky, J.), entered February 17, 2022. The order, insofar as appealed from, granted the motion of defendant Farm Credit East, ACA to dismiss the action against it and granted in part the motion of defendants Anthony V. Gervera and Amanda D. Gervera to dismiss the action against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Farm Credit East, ACA, is denied, the action against that defendant is reinstated, and the motion of defendants Anthony V. Gervera and Amanda D. Gervera is denied in its entirety.

Memorandum: Plaintiff sold his 300-acre farm, which is situated in Oswego and Jefferson Counties, to his daughter and son-in-law, defendants Amanda D. Gervera and Anthony V. Gervera (collectively, Gervera defendants). Defendant Farm Credit East, ACA (Farm Credit) holds a mortgage on that real property. Plaintiff believed he would be given a life estate as part of the transfer but later learned that no life estate had been created. He also learned that the Gervera defendants had sold tractors, hay, and a modular home that belonged to plaintiff and were situated on that property. Plaintiff commenced identical actions in Oswego and Jefferson Counties by service of summonses with notice, seeking, inter alia, to determine his interest in the real property and to recover for the loss of the personal property. In each action, Farm Credit moved to dismiss the action

against it pursuant to CPLR 3012 (b) based on plaintiff's failure to comply with its demands for service of the complaints. The Gervera defendants similarly moved to dismiss the actions against them on that ground.

In opposition to the motions, plaintiff submitted the affirmation of his attorney, who attributed the delay in part to law office failure. With respect to each action, plaintiff also submitted, inter alia, a proposed verified complaint asserting causes of action for "mutual mistake or unilateral mistake with fraud," undue influence, "unjust enrichment/constructive trust," and conversion. As relief, the complaints sought reformation of the deed or rescission of the real estate transaction and monetary damages. In addition, plaintiff submitted an affidavit alleging that he was once the owner of the subject property, which had been in his family for generations. In 2018, due to medical issues and the deterioration of his marriage, plaintiff began to have financial problems. The Gervera defendants offered to purchase the farm for $250,000 to help plaintiff pay off his mortgage and other debts. According to plaintiff, the farm was valued at more than $750,000, and the Gervera defendants led him to believe that he would be given a life estate on the property after the transfer. Although plaintiff continued living on the property following the closing, he later learned that neither the contract nor the deed granted him a life estate. Plaintiff further asserted that the Gervera defendants made plans to sell parts of the farm over plaintiff's objection and sold tractors, hay, and a modular home that belonged to him and were not included in the purchase contract.

Each Supreme Court determined that, although plaintiff established a reasonable excuse for failing to timely serve the complaint, he "failed to establish a meritorious claim of mutual mistake or unilateral mistake with fraud, undue influence, unjust enrichment, or constructive trust." Each court further determined, however, that plaintiff's proposed conversion cause of action had potential merit inasmuch as neither the contract nor the deed transferred to the Gervera defendants any of plaintiff's personal property, such as his tractors, hay, and modular home.

In appeal No. 1, plaintiff appeals from the order in the Oswego County action insofar as it granted Farm Credit's motion in its entirety and dismissed that action against it and granted the Gervera defendants' motion in part and dismissed the action against them except to the extent of allowing plaintiff to serve a complaint alleging a cause of action for conversion against them. In appeal No. 2, plaintiff appeals from a substantially similar order in the Jefferson County action insofar as it granted Farm Credit's motion in its entirety and dismissed that action against it and granted the Gervera defendants' motion in part and dismissed the action against them except to the extent of allowing plaintiff to serve a complaint alleging a cause of action for conversion against them. In each appeal, we reverse the order insofar as appealed from to this Court.

Where, as here, a plaintiff serves a summons without a complaint, the defendant may serve a written demand for a complaint within the

time provided for a notice of appearance (*see* CPLR 3012 [b]). The court upon motion may dismiss the action if the plaintiff fails to serve a timely complaint following the demand (*see id.*). Upon "application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default" (CPLR 3012 [d]). Here, plaintiff failed to serve a complaint in response to defendants' demands, prompting defendants to move to dismiss the action under CPLR 3012 (b). Although plaintiff opposed the motions, he did not move for an extension of time to serve the complaints under CPLR 3012 (d).

"To avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and *a* meritorious cause of action" (*Berges v Pfizer, Inc.*, 108 AD3d 1118, 1119 [4th Dept 2013] [internal quotation marks omitted and emphasis added]; *see Bittinger v Erie Ins. Co.*, 169 AD3d 1359, 1360 [4th Dept 2019]). "A meritorious cause of action may be established by way of 'an affidavit of merit containing evidentiary facts sufficient to establish a prima facie case' " (*Berges*, 108 AD3d at 1119, quoting *Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905 [1985]; *see Roberts v Northington*, 128 AD3d 1487, 1488 [4th Dept 2015]) "or with a verified complaint" (*McIntosh v Genesee Val. Laser Ctr.*, 121 AD3d 1560, 1561 [4th Dept 2014], *lv denied* 25 NY3d 911 [2015]; *see Roberts*, 128 AD3d at 1488; *see generally* CPLR 105 [u]). The documents "must be of a type which would *defeat* a motion for summary judgment on the ground that there is no issue of fact" (*Tonello v Carborundum Co.*, 91 AD2d 1169, 1170 [4th Dept 1983], *affd* 59 NY2d 720 [1983], *rearg denied* 60 NY2d 587 [1983] [emphasis added]; *see Berges*, 108 AD3d at 1119). That is to say, the plaintiff must submit evidence in admissible form from someone with personal knowledge of the relevant facts (*see Tonello*, 91 AD2d at 1170; *Roberts*, 128 AD3d at 1488).

Here, plaintiff submitted both an affidavit of merit and a proposed verified complaint in opposition to each motion. Based on the evidence submitted, each court determined that plaintiff demonstrated merit to his proposed cause of action for conversion, and defendants do not take issue with the courts' rulings in that regard. Inasmuch as plaintiff demonstrated the merit of a proposed cause of action, we conclude that defendants' motions should have been denied in their entirety. Plaintiff was not required to demonstrate merit to all of his proposed causes of action.

We reject defendants' contention, raised as an alternative ground for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545 [1983]), that plaintiff failed to establish a reasonable excuse for failing to timely comply with defendants' demands for service of the complaints. "It is generally within the sound discretion of the court to determine what constitutes a reasonable excuse for the delay in serving the complaint . . . , and the court has the discretion to excuse delay based on law office

failure" (*Kordasiewicz v BCC Prods., Inc.*, 26 AD3d 853, 854 [4th Dept 2006]; *see Mitchell v Erie County Med. Ctr. Corp.*, 70 AD3d 1408, 1408-1409 [4th Dept 2010], *lv dismissed* 14 NY3d 881 [2010]). The affirmation of plaintiff's attorney, submitted in opposition to the motions, established that the default was of short duration, was partially attributable to law office failure, and was not willful. Considering our "preference for resolving disputes on the merits" (*Cary v Cimino*, 128 AD3d 1460, 1461 [4th Dept 2015]; *see Davidson v Straight Line Contrs., Inc.*, 75 AD3d 1143, 1144 [4th Dept 2010]), we cannot conclude that the courts' determinations in this regard constitute an abuse of discretion (*see Mitchell*, 70 AD3d at 1409; *see also Case v Cayuga County*, 60 AD3d 1426, 1427 [4th Dept 2009], *lv dismissed* 13 NY3d 770 [2009]).

Entered: July 28, 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 22-00301

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

DAVID BARKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY V. GERVERA, AMANDA D. GERVERA AND
FARM CREDIT EAST, ACA, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (MATTHEW W. O'NEIL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ANTHONY V. GERVERA AND AMANDA D. GERVERA.

HANCOCK & ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT FARM CREDIT EAST, ACA.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered February 17, 2022. The order, insofar as appealed from, granted the motion of defendant Farm Credit East, ACA to dismiss the action against it and granted in part the motion of defendants Anthony V. Gervera and Amanda D. Gervera to dismiss the action against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Farm Credit East, ACA, is denied, the action against that defendant is reinstated, and the motion of defendants Anthony V. Gervera and Amanda D. Gervera is denied in its entirety.

Same memorandum as in *Barker v Gervera* ([appeal No. 1] — AD3d — [July 28, 2023] [4th Dept 2023]).

Entered: July 28, 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 22-00102
PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

CARMETRIS HARPER AND HORACE HARPER,
PLAINTIFFS-APPELLANTS,

V — MEMORANDUM AND ORDER

SALEH N. AL-SHABY, ALI MOHAMMED SALEH AND
ADEN ENTERPRISES, INC., DOING BUSINESS AS
GREEN FARM MARKET, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA, LLP, BUFFALO (KATHLEEN J. MARTIN OF COUNSEL), FOR DEFENDANT-RESPONDENT SALEH N. AL-SHABY.

MURA LAW GROUP, BUFFALO (SCOTT D. MANCUSO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ALI MOHAMMED SALEH AND ADEN ENTERPRISES, INC., DOING BUSINESS AS GREEN FARM MARKET.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered January 5, 2022. The order denied the motion of plaintiffs to, inter alia, set aside a jury verdict.

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

Same memorandum as in *Harper v Al-Shaby* ([appeal No. 2] — AD3d — [July 28, 2023] [4th Dept 2023].

Entered: July 28, 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 22-00104

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

CARMETRIS HARPER AND HORACE HARPER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SALEH N. AL-SHABY, ALI MOHAMMED SALEH AND
ADEN ENTERPRISES, INC., DOING BUSINESS AS
GREEN FARM MARKET, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA, LLP, BUFFALO (KATHLEEN J. MARTIN OF COUNSEL), FOR
DEFENDANT-RESPONDENT SALEH N. AL-SHABY.

MURA LAW GROUP, BUFFALO (SCOTT D. MANCUSO OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS ALI MOHAMMED SALEH AND ADEN ENTERPRISES, INC.,
DOING BUSINESS AS GREEN FARM MARKET.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered January 11, 2022. The order and judgment dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the posttrial motion is granted, the verdict is set aside, the complaint is reinstated, and a new trial is granted.

Memorandum: Plaintiffs, Carmetris Harper and Horace Harper, commenced this negligence action seeking to recover damages for personal injuries Carmetris Harper allegedly sustained when she tripped after catching her foot between a metal strip and a patch of missing concrete on the exterior steps at the entrance of a store operated by defendants Ali Mohammed Saleh and Aden Enterprises, Inc., doing business as Green Farm Market, on property owned by defendant Saleh N. Al-Shaby. In appeal No. 1, plaintiffs appeal from an order that, inter alia, denied their posttrial motion seeking, among other things, to set aside the verdict and grant a new trial. In appeal No. 2, plaintiffs appeal from an order and judgment that, inter alia, dismissed the complaint upon a jury verdict in favor of defendants. Initially, we note that the appeal from the order and judgment in appeal No. 2 brings up for review the propriety of the order in appeal No. 1, and thus the appeal from the order in appeal No. 1 must be

dismissed (*see Almuganahi v Gonzalez*, 174 AD3d 1492, 1492-1493 [4th Dept 2019]).

In appeal No. 2, plaintiffs contend that Supreme Court erred in denying their posttrial motion insofar as it sought a new trial based on the preclusion of the testimony of their expert. We agree. In preparation for trial, plaintiffs hired an expert to evaluate the condition of the entryway where the accident occurred. Defendants moved, inter alia, to preclude the testimony of that expert on the ground that he inspected the accident site without plaintiffs having provided notice pursuant to CPLR 3120 (1) (ii). In opposition to the motion, plaintiffs asserted that the expert merely drove by the area where the steps were located after repairs had been made and that no inspection took place. The court granted those parts of defendants' motions seeking preclusion and sanctioned plaintiffs by precluding all testimony from that expert.

CPLR 3120 is a notice requirement applicable to a party seeking discovery within another party's control, not a disclosure requirement placed on the party seeking the discovery. Thus, assuming, arguendo, that a failure by a party seeking discovery to provide an opposing party with a CPLR 3120 (1) (ii) notice could serve as the basis for a sanction, we conclude that plaintiffs were not required to give defendants notice pursuant to CPLR 3120 (1) (ii) because the steps were observable by the expert in a public space (*see Rinker v 55 Motor Ave. Co., LLC*, 173 AD3d 1388, 1389 [3d Dept 2019]; *Dorsa v National Amusements*, 6 AD3d 654, 654 [2d Dept 2004]). Moreover, the record reflects that the expert did not perform an inspection or engage in other activities within the scope of CPLR 3120 (1) (ii). We conclude that the court erred in granting those parts of defendants' motions seeking to preclude plaintiffs' expert from testifying and thus erred in denying plaintiffs' posttrial motion insofar as it sought a new trial based on the preclusion of that expert (*see generally Tronolone v Praxair, Inc.*, 39 AD3d 1146, 1147 [4th Dept 2007]).

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

Entered: July 28, 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 19-00445

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RACIEL DEARMAS, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN 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 February 5, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). 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 Shanks*, 37 NY3d 244, 253 [2021]; *People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Although we are thus not precluded from reviewing defendant's contention that the court erred in refusing to suppress video-recorded statements that he made to the police after he purportedly invoked his right to counsel (*see People v Barski*, 66 AD3d 1381, 1382 [4th Dept 2009], *lv denied* 13 NY3d 905 [2009]), we nonetheless reject that contention. " '[V]iewed in context of the totality of circumstances' " (*People v Twillie*, 28 AD3d 1236, 1237 [4th Dept

2006], *lv denied* 7 NY3d 795 [2006]), including defendant’s demeanor, manner of expression, and the particular words he used (*see People v Glover*, 87 NY2d 838, 839 [1995]), we conclude that defendant’s remarks did not constitute an unequivocal invocation of his right to counsel. Defendant’s “comment that he was going to speak with a lawyer was not an assertion of a desire not to respond to questions without counsel and at most manifested a desire to consult with an attorney” about certain issues related to the availability of a plea agreement (*People v Carrier*, 270 AD2d 800, 801 [4th Dept 2000], *lv denied* 95 NY2d 864 [2000] [internal quotation marks omitted]; *see People v Ibarrondo*, 208 AD3d 1647, 1648 [4th Dept 2022], *lv denied* 39 NY3d 1111 [2023]; *see generally People v Fridman*, 71 NY2d 845, 846 [1988]).

Entered: July 28, 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 22-01500

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

DAVID L. MILLER AND JAMIE A. MILLER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

W SERVICES GROUP, LLC, DEFENDANT.

SAFETY NATIONAL CASUALTY CORP., APPELLANT.

LOIS LAW FIRM, LLC, NEW YORK CITY (ADDISON O'DONNELL OF COUNSEL), FOR APPELLANT.

AARON ZIMMERMAN, SYRACUSE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered September 7, 2022. The order, among other things, granted plaintiffs' motion insofar as it sought an order enforcing the terms of the purported settlement agreement between plaintiff David L. Miller and Safety National Casualty Corp.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion insofar as it seeks an order enforcing the terms of the purported settlement agreement between plaintiff David L. Miller and Safety National Casualty Corp. is denied and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by David L. Miller (plaintiff) when he slipped and fell on a bathroom floor in a shopping mall. The complaint alleges that defendant, which provided janitorial services at the mall, was responsible for creating the allegedly dangerous condition in the bathroom. At the time of the accident, plaintiff was employed by nonparty Apple, Inc. (Apple) at a store in the mall, and his injuries prevented him from returning to work for an extended period of time. He therefore received workers' compensation benefits from Apple's insurance carrier, nonparty Safety National Casualty Corp. (Safety National).

In January 2022, while still receiving workers' compensation benefits, plaintiffs agreed to settle this action against defendant for $1,350,000. Before executing a release, however, plaintiffs sought to obtain consent to the settlement from Safety National, which had a net lien of approximately $146,000 for lost wages and medical benefits paid to plaintiff (*see* Workers' Compensation Law § 29 [5]).

Plaintiffs' attorney proposed a "walk away" agreement, also referred to as a "zero dollar" settlement pursuant to Workers' Compensation Law § 32, whereby Safety National would waive its lien in return for plaintiff waiving his right to receive future workers' compensation benefits. In a February 2022 email, Safety National's attorney agreed to the proposal and stated that he would draft the settlement papers and consent letter.

Several weeks later, before the settlement agreement was executed or the consent letter was issued, Safety National learned that plaintiff had returned to work, prompting its attorney to advise plaintiffs' counsel via email that "the terms and figures/amounts of the agreement will have to be re-drafted." Believing that they had a binding agreement with the carrier, plaintiffs refused to renegotiate the terms and instead filed a motion by order to show cause in Supreme Court, seeking an order enforcing the terms of the purported settlement agreement between plaintiff and Safety National. In the alternative, plaintiffs sought an order authorizing the settlement of this negligence action without Safety National's consent. The court agreed with plaintiffs that they had a binding agreement with Safety National, and the resulting order granted plaintiffs' motion insofar as it sought an order enforcing the terms of the purported settlement agreement between plaintiff and Safety National and directed Safety National to "provide a revised consent letter, containing a waiver of the Workers' Compensation Law § 29 lien in the amount of $146,673.73, in the appropriate form, to [plaintiff]." Safety National, on behalf of Apple, now appeals.

Pursuant to Workers' Compensation Law § 29 (1), Safety National has a statutory "lien on the proceeds of any recovery" that plaintiff received from the tortfeasor. If plaintiff wished to settle this personal injury action and continue receiving workers' compensation benefits, he was required to obtain the consent of Safety National to the settlement "or a compromise order from the court in which [this] action [was] pending" (*Matter of Johnson v Buffalo & Erie County Private Indus. Council*, 84 NY2d 13, 19 [1994]; *see Matter of Degennaro v H. Sand & Co., Inc.*, 198 AD3d 1045, 1046 [3d Dept 2021]). Plaintiff's failure to obtain either Safety National's consent to the settlement of this action or a compromise order from the court would result in the termination of future workers' compensation benefits to plaintiff.

Here, we conclude that, although the court had jurisdiction to approve plaintiff's settlement with defendant in the absence of Safety National's consent, thereby allowing plaintiff to continue to receive workers' compensation benefits, the court had no authority to determine that Safety National waived its statutory lien. Workers' Compensation Law § 32 (a) provides that, when a workers' compensation claim has been filed, any agreement between the claimant and the carrier "determining the compensation and other benefits due to the claimant or [the claimant's] dependents . . . shall not bind the parties unless it is approved by the [Workers' Compensation Board (Board)]." Pursuant to section 32 (b), the Board shall approve the agreement unless "(1) the [B]oard finds the proposed agreement unfair,

unconscionable, or improper as a matter of law; (2) the [B]oard finds that the proposed agreement is the result of an intentional misrepresentation of material fact; or, (3) within ten days of submitting the agreement one of the interested parties requests that the [B]oard disapprove the agreement." As the Practice Commentaries explain, "[a]ny agreement of the employer to waive or reduce the lien, or to waive its right to offset against the recovery, should be clear and in writing or it may not exist. A dispute between the parties as to whether there was any agreement between the employer and the claimant will be settled by the Board" (Martin Minkowitz, Prac Commentaries, McKinney's Cons Laws of NY, Workers' Compensation Law § 29).

Inasmuch as the alleged agreement between plaintiff and Safety National—whereby plaintiff would waive future workers' compensation benefits in return for Safety National's waiver of its lien—was never approved by the Board, which has exclusive jurisdiction to approve all settlements of workers' compensation claims, the alleged agreement is unenforceable. Under the circumstances, we conclude that the court erred in granting plaintiffs' motion insofar as it seeks an order enforcing the terms of the purported settlement agreement between plaintiff and Safety National and in ordering Safety National to "provide a revised consent letter, containing a waiver of its Workers' Compensation Law § 29 lien." We therefore reverse the order and remit the matter to Supreme Court for a determination of the alternative relief sought in the motion.

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

Entered: July 28, 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 22-00608

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

LORRAINE DISALVO AND SANDY WEIAND BOOTH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WAYLAND-COHOCTON CENTRAL SCHOOL DISTRICT,
BOARD OF EDUCATION OF WAYLAND-COHOCTON
CENTRAL SCHOOL, WAYLAND-COHOCTON CENTRAL
SCHOOL, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (CLAIRE G. BOPP OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

BETTI & ASSOCIATES, NEW YORK CITY (MICHELE M. BETTI OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered March 7, 2022. The order, insofar as appealed from, denied in part the motion of defendants-appellants to dismiss the complaint against them.

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

Memorandum: Plaintiffs commenced this action pursuant to the Child Victims Act (CVA) (*see* CPLR 214-g) alleging that they were sexually abused over a period of several years in the mid-1970s while attending school at defendant Wayland-Cohocton Central School (School) in defendant Wayland-Cohocton Central School District (District). In particular, they alleged that the School, the District, and defendant Board of Education of Wayland-Cohocton Central School (collectively, defendants) knew or should have known about the sexual abuse, which was allegedly committed by plaintiffs’ band teacher, a former employee of defendants, and that defendants were negligent by, inter alia, failing to warn or protect plaintiffs from the alleged sexual abuse. Defendants moved, inter alia, to dismiss the complaint against them in its entirety as time-barred on the ground that CPLR 208 (b) extended the statute of limitations only until age 55 and plaintiffs were both over that age when they commenced this action. Defendants argued that the “revival” period codified by CPLR 214-g—which, for a limited time, permitted individuals to bring otherwise time-barred civil actions based on allegations of child sexual abuse—was restricted by the age limit contained in CPLR 208 (b). As relevant here, Supreme Court

denied the motion insofar as it sought to dismiss the complaint against defendants in its entirety as time-barred under CPLR 208 (b), and defendants appeal. We affirm.

Defendants contend that, when the two provisions are properly read in conjunction, the age limitation of CPLR 208 (b) applies to all claims brought under CPLR 214-g. We reject that contention. "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the [l]egislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]; *see Samiento v World Yacht Inc.*, 10 NY3d 70, 77-78 [2008]). To do so, we generally "look first to the statutory text, which is the clearest indicator of legislative intent" (*Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 721 [2012] [internal quotation marks omitted]; *see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). "[W]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (*State of New York v Patricia II.*, 6 NY3d 160, 162 [2006] [internal quotation marks omitted]; *see Matter of Anonymous v Molik*, 32 NY3d 30, 37 [2018]).

Here, it is undisputed that plaintiffs' claims of sexual abuse in the 1970s were time-barred at the time of the CVA's enactment, and that they commenced this action during the CPLR 214-g revival period (*see* L 2020, ch 130) when they were both 62 years old. Thus, the only question is whether the limitations period contained in CPLR 208 (b) applies to actions commenced during the CPLR 214-g revival period. We conclude that it does not. CPLR 208 (b) provides, as relevant here, that, "[n]otwithstanding any provision of law which imposes a period of limitation to the contrary . . . with respect to all civil claims or causes of action brought by any person for [child sexual abuse], such action may be commenced, against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of [child sexual abuse], on or before the plaintiff or infant plaintiff reaches the age of [55] years." CPLR 214-g provides, as relevant here, that, during a specified time period, and "[n]otwithstanding any provision of law which imposes a period of limitation to the contrary . . . , every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute [child sexual abuse], which is barred as of the effective date of this section because the applicable period of limitations has expired, . . . is hereby revived."

We conclude that the plain language of both provisions does not support defendants' position that the limitations period specified in CPLR 208 (b) precludes plaintiffs' claims under CPLR 214-g. No language in either provision indicates that CPLR 208 (b) restricts claims brought under CPLR 214-g. Instead, those provisions established two separate avenues of relief for victims of child sexual abuse. Importantly, neither provision directly references or incorporates parts of the other, suggesting that the legislature did

not intend for one provision to control the other. Indeed, to the contrary, CPLR 214-g provides that "*every* civil claim or cause of action brought against any party alleging" negligence stemming from instances of child sexual abuse that was "barred as of the effective date of [the CVA] because the applicable period of limitation has expired . . . *is* hereby revived," so long as the claim or cause of action is brought during the revival period (emphasis added). Moreover, provided that a CVA action was commenced during the revival period, CPLR 214-g applies "[n]otwithstanding *any* provision of law which imposes a period of limitation to the contrary" (emphasis added), including the age limit contained in CPLR 208 (b). Consequently, we conclude that the limitations period of CPLR 208 (b) is irrelevant to whether an action commenced pursuant to CPLR 214-g is timely. So long as the action was commenced during the revival period—as is the case here—the action is timely under CPLR 214-g regardless of the plaintiff's age.

In reaching that conclusion, we note that the structure of the CVA suggests that the two provisions at issue here were intended to solve two different problems and were not intended to overlap with one another (*see generally Town of Aurora v Village of E. Aurora*, 32 NY3d 366, 372 [2018]). The CVA "was intended *primarily to revive* civil claims by persons subjected to [child] sexual abuse . . . but whose claims have become time-barred, *and also* to provide a more generous toll for such claims *in the future*. The first of these goals was achieved by CPLR 214-g, and the second by amendments to CPLR 208" (Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, CPLR 214-g [emphasis added]). In other words, the CVA amended CPLR 208 (b) to *prospectively* and permanently allow all victims of child sexual abuse to pursue those claims until age 55, whereas CPLR 214-g was enacted to provide temporary *retrospective* relief for all claims—regardless of age—for a limited and discrete period of time.

Consequently, we conclude that the court did not err in denying defendants' motion insofar as it sought dismissal of the complaint against them in its entirety on the ground that it was time-barred by CPLR 208 (b).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

281
KA 18-00042
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM WATTS, DEFENDANT-APPELLANT.

HUG LAW, PLLC, ALBANY (MATTHEW C. HUG OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 3, 2017. The judgment convicted defendant upon a jury verdict of promoting prostitution in the third degree, rape in the third degree (three counts), criminal sexual act in the third degree (two counts) and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury trial of promoting prostitution in the third degree (Penal Law § 230.25 [2]), three counts of rape in the third degree (§ 130.25 [2]), two counts of criminal sexual act in the third degree (§ 130.40 [2]), and two counts of endangering the welfare of a child (§ 260.10 [1]) arising from allegations that defendant promoted the prostitution of the victim, who was only 16 years old at the time, and that defendant had oral and vaginal sex with her on three separate occasions.

Defendant contends that County Court lacked jurisdiction over counts 1 and 7 of the indictment. Defendant's contention is actually an assertion that Onondaga County was not the proper venue for those counts because the alleged conduct took place in a different county. "Venue, as distinguished from territorial jurisdiction, refers to the proper county or place of trial, not to the power of the court to hear and determine the case . . . Thus—unlike territorial jurisdiction which goes to the very essence of the State's power to prosecute and which may never be waived—questions relating only to the proper place for the trial are waivable" (*People v McLaughlin*, 80 NY2d 466, 471 [1992]). By failing to timely raise the issue, defendant waived any contention that venue was improper (*see People v Cornell*, 17 AD3d

1010, 1011 [4th Dept 2005], *lv denied* 5 NY3d 805 [2005]).

We reject defendant's contention that he was deprived of a fair trial by the court's *Molineux* ruling, which permitted the People to elicit testimony from the victim's 15-year-old friend that she was present when the victim met defendant in the parking lot prior to her trip to New York City and that defendant had asked the friend if she wanted to engage in prostitution that same weekend. The contested evidence was relevant to show a common scheme or plan and to establish that defendant knew that he was promoting prostitution when he provided money and drugs for the victim's trip to New York City with his associate and told the victim to do everything that his associate told her to do (*see People v Brown*, 74 AD3d 1748, 1749 [4th Dept 2010], *lv denied* 15 NY3d 802 [2010]; *see generally People v Cass*, 18 NY3d 553, 560 [2012]; *People v Fiore*, 34 NY2d 81, 84-85 [1974]). The challenged *Molineux* evidence was highly probative and the probative value of that evidence was not outweighed by its potential for prejudice (*see People v Sin*, — AD3d —, 2023 NY Slip Op 03166, *1 [4th Dept 2023]; *People v Molyneaux*, 49 AD3d 1220, 1221 [4th Dept 2008], *lv denied* 10 NY3d 937 [2008]). Moreover, any possible prejudice to defendant was mitigated by the court's limiting instruction (*see Sin*, — AD3d at —, 2023 NY Slip Op 03166, *1).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention that the evidence is legally insufficient to support his conviction of promoting prostitution in the third degree and endangering the welfare of a child (*see generally People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). "The statutory definition of the term 'advances prostitution' . . . encompasses [a] defendant's conduct in engaging in conduct 'designed to institute, aid or facilitate an act or enterprise of prostitution' " (*People v Simone-Taylor*, 148 AD2d 933, 934 [4th Dept 1989], *lv denied* 74 NY2d 669 [1989]; *see* Penal Law §§ 230.15 [1]; 230.25 [2]). Here, the People presented evidence that defendant provided money and drugs to his associate for the trip to New York City where the victim was prostituted out to multiple men over a period of days. In addition, the victim testified that defendant had a conversation with her about "selling" herself. That evidence was also sufficient to support defendant's conviction of endangering the welfare of a child (*see* § 260.10 [1]).

Further, although "a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings with respect to the testimony of the victim" (*People v Zeitz*, 148 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 29 NY3d 1089 [2017] [internal quotation marks omitted]) we nevertheless conclude, after 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]), that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's contention, the victim's testimony "was not incredible as a matter of law . . . , and the conflicting testimony raised issues of credibility

for the jury to resolve" (*People v Reid*, 281 AD2d 986, 986 [4th Dept 2001], *lv denied* 96 NY2d 923 [2001]; *see People v Johnson*, 56 AD3d 1172, 1173 [4th Dept 2008], *lv denied* 11 NY3d 926 [2009]; *People v Baker*, 30 AD3d 1102, 1102-1103 [4th Dept 2006], *lv denied* 7 NY3d 846 [2006]). Moreover, "no corroboration of the victim's testimony was required inasmuch as the victim was competent to testify under oath" (*Zeitz*, 148 AD3d at 1637). Nevertheless, "several aspects of the victim's testimony were corroborated by other witnesses," as well as photographs, surveillance footage, and text messages (*id*. [internal quotation marks omitted]). Contrary to defendant's further contention, "[a] circumstantial evidence charge is not required where, as here, both direct and circumstantial evidence is presented to prove defendant's guilt" (*People v McHenry*, 233 AD2d 866, 866 [4th Dept 1996]; *see People v Hardy*, 26 NY3d 245, 249 [2015]; *People v Chelley*, 121 AD3d 1505, 1505-1506 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015]).

Defendant's contention that he was deprived of a fair trial due to prosecutorial misconduct "is unpreserved for our review inasmuch as defendant did not object to any of the alleged instances of misconduct" (*People v Pendergraph*, 150 AD3d 1703, 1703 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]; *see* CPL 470.05 [2]), 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]).

We reject defendant's contention that he was denied effective assistance of counsel. 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 counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998] [internal quotation marks omitted]). Contrary to defendant's assertion, defense counsel was not ineffective in failing to request a circumstantial evidence charge inasmuch as such a charge, as previously discussed, was not warranted (*see People v Caban*, 5 NY3d 143, 152 [2005]; *People v Griffin*, 203 AD3d 1608, 1611 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022]). Nor was defense counsel ineffective in his cross-examination of the People's witnesses. Although defendant notes that defense counsel's questioning of the victim elicited a single damaging statement, it is clear when considering defense counsel's cross-examination of the victim and the other witnesses, in totality, that counsel pursued an effective strategy of cross-examination by raising inconsistencies in the witnesses' testimony and attempting to cast doubt on their veracity (*see People v Cortez*, 181 AD3d 820, 822 [2d Dept 2020], *lv denied* 35 NY3d 1065 [2020]; *see generally People v Graves*, 136 AD3d 1347, 1351 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]; *People v Miller*, 45 AD3d 1190, 1190 [3d Dept 2007]). With respect to defendant's remaining allegations of ineffective assistance of counsel, we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, reveal that defendant received meaningful representation (*see Benevento*, 91 NY2d at 712; *People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contention that he was penalized for exercising his right to a trial by the imposition of a sentence that is admittedly greater than the sentence offered during the plea negotiation process (*see People v Becraft*, 140 AD3d 1706, 1706 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]; *People v Garner*, 136 AD3d 1374, 1374 [4th Dept 2016], *lv denied* 27 NY3d 997 [2016]). Finally, the sentence is not unduly harsh or severe.

Entered: July 28, 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 19-01783

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

RICHARD D. HANES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered August 28, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) in connection with the death of a man who was found badly beaten inside his room at a rooming house. We reject defendant's contention that the verdict is against the weight of the evidence. Several witnesses testified that they heard a commotion inside the victim's room in the late evening and then saw a man climbing out through the victim's window. The witnesses, who were familiar with defendant, did not identify that man as defendant, and some even believed that the man was the victim. Other evidence, however, pointed to defendant as the perpetrator. Witness testimony, video surveillance, and defendant's own statement to the police established that he was on his bicycle outside the house talking to some of the witnesses approximately 10 minutes before the murder. Although defendant denied ever talking to or texting with the victim by cell phone, cell phone records showed that the victim and defendant were exchanging texts just prior to the murder regarding a debt owed to the victim and a possible drug transaction. The final text from defendant stated "here." Those text messages had been deleted from defendant's cell phone. A swab from a blood smear taken from defendant's bathroom showed a DNA mixture profile to which the victim was a possible contributor. DNA testing of a baseball cap found outside the rooming house, directly underneath the window to the victim's room, showed that defendant was the major contributor to the mixture of two DNA profiles. In addition, DNA testing of a blood sample taken from the left handlebar of defendant's bicycle showed that the victim was the

major contributor to the two-donor mixture profile.

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 an acquittal would not have been unreasonable, particularly in light of the testimony of several witnesses that the man observed climbing out of the victim's window and fleeing did not appear to be defendant (*see generally People v Romero*, 7 NY3d 633, 643-644 [2006]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). We nonetheless conclude that the jury did not fail to give the evidence the weight it should be accorded (*see generally Romero*, 7 NY3d at 643-644; *Bleakley*, 69 NY2d at 495). " 'Great deference is to be accorded to the fact-finder's resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony' " (*People v Gritzke*, 292 AD2d 805, 805-806 [4th Dept 2002], *lv denied* 98 NY2d 697 [2002]; *see People v Holmes*, 37 AD3d 1042, 1043 [4th Dept 2007], *lv denied* 8 NY3d 986 [2007]), and we perceive no reason to disturb the jury's credibility determinations here.

Defendant next contends that reversal is required because of a *Brady* violation, i.e., the People's failure to turn over a latent fingerprint report that excluded defendant as the source of the only usable prints recovered from the victim's room. The report was referenced by a police witness during his testimony and was then turned over to the prosecutor and defense counsel. In order to establish a *Brady* violation, defendant must establish that "(1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" (*People v McGhee*, 36 NY3d 1063, 1064-1065 [2021] [internal quotation marks omitted]; *see People v Garrett*, 23 NY3d 878, 885 [2014], *rearg denied* 25 NY3d 1215 [2015]; *People v Fuentes*, 12 NY3d 259, 263 [2009], *rearg denied* 13 NY3d 766 [2009]).

Even, assuming, arguendo, that defendant preserved his arguments and met his burden with respect to the first two elements of the test, we conclude that County Court properly denied defendant's motion for a mistrial because defendant failed to establish that the evidence was material. "[W]here a defendant makes a specific request for a document, the materiality element is established provided there exists a 'reasonable possibility' that it would have changed the result of the proceedings . . . Where . . . the defense did not specifically request the information, the test of materiality is whether 'there is a reasonable probability that had it been disclosed to the defense, the result would have been different—i.e., a probability sufficient to undermine the court's confidence in the outcome of the trial' " (*Garrett*, 23 NY3d at 891; *see People v Giuca*, 33 NY3d 462, 473-474 [2019]).

We conclude that there is neither a reasonable probability nor a reasonable possibility that, had the report been disclosed to the defense earlier, it would have changed the result of the trial (*see People v Smith*, 138 AD3d 1418, 1419-1420 [4th Dept 2016], *lv denied* 28

NY3d 937 [2016]; *People v Reed*, 115 AD3d 1334, 1335 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014]). Moreover, defendant was able to use the report to cross-examine the police witness, and thus he was not prejudiced by the delayed disclosure (*see People v Cortijo*, 70 NY2d 868, 870 [1987]; *People v Smith*, 195 AD3d 1416, 1416-1417 [4th Dept 2021], *lv denied* 37 NY3d 995 [2021]). Contrary to defendant's further contention, the court did not abuse its discretion in denying his request for an adjournment to hire an expert to review the report (*see People v Rogers*, 103 AD3d 1150, 1151-1152 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]; *see generally People v Diggins*, 11 NY3d 518, 524 [2008]).

Defendant failed to preserve for our review his contention that prosecutorial misconduct during summation deprived him of a fair trial (*see People v Freeman*, 206 AD3d 1694, 1695 [4th Dept 2022]). In any event, defendant's contention is without merit. Some of the allegedly improper remarks constituted "fair comment on the evidence and the reasonable inferences to be drawn from that evidence" (*People v Anderson*, 29 NY3d 69, 73 [2017], *rearg denied* 29 NY3d 1074 [2017], *cert denied* — US —, 138 S Ct 457 [2017]; *see People v Page*, 105 AD3d 1380, 1382 [4th Dept 2013], *lv denied* 23 NY3d 1023 [2014]). We agree with defendant that the prosecutor improperly speculated on why the baseball cap that was found did not have blood on it by discussing blood splatter patterning, a topic that generally calls for expert testimony (*see e.g. People v Lewis*, 199 AD3d 1441, 1442 [4th Dept 2021], *lv denied* 38 NY3d 1034 [2022], *cert denied* — US —, 143 S Ct 262 [2022]; *People v Murray*, 147 AD2d 925, 925 [4th Dept 1989], *lv denied* 73 NY2d 1019 [1989]). We further agree with defendant that it was improper for the prosecutor to characterize certain witnesses as liars (*see People v Miller*, 174 AD2d 901, 903 [3d Dept 1991]; *People v Stewart*, 92 AD2d 226, 230 [2d Dept 1983]; *see also People v Walker*, 119 AD3d 1402, 1404 [4th Dept 2014]). We conclude, however, that those improper remarks by the prosecutor were not so pervasive or egregious as to deny defendant a fair trial (*see Freeman*, 206 AD3d at 1695; *People v Wilson*, 197 AD3d 962, 963 [4th Dept 2021], *lv denied* 37 NY3d 1100 [2021]).

Defendant next contends that he received ineffective assistance of counsel. To the extent that defendant objects to defense counsel's abandonment of a third-party culpability defense, that contention is "based upon matters outside the record . . . and must be pursued by way of a motion pursuant to CPL article 440" (*People v Jackson*, 153 AD3d 1605, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]). Inasmuch as we conclude that defendant was not denied a fair trial by prosecutorial misconduct on summation, defendant was not denied effective assistance of counsel by defense counsel's failure to object to the allegedly improper remarks (*see Freeman*, 206 AD3d at 1695; *People v Rath*, 192 AD3d 1600, 1601 [4th Dept 2021], *lv denied* 37 NY3d 959 [2021]). In addition, the evidence at trial was not entirely circumstantial, and thus defense counsel was not ineffective for failing to request a circumstantial evidence charge to the jury (*see People v Lawrence*, 192 AD3d 1686, 1688 [4th Dept 2021]; *People v Harris*, 147 AD3d 1328, 1330 [4th Dept 2017]; *People v Smith*, 145 AD3d 1628, 1630-1631 [4th Dept 2016], *lv denied* 31 NY3d 1017 [2018]). Defendant's remaining claim of ineffective assistance of counsel is without merit. Upon viewing the evidence, the

law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contention that the court, after a *Batson* objection was raised by defendant, failed to inquire about and ensure that the prosecutor's investigation of prospective jurors was not racially motivated (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant's contention that the court considered an improper factor when imposing the sentence is not preserved for our review (*see People v Colome-Rodriguez*, 120 AD3d 1525, 1525-1526 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]) and, in any event, is without merit (*see People v Chrisostome*, 167 AD3d 644, 645 [2d Dept 2018], *lv denied* 32 NY3d 1202 [2019]). The sentence is not unduly harsh or severe.

Entered: July 28, 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 22-00014

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

JOEL VERDUGO, PLAINTIFF-APPELLANT,

V — MEMORANDUM AND ORDER

FOX BUILDING GROUP, INC., HINSDALE ROAD GROUP, LLC, CNY BOOM TRUCK, LLC, CBD CONSTRUCTION, LLC, AND CAMERON GROUP, LLC, DEFENDANTS-RESPONDENTS.

DOLCE PANEPINTO, P.C., BUFFALO (SEAN COONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR DEFENDANT-RESPONDENT FOX BUILDING GROUP, INC.

BURKE, SCOLAMIERO & HURD, LLP, ALBANY (STEVEN V. DEBRACCIO OF COUNSEL), FOR DEFENDANT-RESPONDENT HINSDALE ROAD GROUP, LLC.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT CNY BOOM TRUCK, LLC.

SMITH, DOMINELLI & GUETTI, LLC, ALBANY (CHRISTOPHER A. GUETTI OF COUNSEL), FOR DEFENDANT-RESPONDENT CBD CONSTRUCTION, LLC.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered November 24, 2021. The order, among other things, denied plaintiff’s motion for summary judgment and granted those parts of defendants’ motions seeking summary judgment dismissing plaintiff’s Labor Law § 240 (1) causes of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendants’ motions seeking summary judgment dismissing the Labor Law § 240 (1) causes of action against defendants Hinsdale Road Group, LLC, CBD Construction, LLC, and Fox Building Group, Inc., and reinstating those causes of action against those defendants and as modified the order is affirmed without costs.

Memorandum: In this action pursuant to, inter alia, Labor Law § 240 (1), plaintiff seeks to recover damages for injuries he sustained when he fell while installing roof trusses on a building as part of a commercial construction project. On the day of the accident, the roof trusses were raised two at a time by a crane to plaintiff, a carpenter whose duties included securing the trusses to

the frame of the building, approximately 13 to 14 feet above the ground, while wearing a body harness with a four-foot-long lanyard. Plaintiff was injured after the crane cable became entangled with a truss, which was unsecured and upon which plaintiff was standing, causing the truss and plaintiff to fall to the ground. Plaintiff moved for summary judgment on, inter alia, the issue of certain defendants' liability under Labor Law § 240 (1), and defendants filed separate motions seeking, inter alia, summary judgment dismissing the complaints against them. As limited by his brief, plaintiff appeals from an order insofar as it denied plaintiff's motion with respect to the issue of three defendants' liability under Labor Law § 240 (1) and insofar as it granted defendants' motions with respect to the Labor Law § 240 (1) causes of action against four defendants.

We agree with plaintiff that Supreme Court erred in granting those parts of defendants' motions with respect to the Labor Law § 240 (1) causes of action against defendants Hinsdale Road Group, LLC (Hinsdale), CBD Construction, LLC (CBD), Fox Building Group, Inc. (Fox), and CNY Boom Truck, LLC (CNY), on the ground that plaintiff was the sole proximate cause of his injuries because defendants failed to meet their initial burden on their motions to that extent. To establish a sole proximate cause defense, a defendant must demonstrate that the plaintiff "(1) had adequate safety devices available, (2) knew both that the safety devices were available and that [they were] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice" (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020] [internal quotation marks omitted]; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). In evaluating such a defense, "[i]t is well settled that the failure to follow an instruction by an employer or owner to avoid unsafe practices does not constitute a refusal to use available, safe and appropriate equipment" (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403-1404 [4th Dept 2015]) and does not "render [a] plaintiff the sole proximate cause of [their] injuries" (*Schutt v Bookhagen*, 186 AD3d 1027, 1029 [4th Dept 2020], *appeal dismissed* 36 NY3d 939 [2020]; *see generally Salzer v Benderson Dev. Co., LLC*, 130 AD3d 1226, 1228 [3d Dept 2015]). Further, a "plaintiff's decision to employ one method of performing a necessary task, even if a safer method existed, constitute[s] nothing more than comparative fault that is not a defense under the statute" (*Szymkowiak v New York Power Auth.*, 203 AD3d 1618, 1619 [4th Dept 2022] [internal quotation marks omitted]).

In support of their motions, defendants submitted the deposition testimony of the project foreman and another carpenter on the project, who testified that plaintiff was instructed on the correct way to use his harness and lanyard—i.e., by tying his lanyard off only to those trusses that had already been nailed down and braced—and that plaintiff had been corrected when he had previously used them improperly on a job. However, defendants also submitted the deposition testimony of plaintiff, who testified that he did not receive specific training on how to use the harness and lanyard or any instructions regarding the removal of the crane cable. Plaintiff further testified that he used his regular method of performing his

work on the day of the accident, i.e., standing on and attaching his lanyard to the unsecured truss prior to bracing and nailing the truss to the structure. He explained that he proceeded in that manner because it was faster than attaching his lanyard only to trusses that had already been nailed to the frame and braced, he was able to more easily reach the trusses despite his short lanyard, and it was safe as long as the cable held the trusses in place. Furthermore, both the foreman and the crane operator testified at their depositions that they did not observe plaintiff using his lanyard incorrectly on the day of the accident. Plaintiff also testified at his deposition that another carpenter detached the crane cable from the truss and then gave the signal for the crane operator to raise the crane cable out of the way while plaintiff was attached or in the process of attaching his lanyard to the unsecured truss, which he believed remained connected to the crane cable. The foregoing evidence raises triable issues of fact whether an adequate safety device was readily available that plaintiff knew that he was expected to use "but for no good reason chose not to do so, causing an accident," and whether plaintiff would not have been injured had he not made that choice (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *see Martin v Niagara Falls Bridge Commn.*, 162 AD3d 1604, 1606 [4th Dept 2018]). We therefore modify the order by denying those parts of defendants' motions seeking summary judgment dismissing the Labor Law § 240 (1) causes of action against Hinsdale, CBD, and Fox and reinstating those causes of action against those defendants (*see generally Doe v Westfall Health Care Ctr.*, 303 AD2d 102, 114 [4th Dept 2002]; *Bald v Westfield Academy & Cent. School*, 298 AD2d 881, 882-883 [4th Dept 2002]).

CNY alternatively contends that the court did not err in granting its motion with respect to plaintiff's Labor Law § 240 (1) cause of action against it because it is not an owner or general contractor and, therefore, it is not liable. Initially, "[a]lthough the court did not address [that] issue[] in its decision, [CNY] properly raises [it] on appeal as [an] alternative ground[] for affirmance" (*Arista Dev., LLC v Clearmind Holdings, LLC*, 207 AD3d 1127, 1129 [4th Dept 2022] [internal quotation marks omitted]; *see Melgar v Melgar*, 132 AD3d 1293, 1294 [4th Dept 2015]). Furthermore, we agree with CNY that the court should have granted its motion with respect to the Labor Law § 240 (1) cause of action against it on that ground. "[U]nless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (*Walls v Turner Const. Co.*, 4 NY3d 861, 864 [2005]; *see Knab v Robertson*, 155 AD3d 1565, 1565-1566 [4th Dept 2017]; *Krajnik v Forbes Homes, Inc.*, 120 AD3d 902, 903-904 [4th Dept 2014]). "[T]he determinative factor on the issue of control is not whether a [contractor] furnishes equipment but[, rather, is] whether [it] has control of the work being done and the authority to insist that proper safety practices be followed" (*Knab*, 155 AD3d at 1566 [internal quotation marks omitted]). Here, CNY, which was undisputedly not an owner or a general contractor, established as a matter of law that it had no control over plaintiff or the work he was performing, and plaintiff failed to raise a triable issue of fact in opposition (*see id.*; *Kulaszewski v Clinton Disposal Servs.*, 272 AD2d

855, 856 [4th Dept 2000]).

Plaintiff further contends that the court erred in denying his motion for summary judgment with respect to liability on his Labor Law § 240 (1) causes of action against Hinsdale, CBD, and Fox. For the same reasons discussed above, we conclude that plaintiff failed to establish his entitlement to judgment as a matter of law in that respect inasmuch as there are triable issues of fact whether plaintiff was the sole proximate cause of the accident (*see generally Thomas v North Country Family Health Ctr., Inc.*, 208 AD3d 962, 963-964 [4th Dept 2022]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

288

CA 22-00469

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

AMANDA DIPASQUALE AND DYLAN DIPASQUALE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

OONA LIM, M.D., HEIDI ZIELINSKI, C.N.M.,
MIRANDA HARRIS-GLOCKER, M.D., MARY M.
WILSCH, M.D., WILLIAM O'MALLEY, M.D.,
MATTHEW BRESLER, M.D., GENESEE VALLEY
OBSTETRICS & GYNECOLOGY, P.C., WOMEN
GYNECOLOGY AND CHILDBIRTH ASSOCIATES, P.C.,
HIGHLAND HOSPITAL AND UNIVERSITY OF
ROCHESTER MEDICAL CENTER,
DEFENDANTS-RESPONDENTS.

BOTTAR LAW, PLLC, SYRACUSE (SAMANTHA C. RIGGI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HIRSCH & TUBIOLO, P.C., ROCHESTER (RICHARD S. TUBIOLO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS OONA LIM, M.D., HEIDI ZIELINSKI, C.N.M., MIRANDA HARRIS-GLOCKER, M.D., MARY M. WILSCH, M.D., GENESEE VALLEY OBSTETRICS & GYNECOLOGY, P.C., AND WOMEN GYNECOLOGY AND CHILDBIRTH ASSOCIATES, P.C.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (AMANDA B. BURNS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WILLIAM O'MALLEY, M.D., MATTHEW BRESLER, M.D., HIGHLAND HOSPITAL AND UNIVERSITY OF ROCHESTER MEDICAL CENTER.

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered March 8, 2022. The order, among other things, denied the motion of plaintiffs seeking, inter alia, to compel the production of a certain email and granted the cross-motion of defendants William O'Malley, M.D., Matthew Bresler, M.D., Highland Hospital and University of Rochester Medical Center for a protective order with respect to such email.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross-motion and granting the motion to the extent that plaintiffs seek to compel disclosure of the subject email and as modified the order is affirmed without costs.

Memorandum: In this medical malpractice action, plaintiffs

moved, inter alia, to compel defendants to disclose an email sent by defendant Miranda Harris-Glocker, M.D., to the chief operating officer of defendant Highland Hospital and six additional recipients. Defendants William O'Malley, M.D., Matthew Bresler, M.D., Highland Hospital, and University of Rochester Medical Center (Hospital defendants) cross-moved for a protective order on the ground that the subject email was privileged pursuant to Education Law § 6527 (3) and Public Health Law § 2805-m (2). We agree with plaintiffs that Supreme Court abused its discretion in denying their motion insofar as it sought disclosure of the email and in granting the cross-motion.

Initially, there is no dispute that the subject email is material and necessary in the prosecution of this action (*see* CPLR 3101 [a]; *Forman v Henkin*, 30 NY3d 656, 661 [2018]; *Impellizzeri v Campagni*, 184 AD3d 1181, 1182 [4th Dept 2020]). Furthermore, the Hospital defendants failed to establish that the email "was generated in connection with a quality assurance review function pursuant to Education Law § 6527 (3) or a malpractice prevention program pursuant to Public Health Law § 2805-j" (*Maisch v Millard Fillmore Hosps.*, 262 AD2d 1017, 1017 [4th Dept 1999]; *see Matter of Coniber v United Mem. Med. Ctr.*, 81 AD3d 1329, 1330 [4th Dept 2011]; *cf. Drum v Collure*, 161 AD3d 1509, 1510 [4th Dept 2018]; *see generally Katherine F. v State of New York*, 94 NY2d 200, 205 [1999]). One of the seven email recipients, Highland Hospital's chief operating officer, averred in support of the cross-motion that she was responsible for Highland Hospital's quality assurance program; however, the remaining six email recipients were neither Highland Hospital employees nor involved in Highland Hospital's quality assurance review process. Further, although Highland Hospital's senior quality improvement coordinator averred that the email contained information that she would have requested from Harris-Glocker for quality assurance review purposes, "[a] party does not obtain the protection of [Education Law § 6527 (3)] merely because 'the information sought . . . *could* have been obtained during the course of a hospital review proceeding . . . [T]he exemption applies only where the information was in fact so obtained' " (*Crea v Newfane Inter-Community Mem. Hosp.*, 224 AD2d 976, 977 [4th Dept 1996]). Thus, the subject email is not exempted from disclosure under CPLR article 31 pursuant to the confidentiality conferred on information gathered by defendant in accordance with Education Law § 6527 (3) and Public Health Law § 2805-m (*see Maisch*, 262 AD2d at 1017-1018; *cf. Pasek v Catholic Health Sys., Inc.*, 159 AD3d 1553, 1554 [4th Dept 2018]). In light of our conclusion, plaintiffs' alternative contention that the email falls within a statutory exception to the privilege is academic.

Finally, we agree with plaintiffs that the court erred to the extent that it determined that denial of their motion was warranted based on plaintiffs' purported failure to comply with the good faith conferral requirement of 22 NYCRR 202.20-f. The denial of a discovery motion pursuant to that rule is without prejudice (22 NYCRR 202.20-f [c]) and, in any event, further efforts "to resolve the present dispute non-judicially would have been futile" under the circumstances of this case (*Yargeau v Lasertron*, 74 AD3d 1805, 1806 [4th Dept 2010] [internal quotation marks omitted]).

We therefore modify the order by denying the cross-motion and granting the motion to the extent that plaintiffs seek to compel disclosure of the subject email.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

309

CA 22-00380

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

IN THE MATTER OF COLUMBUS MONUMENT CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO THE COLUMBUS MONUMENT ASSOCIATION, NICHOLAS J. PIRRO, BOB GARDINO, JOANNE GARDINO, JAMES ALBANESE, MIKE ALBANESE, KATIE ALBANESE, MARY EMILY ALIBRANDI, SILVIO ASCENZO, LAUREN ASCENZO, BRENDA WENDY LEE BOUSEFELD, ANDREA BUCCI, ANGELO CHIODO, MARGARET CHIODO, JOAN CHRISTENSEN, GABRIEL DIGENOVA, PETER DIGENOVA, GENE FISCH, ANDRE GRASSO, KEVIN KANE, SHANNON KENNEDY, BILLE KINNE, JOE LEPIANE, TED MASSEY, RANDY POTTER, JOSEPH RUSSO, GERARADA SCUDERI, CHARLES TREMPER, AND JOHN VIGLIOTTI,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, RESPONDENT-DEFENDANT-APPELLANT, AND BEN WALSH, INDIVIDUALLY AND AS MAYOR OF THE CITY OF SYRACUSE, RESPONDENT-DEFENDANT.

SUSAN R. KATZOFF, CORPORATION COUNSEL, SYRACUSE, HANCOCK ESTABROOK, LLP (JOHN G. POWERS OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

ANTHONY J. PIETRAFESA, SYRACUSE, ANTHONY F. ALOI, CICERO, JOHN A. DEFRANCISCO, SANIBEL, FLORIDA, AND FRANCIS J. VAVONESE, BRIDGEPORT, FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, ROCKVILLE, MARYLAND (ERICH R. EISELT OF COUNSEL), FOR INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AMICUS CURIAE.

JOSEPH J. HEATH, SYRACUSE, FOR ONONDAGA NATION, AMICUS CURIAE.

BOCHETTO & LENTZ, P.C., PHILADELPHIA, PENNSYLVANIA (GEORGE BOCHETTO OF COUNSEL), FOR THE CONFERENCE OF PRESIDENTS OF MAJOR ITALIAN AMERICAN ORGANIZATIONS, INC., AMICUS CURIAE.

LAW OFFICE OF THANE JOYAL, SYRACUSE (THANE JOYAL OF COUNSEL), FOR WOMEN OF SYRACUSE AND ITALIAN HERITAGE OF CENTRAL NEW YORK AND NEIGHBORS OF THE ONONDAGA NATION, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered March 11, 2022, in a

proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, insofar as appealed from, denied in part the motion of respondents-defendants to dismiss the amended petition-complaint.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion insofar as it seeks dismissal of the amended petition-complaint is granted, and the amended petition-complaint is dismissed in its entirety.

Memorandum: In this hybrid CPLR article 78 proceeding and declaratory judgment action, respondent-defendant City of Syracuse (City) appeals from a judgment that, inter alia, denied in part the motion of the City and respondent-defendant Ben Walsh, individually and as Mayor of the City of Syracuse (Mayor) (collectively, respondents), to dismiss the amended petition-complaint (amended petition) or for judgment on the merits and granted those parts of the amended petition seeking relief related to the City's alleged duty to maintain the Christopher Columbus Monument (Monument) in its present form and location in St. Mary's Circle in downtown Syracuse. We reverse the judgment insofar as appealed from.

The Monument was given to the City in 1934 and placed in St. Mary's Circle, where it has remained to date. In the early 1990s, the City undertook a restoration of the Monument, fountain, and surrounding plaza in St. Mary's Circle, assisted in part by a grant from the New York State Office of Parks, Recreation and Historic Preservation (Parks). The 1990 contract between the City and Parks governing the terms of the grant (Project Agreement) required the City to execute "an agreement conveying an easement or preservation restriction to [Parks] and such others as [Parks] deems appropriate." The City and State subsequently executed and filed a Preservation Covenant in satisfaction of that obligation. The restoration of St. Mary's Circle was also partially funded by a donation from the Columbus Monument Memorial Association (Association) that was accepted by the City in 1991.

In October 2020, following a series of community conversations facilitated by a non-profit organization and the solicitation of recommendations from an action committee organized by the Mayor regarding the presence of the Monument in St. Mary's Circle, the Mayor announced an intention to move forward with the steps required by local and state law to relocate the Monument from St. Mary's Circle to another site. The City and Parks subsequently executed and filed an agreement terminating the Preservation Covenant.

Petitioners thereafter commenced the instant hybrid proceeding. Respondents moved to, inter alia, dismiss the amended petition on the grounds that the claims were premature because no final determination had been made and that petitioners lacked standing to bring the claims in the amended petition. Supreme Court denied the motion in part and granted the amended petition insofar as it sought relief pursuant to CPLR 7803 (1) and (3) enjoining the City from doing anything other than conserving and maintaining the Monument and insofar as it sought

declarations that the City had no legal right to alter or remove the Monument, that the Monument had not exceeded its useful life, that the Preservation Covenant had not been validly terminated, and that petitioners were third-party beneficiaries of the City's obligation to preserve and maintain the Monument for its useful life.

We agree with the City that petitioners' claims for relief pursuant to CPLR 7803 (1) and (3) and for declarations that the City lacks the legal right to alter or move the Monument and that any such alteration or movement would violate both the City's duty to protect the Monument and section 8-111 of the Charter of the City of Syracuse–1960 (City Charter) are premature and must be dismissed because they are not ripe for judicial review (*see Matter of Agoglia v Benepe*, 84 AD3d 1072, 1076 [2d Dept 2011]; *see generally Matter of State of New York v Calhoun*, 106 AD3d 1470, 1472 [4th Dept 2013]). A proceeding under CPLR article 78 generally "shall not be used to challenge a determination" that is "not final or can be adequately reviewed by appeal . . . to some other body or officer" (CPLR 7801 [1]). Similarly, "a court should decline to apply the discretionary relief of declaratory judgment . . . to administrative determinations unless these arise in the context of a controversy ripe for judicial resolution" (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 518 [1986], *cert denied* 479 US 985 [1986] [internal quotation marks omitted]). For the purpose of both a CPLR article 78 proceeding and a declaratory judgment action, "[t]he concept of finality requires an examination of the completeness of the administrative action and a pragmatic evaluation of whether the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (*id.* at 519 [internal quotation marks omitted]; *see Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005], *rearg denied* 5 NY3d 824 [2005]; *see generally Matter of Goodyear v New York State Dept. of Health*, 163 AD3d 1427, 1428-1429 [4th Dept 2018], *lv denied* 32 NY3d 914 [2019]; *Matter of Committee to Save Beacon Theater v City of New York*, 146 AD2d 397, 402-404 [1st Dept 1989]). Further, in order for the administrative action to be considered final, it must be the case that the alleged injury from the administrative action "may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Best Payphones, Inc.*, 5 NY3d at 34; *see Church of St. Paul & St. Andrew*, 67 NY2d at 520).

Contrary to the court's determination, the December 7, 2020 letter from an Assistant Corporation Counsel for the City to Parks does not constitute a final administrative determination regarding the future of the Monument. In that letter, the Assistant Corporation Counsel requested an opinion from Parks whether the Preservation Covenant—which had a stated term of " '23 years or the useful life of the improvement, made with funds provided . . . whichever is longer' "—was still in effect and what regulatory role, if any, Parks might still have in the City's decision. The letter itself thus acknowledges that the City had not yet made a final determination and that further action with respect to St. Mary's Circle and the Monument might involve Parks or might be precluded by the Preservation

Covenant. Further, in support of their motion, respondents submitted evidence establishing that multiple administrative steps would be required before any action could be taken with respect to the Monument. Those steps include a requirement that the City obtain a certificate of appropriateness from the Syracuse Landmark Preservation Board with respect to any proposed material changes to St. Mary's Circle and the Monument, in the absence of which "finality is lacking" (*Committee to Save Beacon Theater*, 146 AD2d at 403; *see* City of Syracuse Zoning Rules and Regulations, part C, § VII, art 6 [A]). We note that, in determining whether to grant such a certificate, the Syracuse Landmark Preservation Board is obligated to consider the very issues raised by petitioners in this proceeding, i.e., the historical and architectural value and significance of the property to be altered (*see* City of Syracuse Zoning Rules and Regulations, part C, § VII, art 6 [A]).

Contrary to the further conclusion of the court, there is nothing in the plain language of section 8-111 of the City Charter that precludes the City from altering or moving the Monument such that petitioners' "right to relief [under CPLR article 78] is 'clear' and the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion" (*Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 96 [1981]). Instead, the issue whether the City would be acting in bad faith or wasting public resources in violation of section 8-111 of the City Charter if it were to alter the Monument or move it from St. Mary's Circle is not "so clear as not to admit [any] reasonable doubt or controversy" (*Matter of Association of Surrogates & Supreme Ct. Reporters within City of N.Y. v Bartlett*, 40 NY2d 571, 574 [1976]; *see generally* Second Class Cities Law § 22; *Montecalvo v City of Utica*, 170 Misc 2d 107, 110-112 [Sup Ct, Oneida County 1996], *affd* 233 AD2d 960 [4th Dept 1996], *appeal dismissed* 89 NY2d 938 [1997]). Thus, this is not a matter in which CPLR article 78 relief may lie in the absence of a final administrative determination (*see Hamptons Hosp. & Med. Ctr.*, 52 NY2d at 96).

The remaining claims for declaratory relief granted by the court, i.e., that "the Monument has not exceeded its useful life," that the "Termination of Protective Covenant filed . . . on March 22, 2021 is null and void," and that "[p]etitioners are third-party beneficiaries of the City's obligation to preserve and maintain the Monument for its useful life," relate to petitioners' alleged rights as third-party beneficiaries of the Project Agreement or the Preservation Covenant. A declaratory judgment cause of action is "an appropriate vehicle for settling justiciable disputes as to contract rights and obligations" (*Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727, 731 [1988]; *see Burrstone Energy Ctr., LLC v Faxton-St. Luke's Healthcare*, 162 AD3d 1554, 1554-1555 [4th Dept 2018]). Nevertheless, we agree with the City that petitioners are not third-party beneficiaries of either contract (*see generally Katz v DePaola*, 211 AD3d 1020, 1021 [2d Dept 2022]; *Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 94 AD3d 1466, 1468 [4th Dept 2012]) and that they therefore lack standing to enforce the terms of those agreements or to challenge the termination of the

Preservation Covenant by the City and Parks (*see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786-787 [2006]; *Matter of Coalition for Cobbs Hill v City of Rochester*, 194 AD3d 1428, 1435-1436 [4th Dept 2021]).

Although "[g]overnment contracts often confer benefits to the public at large[, that fact alone] is not . . . a sufficient basis in itself to infer the government's intention to make any particular member of the public a third party beneficiary, entitled to sue on such contract" (*Grunewald v Metropolitan Museum of Art*, 125 AD3d 438, 439 [1st Dept 2015], *lv denied* 27 NY3d 907 [2016]; *see generally Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 44 [1985]). Instead, " '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]; *see Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 655 [1976]; *see also Nature Conservancy v Congel*, 253 AD2d 248, 253 [4th Dept 1999]). Such intent is shown "when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was an intent to permit enforcement by the third party" (*Dormitory Auth. of the State of N.Y.*, 30 NY3d at 710 [internal quotation marks omitted]). Neither situation is present here. Parks clearly has an enforcement right with respect to both the Project Agreement and the Preservation Covenant, and therefore it cannot be concluded that petitioners are the only parties who can recover under those contracts (*see id.*). Further, although the court relied on the status of certain petitioners as donors to the restoration project, nothing in the plain language of the Project Agreement, which was executed in 1990, specifies or anticipates how the City would appropriate or raise its share of the funds for the restoration. Instead, with respect to donations that contract states only that "[m]atching funds must be raised in full by June 30, 1990." The funds raised by the Association, to which three individual petitioners contributed, were not donated until October 1991, and the City ordinance accepting that donation contains no language from which it can be inferred that, in accepting the donation, the City was recognizing an enforcement right on the part of the Association or that the donation was made subject to any specific conditions (*see id.*; *cf. Smithers v St. Luke's-Roosevelt Hosp. Ctr.*, 281 AD2d 127, 139 [1st Dept 2001]).

Further, the Project Agreement expressly obligated the City to execute "an agreement conveying an easement or preservation restriction to [Parks] and such others as [Parks] deems appropriate" with no reference to any other known or unknown donor to the restoration project. Thus, the language of the Project Agreement belies the conclusion that the restrictive covenant obligation was included in the Project Agreement for the specific benefit of any petitioner (*cf. Nature Conservancy,* 253 AD2d at 253). The Preservation Covenant itself also contains no language from which it can be inferred that petitioners were among its intended beneficiaries (*see Wheeler v Del Duca*, 151 AD3d 1005, 1006 [2d Dept 2017]). Thus,

even assuming, arguendo, that petitioner-plaintiff Columbus Monument Corporation is a legal successor-in-interest to the Association, we conclude that petitioners lack standing to seek declaratory relief with respect to the Project Agreement, the Preservation Covenant, or the termination of the Preservation Covenant.

In light of our determination, we do not address the City’s remaining contentions.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

312
CA 22-01332
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

ROBERT T. BURNETT, PLAINTIFF-RESPONDENT,

V ORDER

DESTINI ALLEN, BRIAN J. SMITH AND J&L
JANITORIAL SERVICES, INC., DOING BUSINESS AS
K&K JANITORIAL SERVICE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

HAGELIN SPENCER LLC, BUFFALO (LAURA B. GARDINER OF COUNSEL), FOR DEFENDANT-APPELLANT DESTINI ALLEN.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., WILLIAMSVILLE (ALAN J. BEDENKO OF COUNSEL), FOR DEFENDANTS-APPELLANTS BRIAN J. SMITH AND J&L JANITORIAL SERVICES, INC., DOING BUSINESS AS K&K JANITORIAL SERVICE.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANTHONY IACONO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered July 29, 2022. The order, among other things, granted in part the cross-motion of plaintiff for summary judgment.

It is hereby ORDERED that said appeals are unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

313
CA 22-01602
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

ROBERT T. BURNETT, PLAINTIFF-RESPONDENT,

V   ORDER

DESTINI ALLEN, DEFENDANT,
BRIAN J. SMITH AND J&L JANITORIAL SERVICES, INC.,
DOING BUSINESS AS K&K JANITORIAL SERVICE,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

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

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANTHONY IACONO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered October 4, 2022. The order denied the motion of defendants Brian J. Smith and J&L Janitorial Services, Inc., doing business as K&K Janitorial Service, for leave to reargue.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1984]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

314
CA 22-01648
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

ROBERT T. BURNETT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DESTINI ALLEN, BRIAN J. SMITH AND J&L JANITORIAL SERVICES, INC., DOING BUSINESS AS K&K JANITORIAL SERVICE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

HAGELIN SPENCER LLC, BUFFALO (LAURA B. GARDINER OF COUNSEL), FOR DEFENDANT-APPELLANT DESTINI ALLEN.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., WILLIAMSVILLE (ALAN J. BEDENKO OF COUNSEL), FOR DEFENDANTS-APPELLANTS BRIAN J. SMITH AND J&L JANITORIAL SERVICES, INC., DOING BUSINESS AS K&K JANITORIAL SERVICE.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANTHONY IACONO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an amended order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered October 11, 2022. The amended order, among other things, granted in part the cross-motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action to recover for injuries he allegedly sustained in a motor vehicle accident. At the time of the accident, plaintiff was a passenger in a vehicle operated by defendant Destini Allen. Allen mistakenly pulled into the wrong driveway. As Allen reversed her car out of the driveway and onto the road, a vehicle owned by defendant J&L Janitorial Services, Inc., doing business as K&K Janitorial Service and driven by defendant Brian J. Smith (collectively, Smith defendants) collided with Allen's vehicle. As a result of the collision, plaintiff allegedly sustained serious injuries to his face, head, and back. Allen moved for summary judgment dismissing the complaint against her on the ground that plaintiff did not sustain a qualifying serious injury under Insurance Law § 5102 (d). The Smith defendants cross-moved for, inter alia, summary judgment

dismissing the complaint against them on the ground that Allen was negligent as a matter of law and was the sole proximate cause of the accident. Plaintiff cross-moved for summary judgment on the issues of negligence and whether he sustained a serious injury. Supreme Court denied Allen's motion, denied the Smith defendants' cross-motion except with respect to the issue of Allen's negligence, and granted plaintiff's cross-motion for summary judgment to the extent of determining that plaintiff was not negligent, that Allen was negligent, and that plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) under the significant disfigurement category. The Smith defendants appeal, and Allen separately appeals.

The Smith defendants contend on their appeal that the court erred in denying their cross-motion insofar as it sought summary judgment on the issue of liability on the ground that Allen was the sole proximate cause of the accident. We reject that contention. As the movants for summary judgment, the Smith defendants "had the burden of establishing as a matter of law that [Smith] was not negligent or that, even if [Smith] was negligent, his negligence was not a proximate cause of the accident" (*Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept 2018]). To meet that burden, the Smith defendants were required to establish that Smith "fulfilled his common-law duty to see that which he should have seen [as a driver] through the proper use of his senses . . . and to exercise reasonable care under the circumstances to avoid an accident" (*id.* [internal quotation marks omitted]; *see Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]). Viewing the evidence in the light most favorable to the nonmoving parties, as we must, and affording them the benefit of every reasonable inference (*see Bank of N.Y. Mellon v Simmons*, 169 AD3d 1446, 1446 [4th Dept 2019]), we conclude that the Smith defendants failed to meet their initial burden with respect to either Smith's negligence or proximate cause. In support of their cross-motion, the Smith defendants submitted the transcripts of plaintiff's and Smith's deposition testimony, which establish that, although Smith was several car lengths away, he did not slow down before the collision and did not attempt to swerve from the vehicle or sound his horn, and the Smith defendants failed to submit any other evidence establishing that there was nothing Smith could have done to avoid the accident (*see Pagels*, 167 AD3d at 188-189).

We agree with Allen on her appeal, however, that the court erred in granting that part of plaintiff's cross-motion with respect to serious injury under the significant disfigurement category, and we therefore modify the amended order accordingly. Plaintiff failed to meet his initial burden on his cross-motion of demonstrating that he sustained a serious injury under the significant disfigurement category (*see generally Waldron v Wild*, 96 AD2d 190, 193-194 [4th Dept 1983]). Although plaintiff submitted photographs of his facial scar in support of his cross-motion, that evidence did not establish as a matter of law that "a reasonable person viewing [his face] in its altered state would regard the condition as unattractive, objectionable or as the subject of pity or scorn" (*Smyth v McDonald*, 101 AD3d 1789, 1791 [4th Dept 2012] [internal quotation marks omitted]; *see Langensiepen v Kruml*, 92 AD3d 1302, 1303 [4th Dept 2012]). Because plaintiff failed to meet his initial burden on that part of his cross-motion with respect to serious

injury under the significant disfigurement category, there is no need to consider the sufficiency of Allen's opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

315
CA 22-00897
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

MICHAEL FORNINO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
W.B. PAYNE COMPANY, INC., DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

SAUNDERS KAHLER, L.L.P., UTICA (MICHAEL D. CALLAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SARETSKY KATZ & DRANOFF, L.L.P., ELMSFORD (ALLEN L. SHERIDAN OF COUNSEL), FOR DEFENDANT-RESPONDENT NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ALAN J. BEDENKO OF COUNSEL), FOR DEFENDANT-RESPONDENT W.B. PAYNE COMPANY, INC.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered May 3, 2022. The order denied plaintiff's motion for summary judgment on the amended complaint against defendant New York Central Mutual Fire Insurance Company and defendant W.B. Payne Company, Inc.

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

Same memorandum as in *Fornino v New York Cent. Mut. Fire Ins. Co.* ([appeal No. 2] — AD3d — [July 28, 2023] [4th Dept 2023]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

316

CA 22-00898

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

MICHAEL FORNINO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

SAUNDERS KAHLER, L.L.P., UTICA (MICHAEL D. CALLAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SARETSKY KATZ & DRANOFF, L.L.P., ELMSFORD (ALLEN L. SHERIDAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (David A. Murad, J.), entered May 3, 2022, in a declaratory judgment action. The judgment, among other things, granted the motion of defendant New York Central Mutual Fire Insurance Company for summary judgment and dismissed plaintiff's amended complaint against it.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the provision dismissing the amended complaint against defendant New York Central Mutual Fire Insurance Company and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff is insured under a homeowner's policy (Policy) issued by defendant New York Central Mutual Fire Insurance Company (NYCM) through an insurance agent, defendant W.B. Payne Company, Inc. (W.B. Payne). After NYCM declined to defend and indemnify plaintiff in a personal injury action arising from the off-premises use of a skid steer owned by plaintiff, plaintiff commenced this action seeking, inter alia, a declaration that NYCM was obligated under the Policy to defend and indemnify him in the personal injury action or, in the alternative, a determination that W.B. Payne breached its duty of care as his insurance agent by failing to obtain proper insurance coverage.

In appeal No. 1, plaintiff appeals from an order denying his motion for summary judgment on the amended complaint against NYCM and W.B. Payne. In appeal No. 2, plaintiff appeals from a judgment that granted NYCM's motion for summary judgment, declared that NYCM had no

duty to defend or indemnify plaintiff under the Policy based on the Policy's Motor Vehicle Liability exclusion, and dismissed the amended complaint against NYCM. In appeal No. 3, plaintiff appeals from an order granting W.B. Payne's cross-motion for summary judgment dismissing the amended complaint and all cross-claims against it.

Addressing first appeal No. 2, we reject plaintiff's contention that Supreme Court erred in granting NYCM's motion inasmuch as we conclude that the court properly determined that the occurrence was not covered under the Policy because the Policy's Motor Vehicle Liability exclusion applies. "In determining a dispute over insurance coverage, we first look to the language of the policy. We construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005], *rearg denied* 5 NY3d 825 [2005] [internal quotation marks omitted]). An insurer's duty to defend "is exceedingly broad" (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648 [1993] [internal quotation marks omitted]), and any "ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 353 [1978], *rearg denied* 46 NY2d 940 [1979]; *see 140 Grist, Inc. v Privilege Underwriters Reciprocal Exch.*, 185 AD3d 636, 638 [2d Dept 2020]). Exclusions contained within the policy "are to be accorded a strict and narrow construction," and the insurance company "must satisfy the burden which it bears of establishing that the exclusions . . . apply in the particular case, and that they are subject to no other reasonable interpretation" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011] [internal quotation marks omitted]). However, a court will "not disregard clear provisions which the insurers inserted in the policies and the insured accepted, and equitable considerations will not allow an extension of coverage beyond its fair intent and meaning in order to obviate objections which might have been foreseen and guarded against" (*Raymond Corp.*, 5 NY3d at 162).

Here, the Policy does not provide personal liability coverage or coverage for medical payments to others if the motor vehicle involved in the occurrence is being used somewhere other than the insured location. There is no dispute that the occurrence at issue here did not take place at either of the locations insured under the Policy. Thus, the question here is only whether the skid steer that was involved in the occurrence is a "motor vehicle" under the terms of the Policy. We conclude that it is. The Policy defines a "motor vehicle" as "[a] self-propelled land or amphibious vehicle." Contrary to plaintiff's contention, that definition "is reasonably susceptible of only one meaning" (*White v Continental Cas. Co.*, 9 NY3d 264, 268 [2007] [internal quotation marks omitted]). "[A]n ambiguity does not arise from an undefined term in a policy"—here, the term "vehicle"—"merely because the parties dispute the meaning of that term" (*Hansard v Federal Ins. Co.*, 147 AD3d 734, 737 [2d Dept 2017], *lv denied* 29 NY3d 906 [2017]). The relevant definition of "vehicle" is "a means of carrying or transporting something" (Merriam-Webster.com Dictionary, vehicle [https://www.merriam-webster.com/

dictionary/vehicle]). Giving "vehicle" its "plain and ordinary meaning does not result in ambiguity" (*Hansard*, 147 AD3d at 737) and, therefore, "the plain and ordinary meaning of the language used [in the Policy] must control its interpretation" (*Malican v Blue Shield of W. N.Y.*, 52 AD2d 190, 192 [4th Dept 1976]). Contrary to plaintiff's contention, the fact that the Vehicle and Traffic Law may define "motor vehicle" differently is of no moment inasmuch as the contract itself provides a definition of that term (*see generally City of Albany v Standard Acc. Ins. Co.*, 7 NY2d 422, 430 [1960]; *Phoenix Ins. Co. v Guthiel*, 2 NY2d 584, 588-589 [1957]). We note, however, that the court erred in dismissing the amended complaint against NYCM in this declaratory judgment action (*see Teague v Automobile Ins. Co. of Hartford, Conn.*, 71 AD3d 1584, 1586 [4th Dept 2010]; *Lyell Party House v Travelers Indem. Co.*, 11 AD3d 972, 973 [4th Dept 2004]), and we therefore modify the judgment accordingly.

We reject plaintiff's contention in appeal No. 3 that the court erred in granting W.B. Payne's cross-motion. "[I]nsurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). "To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy" (*American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735 [2012], *rearg denied* 20 NY3d 1044 [2013]). "A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage" (*Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 158 [2006]). Here, the evidence W.B. Payne submitted in support of its cross-motion established that it had no record showing that plaintiff made a specific request for third-party liability coverage related to use of the skid steer at a property other than the two insured locations. In opposition, plaintiff submitted evidence demonstrating that he had, at most, made a general request for coverage and that W.B. Payne had, in fact, obtained insurance coverage for the use of the skid steer at plaintiff's residence, in keeping with plaintiff's assertion that the skid steer was solely for personal use.

In light of our determinations in appeal Nos. 2 and 3, plaintiff's contention in appeal No. 1 that the court erred in denying his motion is academic.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

317
CA 22-00899
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

MICHAEL FORNINO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
ET AL., DEFENDANTS,
AND W.B. PAYNE COMPANY, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

SAUNDERS KAHLER, L.L.P., UTICA (MICHAEL D. CALLAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered May 3, 2022. The order, among other things, granted the cross-motion of defendant W.B. Payne Company, Inc. for summary judgment dismissing plaintiff's amended complaint and all cross-claims against it.

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

Same memorandum as in *Fornino v New York Cent. Mut. Fire Ins. Co.* ([appeal No. 2] — AD3d — [July 28, 2023] [4th Dept 2023]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

328
CA 22-00823
PRESENT: SMITH, J.P., LINDLEY, CURRAN, MONTOUR, AND OGDEN, JJ.

MIKAYLA H. MANNER, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

STEVEN A. YANCEY AND WHITE'S FARM SUPPLY, INC.,
DEFENDANTS-APPELLANTS.

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

GOLDBLATT & ASSOCIATES, P.C., MOHEGAN LAKE (KENNETH B. GOLDBLATT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered April 26, 2022. The order, inter alia, granted those parts of the motion of defendants seeking to compel plaintiff to submit to a defense neuropsychological examination with safeguards and for a protective order, and directed defendant to provide test materials and raw data to plaintiff's counsel.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the order directing defendants to provide the testing materials and raw data directly to plaintiff's counsel and that part of the order granting that part of defendants' motion for a protective order and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle that she was driving was struck by a flatbed tow truck operated by defendant Steven A. Yancey and owned by defendant White's Farm Supply, Inc. Plaintiff alleged, inter alia, that she suffered a concussion, post-concussion syndrome, and a traumatic brain injury as a result of the accident. In response to notice that defendants would be requesting an independent neuropsychological evaluation, plaintiff's counsel indicated that plaintiff would be produced once the parties entered into a stipulation requiring that the testing neuropsychologist provide directly to plaintiff's counsel the testing materials used during the examination and the raw data generated. Specifically, plaintiff proposed a stipulation whereby the testing materials and raw data disclosed to plaintiff's counsel would not be released to any third party other than a licensed psychologist or neuropsychologist, would not be placed in the public court file or copied, and would be returned, unaltered, to defense counsel at the conclusion of the

litigation.

Defendants contacted three neuropsychologists, each of whom refused to conduct the examination under the terms outlined in the proposed stipulation. Thereafter, defendants moved, inter alia, to compel plaintiff to submit to an independent neuropsychological examination and for a protective order pursuant to CPLR 3103 directing that the data and materials be released to plaintiff's treating neuropsychologist and not directly to plaintiff's counsel. Defendants submitted the affidavits of the three neuropsychologists, each of whom averred that they would not perform an examination on plaintiff if they were required to release the testing materials and raw data directly to plaintiff's counsel.

Supreme Court granted defendants' motion to the extent that it sought to compel plaintiff to submit to an independent neuropsychological examination but ordered defendants to disclose the testing materials and raw data directly to plaintiff's counsel, subject to the safeguards set forth in plaintiff's proposed stipulation. Defendants appeal.

Defendants contend that the court abused its discretion in ordering that the testing materials and raw data be provided directly to plaintiff's counsel because the order has resulted in prejudice to defendants inasmuch as they are unable to obtain an examination subject to the conditions imposed. It is well settled that "[a] trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion" (*Giles v Yi*, 105 AD3d 1313, 1315 [4th Dept 2013], *mod sub nom. Hamilton v Miller*, 23 NY3d 592 [2014] [internal quotation marks omitted]). The CPLR provides that the court may issue "a protective order denying, limiting, conditioning or regulating the use of any disclosure device . . . to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]; *see Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729, 730-731 [2d Dept 2011]).

Here, defendants have established that they were unable to obtain an independent neuropsychological examination under the conditions contemplated by the proposed stipulation, which have been imposed by the court. We note that several cases cited by plaintiff (*see Jessica H. v Spagnolo*, 41 AD3d 1261, 1263 [4th Dept 2007]; *Marable v Hughes*, 38 AD3d 1344, 1344-1345 [4th Dept 2007]; *Anderson v Seigel*, 255 AD2d 409, 410 [2d Dept 1998]; *Andruszewski v Cantello*, 247 AD2d 876, 876-877 [4th Dept 1998]) are distinguishable because, inter alia, in those cases the testing in question had already been conducted. Thus, under the facts and circumstances presented, we vacate that portion of the order directing defendants to provide the testing materials and raw data directly to plaintiff's counsel. In light of our determination with regard to disclosure, we conclude that defendants' request for a protective order is premature and we therefore further modify the order by vacating that part of the order granting that part of

defendants' motion for a protective order. Of course, nothing in our decision precludes plaintiff from moving, after having appeared for examination, to compel the disclosure of the testing materials and raw data directly to her counsel (*see Giordano*, 84 AD3d at 730-731).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

331
CA 22-00251
PRESENT: SMITH, J.P., LINDLEY, CURRAN, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF THE ESTATE OF RICHARD N.
PANELLA, DECEASED.
-- MEMORANDUM AND ORDER
NICOLE A. IVIE AND STEPHEN R. PANELLA,
PETITIONERS-APPELLANTS,

V

DEBORAH WHALEN PANELLA, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

BARCLAY DAMON LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Oneida County (Louis P. Gigliotti, S.), entered August 3, 2021. The order, among other things, denied petitioners' motion for summary judgment.

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

Same memorandum as in *Matter of Estate of Panella* ([appeal No. 2] — AD3d — [July 28, 2023] [4th Dept 2023]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

332
CA 22-01573
PRESENT: SMITH, J.P., LINDLEY, CURRAN, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF THE ESTATE OF RICHARD N. PANELLA, DECEASED.
-- MEMORANDUM AND ORDER
NICOLE A. IVIE AND STEPHEN R. PANELLA, PETITIONERS-APPELLANTS;

DEBORAH WHALEN PANELLA, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

BARCLAY DAMON LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Oneida County (Louis P. Gigliotti, S.), entered September 21, 2022. The order dismissed the petition.

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

Memorandum: Petitioners, who are the adult children of Richard N. Panella (decedent), commenced this proceeding seeking to enforce a provision ("will provision") in the 1989 Separation Agreement (Agreement) and Final Decree of Divorce (Decree) between decedent and their mother, Carol D. Jubenville (mother). The will provision stated that decedent and the mother would "execute his or her Last Will and Testament, naming [petitioners] as irrevocable beneficiar[ies] . . . of 100% of the existing assets of his or her gross estate." The Agreement and Decree further stated that decedent and the mother would "provide the other with a conformed copy of the executed will."

In appeal No. 1, petitioners appeal from an order insofar as it denied their motion for summary judgment, while in appeal No. 2 petitioners appeal from an order that dismissed their petition following a hearing. In appeal No. 3, petitioners appeal from an amended order that corrected typographical errors in the order in appeal No. 2.

As a preliminary matter, we conclude that the appeals from the order in appeal No. 1 and amended order in appeal No. 3 must be dismissed. Although we agree with petitioners that their contentions related to their summary judgment motion are not moot, we nevertheless

dismiss the appeal from the order in appeal No. 1 because that order is subsumed in the final order in appeal No. 2 (*see Matter of Tehan [Tehan's Catalog Showrooms, Inc.]* [appeal No. 2], 144 AD3d 1530, 1531 [4th Dept 2016]; *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 generally* CPLR 5501 [a] [1]). The issues raised on the appeal from the order denying petitioners' motion for summary judgment are brought up for review on the appeal from the final order (*see* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d 241, 248 [1976]; *State of New York v 158th St. & Riverside Dr. Hous. Co., Inc.*, 100 AD3d 1293, 1295 n 2 [3d Dept 2012], *lv denied* 20 NY3d 858 [2013]). Additionally, inasmuch as the amended order in appeal No. 3 did not make any material or substantive changes to the order in appeal No. 2, the appeal from the amended order in appeal No. 3 must be dismissed (*see Schachtler Stone Prods., LLC v Town of Marshall*, 209 AD3d 1316, 1318 [4th Dept 2022]; *Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Decedent died in 2017, and the terms of his 2016 will left his entire estate to respondent, who was his second wife. Ignorant of the provisions of the Agreement and Decree, petitioners signed waivers of process and consented to the probate of decedent's 2016 will. Surrogate's Court entered a decree granting probate on June 1, 2017. Later, the mother had occasion to review the Decree, and informed petitioners about the will provision.

We conclude that the Surrogate properly denied petitioners' motion for summary judgment. This proceeding, at its heart, is a breach of contract action by two adult children who are seeking to enforce a separation agreement that was executed when they were minors. According to petitioners, they are third-party beneficiaries of the will provision contained in the Agreement and Decree and decedent breached that contract when he failed to leave them 100% of his estate in his 2016 will. Petitioners, however, failed to submit decedent's will in support of their motion and, in any event, they failed to establish as a matter of law that decedent breached the Agreement and Decree.

"It is well settled that the elements of a breach of contract cause of action are the existence of a contract, the *plaintiff's* performance under the contract, the defendant's breach of that contract, and resulting damages" (*Arista Dev., LLC v Clearmind Holdings, LLC*, 207 AD3d 1127, 1127 [4th Dept 2022] [emphasis added and internal quotation marks omitted]; *see Pearl St. Parking Assoc. LLC v County of Erie*, 207 AD3d 1029, 1031 [4th Dept 2022]; *Wilsey v 7203 Rawson Rd., LLC*, 204 AD3d 1497, 1498-1499 [4th Dept 2022]). As alleged third-party beneficiaries of the contract, however, petitioners were not required to demonstrate performance, and we therefore agree with petitioners that the Surrogate improperly focused on whether the mother performed under the Agreement and Decree.

"It has been long established that a third party may sue as a beneficiary on a contract made for [the third party's] benefit . . . An intent to benefit the third party must be shown . . . Absent such

intent, the third party is merely an incidental beneficiary with no right to enforce the particular contract" (*Goresen v Gallagher*, 97 AD2d 626, 627 [3d Dept 1983], *lv denied* 61 NY2d 602 [1984]). In the seminal case of *Forman v Forman* (17 NY2d 274 [1966]), the Court of Appeals recognized the right of *infant* children to enforce separation agreement provisions where the children are the actual and direct beneficiaries of a provision in that agreement (*see Markwica v Davis*, 99 AD2d 906, 906-907 [3d Dept 1984], *affd* 64 NY2d 38 [1984]; *Forman*, 17 NY2d at 280; *Drake v Drake*, 89 AD2d 207, 209 [4th Dept 1982]).

Notably, the Court in *Forman* allowed the children's action against the father to proceed even though it was established that the mother was the first to breach the separation agreement (*see Forman*, 17 NY2d at 283). Relying on *Forman*, we conclude that petitioners' right to enforce the Decree against decedent's estate is not dependent on the mother's performance of her obligations.

Where, as here, a separation agreement is incorporated but not merged into a judgment of divorce, the agreement "is a contract subject to the principles of contract construction and interpretation" (*Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990], *rearg denied* 76 NY2d 889 [1990]; *see Matter of Wheeler v Wheeler*, 174 AD3d 1507, 1508 [4th Dept 2019]). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms . . . Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous . . . Where, however, contract language is reasonably susceptible of more than one interpretation, . . . extrinsic or parol evidence may be then permitted to determine the parties' intent as to the meaning of that language" (*Timkey v City of Lockport*, 167 AD3d 1490, 1491-1492 [4th Dept 2018] [internal quotation marks omitted]; *see Ames v County of Monroe*, 162 AD3d 1724, 1725-1726 [4th Dept 2018]; *see generally Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]).

To determine whether a contractual provision is ambiguous, the entire agreement must be reviewed as a whole, "and '[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby' " (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]; *see Brad H. v City of New York*, 17 NY3d 180, 185-186 [2011]; *Continental Indus. Capital, LLC v Lightwave Enters., Inc.*, 85 AD3d 1639, 1640 [4th Dept 2011]). "An agreement is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014] [internal quotation marks omitted]; *see Dan's Hauling & Demo, Inc. v GMMM Hickling, LLC*, 193 AD3d 1404, 1406 [4th Dept 2021]).

"Ambiguity in a contract arises where the contract, read as a whole, fails to disclose its purpose and the parties' intent . . . ,

or where specific language is susceptible of two reasonable interpretations . . . [A] party seeking summary judgment has the burden of establishing that the construction it favors is the only construction which can fairly be placed thereon" (*Dan's Hauling & Demo, Inc.*, 193 AD3d at 1406-1407 [internal quotation marks omitted]; *see Donahue v Cuomo*, 38 NY3d 1, 13 [2022]; *see generally Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]).

Here, upon review of the Agreement and Decree, we conclude that the will provision is ambiguous. Although the will provision required the mother and decedent to name petitioners in their wills as 100% beneficiaries of their then "existing" gross estates and contained no termination provision, the Agreement and Decree contained various provisions setting out benefits to petitioners that would terminate upon their emancipation, as defined therein, as well as provisions with no termination clause that would necessarily terminate upon petitioners reaching the age of majority (*see Matter of Stroud v Vahl*, 74 AD3d 1726, 1727 [4th Dept 2010]; *Matter of Osmundson v Held-Cummings*, 20 AD3d 922, 923 [4th Dept 2005], *lv denied* 5 NY3d 711 [2005]; *see generally* Domestic Relations Law § 2).

Consequently, we agree with respondent that the will provision was ambiguous regarding its expiration date. Reading the Agreement and Decree as a whole, including the numerous provisions for which termination would necessarily occur even without a specific termination provision, we conclude that petitioners failed to meet their burden of establishing that their interpretation of the will provision is the only construction that can fairly be made. The Surrogate therefore properly denied petitioners' motion for summary judgment.

Following a hearing, the Surrogate concluded that petitioners failed to establish entitlement to relief. Preliminarily, we agree with petitioners that the Surrogate erred in determining that petitioners may enforce the Agreement and Decree only if they establish that the *mother* requested that the will provision be inserted into the operative documents. Although "[i]n ascertaining the rights of an asserted third-party beneficiary, the intention of the promisee is of primary importance" (*Drake*, 89 AD2d at 209), here the evidence at the hearing established that *both* the mother and decedent were promisees, and that decedent, the promisee at issue in this proceeding, requested that the provision be inserted into the Agreement.

Nevertheless, we conclude that the Surrogate properly dismissed the petition because petitioners' own evidence at the hearing, including the testimony of the mother, established that it was the intention of decedent and the mother to leave their assets exclusively to petitioners but only while they were minors (*see generally Matter of Brooks v Brooks*, 171 AD3d 1462, 1464 [4th Dept 2019]).

Contrary to petitioners' remaining contention, the Surrogate did not violate the law of the case doctrine. Initially, the law of the

case doctrine would not apply to the conclusions reached by the Surrogate in the context of the summary judgment motion because the Surrogate's " 'holding in relation to the prior motion . . . was based on the facts and law presented by the parties in that procedural posture, and no more' " (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 152 AD3d 1215, 1216-1217 [4th Dept 2017]). Moreover, "[t]he law of the case doctrine does not apply to appellate review of a subordinate court's order" (*Hey v Town of Napoli*, 265 AD2d 803, 804 [4th Dept 1999]; *see Burgundy Basin Inn v Watkins Glen Grand Prix Corp.*, 51 AD2d 140, 143 [4th Dept 1976]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

333
CA 22-01753
PRESENT: SMITH, J.P., LINDLEY, CURRAN, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF THE ESTATE OF RICHARD N. PANELLA, DECEASED.
-- MEMORANDUM AND ORDER
NICOLE A. IVIE AND STEPHEN R. PANELLA, PETITIONERS-APPELLANTS;

DEBORAH WHALEN PANELLA, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

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

BARCLAY DAMON LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an amended order of the Surrogate’s Court, Oneida County (Louis P. Gigliotti, S.), entered October 11, 2022. The amended order dismissed the petition.

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

Same memorandum as in *Matter of Estate of Panella* ([appeal No. 2] — AD3d — [July 28, 2023] [4th Dept 2023]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

337
CA 22-00602
PRESENT: SMITH, J.P., LINDLEY, CURRAN, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF MDS ASSOCIATES, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ECONOMIC
DEVELOPMENT, DIVISION OF MINORITY AND WOMEN'S
BUSINESS DEVELOPMENT, RESPONDENT-APPELLANT.

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

COLLIGAN LAW, LLP, BUFFALO (ERICK KRAEMER OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered February 10, 2022, in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner, MDS Associates, Inc. (MDS), commenced this CPLR article 78 proceeding seeking to annul a determination that denied its application for recertification of MDS as a women-owned business enterprise (WBE) (*see* Executive Law § 310 [15]; 5 NYCRR 144.2). MDS is a distributor of personal protective equipment and other products. From its incorporation in 1986 until 2010, Marianne Stec (Marianne) was the 51% owner and Donald Stec (Donald) was the 49% owner. In approximately 1991, MDS was certified by respondent, New York State Department of Economic Development, Division of Minority and Women's Business Development (Division), as a WBE. In 2010, Marianne and Donald, respectively, transferred their ownership interests to their daughter-in-law Sarah Stec (Sarah) and their son Chris Stec (Chris).

In 2016, MDS applied for recertification as a WBE, but the Division denied the application, based on MDS's failure to meet three eligibility criteria related to Sarah's ownership and control of MDS. MDS filed an administrative appeal. The Administrative Law Judge (ALJ) recommended that the determination be affirmed, and the Executive Director of the Division accepted that recommendation.

Supreme Court granted MDS's petition, remitted the application for WBE certification to the Division, and directed the Division to grant the application. The Division appeals. We reverse the judgment and dismiss the petition.

" 'In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious' " (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *see generally* CPLR 7803 [3]). Here, we agree with the Division that its determination is supported by a rational basis and is not arbitrary and capricious.

It was rational for the Division to determine that Sarah's contribution was not proportionate to her equity interest in the business enterprise (*see* 5 NYCRR 144.2 [former (a) (1)]). After the Division received MDS's initial application, it requested, among other things, "a detailed narrative showing how [Sarah's] . . . contribution of money, property, equipment or expertise is proportionate to" her 51% ownership interest. With respect to that request, MDS submitted a brief response stating that there was no corresponding documentation because Sarah had been gifted 51% of the company by Marianne so that MDS could keep its status as a WBE. MDS also submitted documents summarizing, inter alia, Sarah's and Chris's respective duties in the business.

We conclude that the record properly before the ALJ established that Chris contributed more significant expertise than Sarah, who mainly handled administrative tasks, and that a rational basis exists for the Division's determination that Sarah's contributions were not proportionate to her 51% equity interest.

Inasmuch as we conclude that the Division's determination has a rational basis on that ground, it is not necessary for us to address the other two bases for the Division's determination (*see Matter of Occupational Safety & Envtl. Assoc., Inc. v New York State Dept. of Economic Dev.*, 161 AD3d 1582, 1583 [4th Dept 2018], *lv denied* 32 NY3d 904 [2018]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

351

CA 22-01678

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

CHANA FREEDMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BARBARA GOLDSTEIN, DEFENDANT,
MICHAEL GOLDSTEIN AND RICHARD GOLDSTEIN,
DEFENDANTS-RESPONDENTS.

LACY KATZEN LLP, ROCHESTER (HAL KIEBURTZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NOVICK & ASSOCIATES, P.C., HUNTINGTON (ALBERT V. MESSINA, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Craig J. Doran, J.), entered May 10, 2022. The order granted the motion of defendants Michael Goldstein and Richard Goldstein to dismiss the complaint against them.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action against defendant Barbara Goldstein (Barbara), her aunt, and defendants Michael Goldstein (Michael) and Richard Goldstein (Richard), her uncles, seeking the recovery of certain funds. In her complaint, plaintiff alleged that she opened a bank account to hold money for the benefit of her brother (brother), a nonparty who lives in and is a citizen of Israel. She further alleged that Barbara persuaded plaintiff to transfer the money to her in order to set up a trust for the brother's benefit. Plaintiff alleged that, instead of setting up a trust for her brother's benefit, Barbara transferred the money into defendants' accounts. Michael and Richard moved pursuant to CPLR 3211 (a) (10) to dismiss the complaint against them for failure to join a necessary party, i.e., the brother. Supreme Court granted the motion and dismissed the complaint, and plaintiff now appeals.

Contrary to plaintiff's contention, the court properly determined that her brother was a necessary party to the action. CPLR 1001 (a) provides in relevant part that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." In support of the motion, Michael and Richard submitted evidence that the parties were

engaged in settlement negotiations, and plaintiff was attempting to get her brother's signature on a release for a settlement of the action. In addition, plaintiff's attorney essentially admitted in opposition to the motion that the brother was a necessary party. Plaintiff's attorney averred that the settlement of the action was contingent on obtaining a release from the brother and that, under the settlement, the money would be held in trust for the brother's benefit, with a portion of the money going to defendants. The attorney also admitted that the brother had as much of a moral or legal claim to the disputed money as did defendants. We therefore agree with the court that the brother was a necessary party inasmuch as he "might be inequitably affected by a judgment in the action" (CPLR 1001 [a]; *see Matter of Hartford/North Bailey Homeowners Assn. v Zoning Bd. of Appeals of Town of Amherst*, 63 AD3d 1721, 1723 [4th Dept 2009], *lv dismissed* 13 NY3d 901 [2009]; *see generally Matter of Green v Bellini*, 12 AD3d 1148, 1150 [4th Dept 2004]).

Plaintiff further contends that the court erred in granting the motion and dismissing the complaint without considering the factors set forth in CPLR 1001 (b). CPLR 1001 (b) provides in relevant part that, when "a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order [the person] summoned. If jurisdiction over [the person] can be obtained only by [their] consent or appearance, the court, when justice requires, may allow the action to proceed without [their] being made a party." In determining whether to allow the action to proceed, a court must consider the five factors set forth in CPLR 1001 (b). Thus, where, as here, "a necessary party can be joined only by consent or appearance, a court must engage in the CPLR 1001 (b) analysis to determine whether to allow the case to proceed without that party" (*Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 459 [2005]; *see Miller v Wendy Joan St. Wecker Trust U/A Aug. 28, 1997*, 173 AD3d 1007, 1008-1009 [2d Dept 2019]). Courts have discretion to permit a case to go forward without a necessary party "after weighing the interests of the litigants, the absent party and the public" (*Red Hook/Gowanus Chamber of Commerce*, 5 NY3d at 459). Dismissal of an action for failure to join a necessary party is a "last resort" (*id.*; *see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 821 [2003], *cert denied* 540 US 1017 [2003]). No single factor under CPLR 1001 (b) is determinative and, "while the court need not separately set forth its reasoning as to each factor, the statute directs it to consider all five" factors (*Red Hook/Gowanus Chamber of Commerce*, 5 NY3d at 459).

Here, after determining that the brother was a necessary party, the court should not have granted the motion and dismissed the complaint without considering the CPLR 1001 (b) factors (*see Eclair Advisor Ltd. v Jindo Am., Inc.*, 39 AD3d 240, 245 [1st Dept 2007]). Inasmuch as the record is insufficient for us to make a determination with respect to those factors, we hold the case, reserve decision, and remit the matter to Supreme Court for a determination pursuant to CPLR 1001 (b), following a hearing if necessary, whether plaintiff should be permitted to proceed without joining her brother as a party (*see*

Miller, 173 AD3d at 1009; *Matter of Llana v Town of Pittstown*, 234 AD2d 881, 884 [3d Dept 1996]; *Staten Is. Hosp. v Alliance Brokerage Corp.*, 166 AD2d 574, 576 [2d Dept 1990]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

352

CA 22-00432

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

VICTORY VILLAGE TENANTS ASSOCIATION, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EVERGREEN COMMUNITIES, LLC, VICTORY
VILLAGE MHC, LLC, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

ROWLANDS, LEBROU & GRIESMER, PLLC, SARATOGA SPRINGS (MICHAEL J. CATALFIMO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., ROCHESTER (JONATHAN C. PLACITO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered February 14, 2022. The order, insofar as appealed from, denied the motion of defendants Evergreen Communities, LLC, and Victory Village MHC, LLC, to dismiss the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendants Evergreen Communities, LLC, and Victory Village MHC, LLC, and dismissing the amended complaint against those defendants insofar as it seeks monetary damages, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a non-profit corporation composed of certain residents of nonparty Victory Village Manufactured Home Community (Victory Village), was formed to promote the interests of the Victory Village residents. Plaintiff commenced this action against two business entities associated with Victory Village, i.e., Victory Village MHC, LLC, and Evergreen Communities, LLC (collectively, defendants), as well as two individuals. In its amended complaint, plaintiff alleged that defendants imposed a $60 monthly increase in rent on all Victory Village tenants in 2017 for the purpose of “begin[ning] the process of providing residents with access to city water and sewer services,” but failed to make any meaningful progress on that project in the more than two-year period from the time the monthly increase was imposed through the time the suit was commenced. In the same period, Victory Village’s water and sewage systems continued to deteriorate, leading to sewage backups, foul smells, illnesses, and a week-long “boil water” notice. The

amended complaint asserts seven causes of action, including breach of contract, unjust enrichment, and violations of Real Property Law § 233, and seeks declaratory and injunctive relief, as well as monetary damages including rent abatement. Defendants moved to dismiss the amended complaint against them on the ground that plaintiff lacked standing, and Supreme Court, inter alia, denied the motion. Defendants appeal.

"An association or organization has standing when 'one or more of its members would have standing to sue,' 'the interests it asserts are germane to its purposes,' and 'neither the asserted claim nor the appropriate relief requires the participation of the individual members' " (*Matter of Melrose Credit Union v City of New York*, 161 AD3d 742, 747 [2d Dept 2018], quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 775 [1991]). It is undisputed that plaintiff meets the first two requirements.

With respect to the third requirement, "whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought" (*Warth v Seldin*, 422 US 490, 515 [1975]; *see generally Society of Plastics Indus.*, 77 NY2d at 772-775; *Matter of Dental Socy. of State of N.Y. v Carey*, 61 NY2d 330, 333-334 [1984]). That is because, where an "association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy . . . will inure to the benefit of those members of the association actually injured" (*Warth*, 422 US at 515). Nevertheless, "[t]he fact that a limited amount of individuated proof may be necessary [to prove a claim] does not in itself preclude associational standing" (*National Assn. of Coll. Bookstores, Inc. v Cambridge Univ. Press*, 990 F Supp 245, 250 [SD NY 1997]; *see New York State Natl. Org. for Women v Terry*, 886 F2d 1339, 1349 [2d Cir 1989], *cert denied* 495 US 947 [1990]; *see generally Dental Socy. of State of N.Y.*, 61 NY2d at 335). Indeed, "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction" (*Warth*, 422 US at 511).

Here, inasmuch as the monthly increase impacted all tenants equally, and inasmuch as a plaintiff who "seeks only injunctive relief [can] prevail without a showing by its members" as to their individual damages (*National Assn. of Coll. Bookstores, Inc.*, 990 F Supp at 248), we conclude that plaintiff has standing to seek declaratory and injunctive relief (*see generally Hunt v Washington State Apple Advertising Commn.*, 432 US 333, 344 [1977]; *Warth*, 422 US at 511). However, to the extent that plaintiff seeks monetary damages, which would require individualized evidence from plaintiff's members, plaintiff lacks standing (*see Matter of Scarsdale Comm. for Fair Assessments v Albanese*, 202 AD3d 966, 968 [2d Dept 2022]; *see generally Matter of Citizens Organized to Protect the Envt. v Planning Bd. of Town of Irondequoit*, 50 AD3d 1460, 1461 [4th Dept 2008]). We therefore modify the order by granting the motion in part and

dismissing the amended complaint against defendants insofar as it seeks monetary damages.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

353

CA 22-01208

PRESENT: PERADOTTO, J.P., CURRAN, OGDEN, AND GREENWOOD, JJ.

EDWIN G. SHELP, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RONALD H. RATNIK, DEFENDANT-RESPONDENT.

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

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANTHONY R. BRIGHTON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered February 8, 2022. The judgment effectively dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained as a result of a motor vehicle accident in which his vehicle was struck by a vehicle operated by defendant. Plaintiff appeals from a judgment, entered upon a jury verdict of no cause of action, effectively dismissing the complaint. Plaintiff's appeal brings up for review the denial of his posttrial motion to set aside the verdict (*see* CPLR 5501 [a] [2]).

We reject plaintiff's contention that Supreme Court erred in failing to set aside the verdict as against the weight of the evidence. It is well established that "[a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*Sauter v Calabretta*, 103 AD3d 1220, 1220 [4th Dept 2013] [internal quotation marks omitted]). "That determination is addressed to the sound discretion of the trial court, but if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720 [4th Dept 2003]; *see Todd v PLSIII, LLC-We Care*, 87 AD3d 1376, 1377 [4th Dept 2011]). Here, there were conflicting expert medical opinions presented at trial on the issue whether plaintiff's injuries were caused by the accident, and thus the issue of causation raised credibility issues for the jury (*see Salisbury v Christian*, 68 AD3d

1664, 1665 [4th Dept 2009]). Moreover, the evidence at trial established that plaintiff failed to inform his expert treating physicians that he had suffered similar complaints before the accident, and also established that those physicians relied upon the history as provided to them by plaintiff (*see Sanchez v Dawson*, 120 AD3d 933, 934-935 [4th Dept 2014]; *Salisbury*, 68 AD3d at 1665). Under these circumstances, we conclude that the jury's interpretation of the evidence was not "palpably wrong" (*McMillian v Burden*, 136 AD3d 1342, 1344 [4th Dept 2016] [internal quotation marks omitted]).

We also reject plaintiff's contention that the court erred in refusing to set aside the verdict on the ground that the conduct of defendant's counsel denied him a fair trial. Although defendant's counsel made some improper comments, we conclude that, under the circumstances here, they were not so prejudicial as to deprive plaintiff of a fair trial (*see Bhim v Platz*, 207 AD3d 511, 514 [2d Dept 2022]; *Yu v New York City Health & Hosps. Corp.*, 191 AD3d 1040, 1043 [2d Dept 2021]; *Harden v Faulk*, 111 AD3d 1380, 1381 [4th Dept 2013], *amended on other grounds* 115 AD3d 1274 [4th Dept 2014], *lv denied* 23 NY3d 907 [2014]).

Finally, we have reviewed plaintiff's remaining contentions and conclude that they do not warrant reversal or modification of the judgment.

Entered: July 28, 2023 Ann Dillon Flynn
Clerk of the Court

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

354
CA 22-01620
PRESENT: WHALEN, P.J., PERADOTTO, CURRAN, OGDEN, AND GREENWOOD, JJ.

DAVID IMPELLIZZERI, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

CINDY CAMPAGNI, DENISE BARBER, LORI FEENEY,
SHARON KLAIBER, MAXINE THOMPSON AND LISA BRACKETT,
DEFENDANTS-RESPONDENTS.

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GALE GALE & HUNT, LLC, FAYETTEVILLE (MINLA KIM OF COUNSEL), FOR DEFENDANT-RESPONDENT CINDY CAMPAGNI.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY KIERNAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DENISE BARBER, LORI FEENEY, SHARON KLAIBER, MAXINE THOMPSON AND LISA BRACKETT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 4, 2022. The order granted the motions of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff worked as a registered nurse for nonparty SUNY Upstate Medical University (Upstate) for several years until June 2015. At that time, defendant Cindy Campagni—who was being trained by plaintiff—accused him of, inter alia, sexually harassing her and inappropriately accessing the medical records of a person who was not his patient. Upon receiving Campagni’s accusations, several Upstate administrators, including defendants Denise Barber, Lori Feeney, Sharon Klaiber, Maxine Thompson, and Lisa Brackett (collectively, Upstate defendants), commenced investigations into plaintiff’s behavior. At the conclusion of those internal investigations, Upstate determined that Campagni’s accusations against plaintiff were substantiated.

Thereafter, Upstate issued plaintiff a notice of discipline (NOD), which indicated that Upstate was ultimately seeking to terminate plaintiff’s employment based on the substantiated accusations. Because plaintiff was a registered nurse, Klaiber sent the NOD to the New York State Office of Professional Discipline (OPD)

in accordance with Public Health Law § 2803-e. Pursuant to the collective bargaining agreement between Upstate and plaintiff's union, plaintiff elected to arbitrate the NOD. Ultimately, following a full hearing on the matter, the arbitrator exonerated plaintiff on the charge of sexually harassing Campagni, but nonetheless determined that he had improperly accessed medical records of someone who was not his patient. The arbitrator concluded, inter alia, that termination was not a proper penalty, and reinstated plaintiff's employment at Upstate. In light of that decision, one of the Upstate defendants tried to call plaintiff about returning to work, indicating that he would be working the night shift. Plaintiff did not respond to the call or appear for his first scheduled shift. At that point, Upstate sent plaintiff a letter noting his absence and warning him that he could face discipline, up to and including termination. Plaintiff ultimately tendered his resignation asserting that Upstate was attempting to reinstate him into a hostile work environment.

Shortly thereafter, plaintiff commenced this action asserting causes of action for tortious interference with his employment, defamation, and intentional infliction of emotional distress. He appeals from an order that granted the separate motions of the Upstate defendants and Campagni for summary judgment dismissing the complaint against them. We affirm.

Initially, we note that plaintiff has abandoned his intentional infliction of emotional distress cause of action and his defamation cause of action, except insofar as it pertained to Klaiber and her forwarding of the NOD to the OPD (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Thus, the only claims relevant to this appeal are the tortious interference claims against the Upstate defendants and Campagni, and the defamation claim asserted against Klaiber.

We conclude that, with respect to the tortious interference claims against the Upstate defendants and the defamation claim against Klaiber, Supreme Court properly granted the Upstate defendants' motion on the ground that it lacked subject matter jurisdiction over those claims. The Court of Claims has exclusive "jurisdiction . . . [t]o hear and determine a claim of any person . . . against the state . . . for the torts of its officers or employees while acting as such officers or employees" (Court of Claims Act § 9; *see* NY Const, art VI, § 9; *see generally Morell v Balasubramanian*, 70 NY2d 297, 300-301 [1987]). More specifically, "[a] suit against a State officer will be held to be one which is really asserted against the State when it arises from actions or determinations of the officer made in [their] official role and involves rights asserted, not against the officer individually, but solely against the State" (*Morell*, 70 NY2d at 301). In contrast, where "the suit against the State agent or officer is in tort for damages arising from the breach of a duty owed individually by such agent or officer directly to the injured party, the State is not the real party in interest—even though it could be held secondarily liable for the tortious acts under respondeat superior" (*id.*).

Here, the Upstate defendants established that the allegedly improper acts undertaken in connection with the investigation concerning plaintiff were all done in their official capacities (*see Monreal v New York State Dept. of Health*, 38 AD3d 1118, 1119 [3d Dept 2007]; *Olsen v New York State Dept. of Envtl. Conservation*, 307 AD2d 595, 596 [3d Dept 2003], *lv denied* 1 NY3d 502 [2003]). Specifically, the Upstate defendants established that they had conducted their investigation pursuant to the law, as well as Upstate's internal policies, and that any deviations from Upstate's internal policies were not so severe or egregious that they raised triable issues of fact whether the Upstate defendants had acted intentionally in their individual capacity. Additionally, the Upstate defendants established that Klaiber's decision to send the NOD to the OPD—the basis of the surviving defamation claim—was done pursuant to her obligations under Public Health Law § 2803-e, i.e., in furtherance of her official duties for Upstate. We further conclude that, in opposition, plaintiff failed to raise any triable issues of fact whether the Upstate defendants acted outside the scope of their official duties in conducting the investigation into Campagni's complaints about plaintiff (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With respect to the tortious interference claim asserted against Campagni, it is undisputed that she did not move for summary judgment on the basis of collateral estoppel. Thus, the court erred in raising that issue sua sponte as the primary ground for granting Campagni's motion inasmuch as "[t]he parties had no opportunity to address the issue of collateral estoppel" (*Frank M. Flower & Sons, Inc. v North Oyster Bay Baymen's Assn., Inc.*, 150 AD3d 965, 966 [2d Dept 2017]; *see Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 54 [2d Dept 2014]; *see generally Misicki v Caradonna*, 12 NY3d 511, 519 [2009]).

Campagni nevertheless asserts that, even if we cannot affirm on the ground of collateral estoppel, the court properly granted her motion with respect to the tortious interference claim because, with respect to the merits of that claim, she did not cause the end of plaintiff's employment relationship with Upstate. "Although the court did not address that issue in its decision, [Campagni] properly raises it on appeal as an alternative ground for affirmance" (*Melgar v Melgar*, 132 AD3d 1293, 1294 [4th Dept 2015]; *see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]). We agree with Campagni.

In order to succeed on a cause of action for tortious interference with an employment relationship, a plaintiff must show: "(1) the existence of a business relationship between the plaintiff and a third party; (2) the defendant['s] interference with that business relationship; (3) that the defendant[] acted with the sole purpose of harming plaintiff or used dishonest, unfair, improper or illegal means that amounted to a crime or an independent tort; and (4) that such acts resulted in the injury to the plaintiff's relationship with the third party" (*Conklin v Laxen*, 180 AD3d 1358, 1359 [4th Dept

2020] [internal quotation marks omitted]; *see McHenry v Lawrence*, 66 AD3d 650, 651 [2d Dept 2009], *lv denied* 15 NY3d 703 [2010]).

The parties do not dispute that Campagni established her entitlement to judgment as a matter of law by showing that she did not proximately cause any injury to plaintiff's employment relationship with Upstate because he made the decision to resign his employment, i.e., he was not terminated as a direct consequence of her accusations (*see generally Zuckerman*, 49 NY2d at 562; *Conklin*, 180 AD3d at 1359-1360). In opposition, plaintiff failed to raise a triable issue of fact with respect to proximate cause because he relied on nothing more than speculation and conjecture to show that he was constructively terminated as a consequence of Campagni's accusations (*see generally Zuckerman*, 49 NY2d at 562; *Trahwen, LLC v Ming 99 Cent City #7, Inc.*, 106 AD3d 1467, 1468 [4th Dept 2013], *lv dismissed* 21 NY3d 1066 [2013]). In short, plaintiff's submissions in opposition did not raise any triable issues of fact whether Upstate's decision to assign him to the night shift was an attempt to have him resign.

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

378

CA 22-00449

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

GERALD D. LISOWSKI,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MELINDA A. LISOWSKI,
DEFENDANT-RESPONDENT-APPELLANT.

JAMES P. RENDA, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT-RESPONDENT.

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

Appeal and cross-appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 3, 2022, in a divorce action. The judgment, inter alia, equitably distributed the marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing plaintiff, upon receipt of either an invoice from the school or proof of payment by defendant, to pay $12,622.27 in college expenses to either the school or defendant, as appropriate; striking subparagraph 1 of the eighth decretal paragraph; and directing that plaintiff is entitled to 50% of the monies he expended for improvement or repair to the marital residence, as recommended by the realtor, from defendant's net share of the proceeds from the sale of the marital residence; and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff husband appeals and defendant wife cross-appeals from a judgment of divorce that incorporated and merged into the judgment a Referee's memorandum decision as well as Supreme Court's decision modifying the Referee's recommendation in part. The parties each raise numerous contentions regarding the judgment of divorce, and we now modify it in several respects.

The husband commenced this action in February 2018, and a temporary order dated August 14, 2018 required the husband "to pay all of the expenses he has paid throughout the marriage" with the exception of the cellular telephone phone bills for the wife and the parties' three children. The order also required the husband to "continue to pay the sum of $300.00 per week" to the wife "for unallocated support." According to a spreadsheet that the parties stipulated to admitting in evidence, the husband had been paying all

of the household expenses and $300 per week to the wife since March 2018.

In May 2019, the parties entered into a parenting agreement, and the action proceeded to a financial hearing that month. In July 2019, the parties placed on the record a stipulation resolving all of the financial matters. The wife, however, never ratified that stipulation and, as a result, the financial hearing was resumed in May 2021. At that hearing, the parties stipulated to numerous issues, limiting the hearing to issues involving maintenance, credits for payments allegedly made by the husband during the pendency of the proceeding, tax impacts regarding changes in tax laws that had occurred during the pendency of the action, child support, pro rata shares of other obligations, college expenses related to the parties' three children, attorneys' fees and resolution of a motion for enforcement of the temporary order.

Following that hearing, the Referee issued a memorandum decision, which was adopted in part and modified in part by the court, and the judgment was entered accordingly.

Although contested by the wife on her cross-appeal, we decline to modify the awards for maintenance and child support. We further decline the parties' request to modify the determination of how much credit the husband should be awarded for past payments. The husband contends on his appeal that he should have been credited for the expenses that he paid during the pendency of the divorce action and that the court erred in computing the number of months for which he would receive retroactive credit for the $300 weekly payments to the wife. The wife contends on her cross-appeal that the court erred in calculating the amount of the maintenance and child support awards, but does not challenge the duration of the maintenance award. She also contends that the court erred in awarding the husband *any* retroactive credit. We reject both parties' contentions.

Using the 2021 maintenance cap (*see* Domestic Relations Law § 236 [B] [6] [b] [4]; [d] [1-3]), the Referee, and by adoption the court, determined that the husband owed $1,950 a month in maintenance for a duration of seven years. Neither the Referee nor the court awarded maintenance above the income cap (*see generally* § 236 [B] [6] [b] [4]). Where, as here, the payor's income exceeds the income cap, it is in the discretion of the court to include income above the cap (*see* § 236 [B] [6] [d] [2]), but the Referee, and by adoption the court, must "set forth the factors . . . considered and the reasons for [the] decision" (§ 236 [B] [6] [d] [3]). The Referee did so and, by adopting the Referee's decision in that regard, the court did so as well. With respect to the duration of maintenance, which is covered by section 236 (B) (6) (f), the Referee, and by adoption the court, awarded the wife durational maintenance within the statutory range.

"[A]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court . . . , although 'the authority of this Court in determining issues of maintenance is as broad as that of the trial court' . . . Where, as

here, the trial court [or Referee] gave appropriate consideration to the factors enumerated in Domestic Relations Law § 236 (B) [(6) (e) (1) (a-n)], ‘this Court will not disturb the determination of maintenance absent an abuse of discretion’ ” (*Anastasi v Anastasi*, 207 AD3d 1131, 1131 [4th Dept 2022]; *see Wilkins v Wilkins*, 129 AD3d 1617, 1618 [4th Dept 2015]). We see no basis to disturb the maintenance award.

With respect to the amount of child support, we likewise reject the wife’s contention on her cross-appeal that the child support award should be modified. Again, the Referee, and by adoption the court, capped the child support award at the statutory amount for combined parental income (*see* Domestic Relations Law § 240 [1-b] [c] [2], [3]). Neither the Referee nor the court set forth the factors it considered in electing not to include income over the statutory cap, in violation of section 240 (1-b) (c) (3) (*see Headwell v Headwell*, 198 AD3d 1130, 1134 [3d Dept 2021]; *Otto v Otto*, 150 AD2d 57, 61 [2d Dept 1989]). Nevertheless, this Court “has the power to assume the functions and obligations of the trial court and make its own findings” (*Deckert v Deckert*, 147 AD2d 920, 921 [4th Dept 1989]; *see Timperio v Timperio*, 232 AD2d 857, 859 [3d Dept 1996]; *Beason v Sloane*, 174 AD2d 1016, 1016 [4th Dept 1991], *lv dismissed* 78 NY2d 1007 [1991]). In addressing the various factors related to maintenance, the Referee, and by adoption the court, addressed many of the factors relevant to the determination whether child support should be capped at the statutory amount (*compare* § 236 [B] [6] [e] [1] [a-n] *with* § 240 [1-b] [f] [1-10]). Upon review of the voluminous record on appeal, we exercise our power to make our own findings with respect to the relevant factors, including the age of the children, the husband’s maintenance obligations, his payment of college expenses, and his numerous contributions both before and after the divorce, and we decline to disturb the determination regarding child support.

Addressing next the amount of credit awarded to the husband, we initially conclude that the wife’s challenge on her cross-appeal to the husband’s spreadsheet of expenses is waived inasmuch as that exhibit was admitted in evidence upon the parties’ stipulation (*see Lahren v Boehmer Transp. Corp.*, 49 AD3d 1186, 1187 [4th Dept 2008]).

Contrary to the husband’s contention on his appeal, we conclude that the Referee, and by adoption the court, did not err in declining to credit him for household expenses he paid during the pendency of the divorce (*see Quarty v Quarty*, 96 AD3d 1274, 1281 [3d Dept 2012]; *cf. Gargiulo v Gargiulo*, 183 AD3d 803, 807 [2d Dept 2020]; *Magyar v Magyar* [appeal No. 2], 272 AD2d 941, 942 [4th Dept 2000]). Although there is authority to award a payor spouse credit for carrying costs on a marital residence (*see Myers v Myers*, 87 AD3d 1393, 1394-1395 [4th Dept 2011]), the husband, here, resided in the marital residence during the pendency of the proceeding, and we discern no error in declining to award him credits for those payments.

Regarding the credits to the husband for the $300 weekly payments that he made to the wife, we reject the wife’s contention on her

cross-appeal that the husband was not entitled to any credit for those payments and we likewise reject the husband's contention on his appeal that he was entitled to additional credits for those payments. The Referee, and by adoption the court, determined that the husband should be entitled to some credit for the $300 per week payments he made to the wife. The Referee granted credit for those payments retroactive to the temporary order, but the court modified that determination and awarded the husband credit retroactive to the date when he began making voluntary payments in that amount. Inasmuch as there is authority to award a spouse retroactive credit for voluntary payments made before any temporary order was issued (*see Antinora v Antinora*, 125 AD3d 1336, 1337, 1339 [4th Dept 2015]; *Southwick v Southwick*, 214 AD2d 987, 987 [4th Dept 1995]; *see also Sinnott v Sinnott*, 194 AD3d 868, 878 [2d Dept 2021]), the issue then becomes whether the award related to "unallocated support" can be credited against the ultimate maintenance award. Although the matter could be remitted to the court to clarify if those payments were intended as maintenance payments (*see e.g. Ford v Ford*, 200 AD3d 854, 856-857 [2d Dept 2021]; *Schiffer v Schiffer*, 21 AD3d 889, 890 [2d Dept 2005]), we see no need for remittal where, as here, the husband paid all household expenses, aside from cellular telephone bills, as well as an additional $300 per week to the wife. Exercising our broad authority to determine issues of maintenance (*see Anastasi*, 207 AD3d at 1131; *D'Amato v D'Amato*, 132 AD3d 1424, 1425 [4th Dept 2015]), we conclude that the husband is entitled to credit against his maintenance obligation for all of the $300 weekly payments he made to the wife. We reject the husband's contention, however, that he is entitled to 6½ months of additional credit and note that the court's decision afforded the husband credit for those payments "until the date of closing of the marital residence."

Assuming, arguendo, that the husband preserved for our review his contention on his appeal that the maintenance award should be tax impacted to account for the changes in federal tax law imposed by the Tax Cuts and Jobs Act of 2017 (Pub L 115-97, § 11051, 131 US Stat 2089), we reject his contention that the Referee, and by adoption the court, erred in refusing to tax impact his maintenance obligations (*see Rapp v Rapp*, 68 Misc 3d 1226[A], 2020 NY Slip Op 51073[U], *3 [Sup Ct, Monroe County 2020]; *Y.L. v L.L.*, 68 Misc 3d 1209[A], 2020 NY Slip Op 50896[U] *44 [Sup Ct, Richmond County 2020]; *but see Wisseman v Wisseman*, 63 Misc 3d 819, 821 [Sup Ct, Dutchess County 2019]).

We conclude, however, that the husband's contention on appeal that the Referee, and by adoption the court, erred in failing to account for changes in the federal tax law concerning tax dependency exemptions (*see* 26 USC § 151 [d] [5] [a]) is not preserved for our review inasmuch as the husband is raising that contention for the first time on appeal (*see Zacharek v Zacharek*, 116 AD2d 1004, 1005 [4th Dept 1986]; *see also Barrett v Barrett*, 175 AD3d 1067, 1070 [4th Dept 2019]).

With respect to the parties' contentions on the appeal and cross-appeal regarding allocation of college expenses for the children, it is well settled that "[s]uch costs may be awarded based upon 'the

circumstances of the case and of the respective parties and in the best interests of the child[ren], and as justice requires' " (*Castello v Castello*, 144 AD3d 723, 728 [2d Dept 2016], quoting Domestic Relations Law § 240 [1-b] [c] [7]). Nevertheless, "in contrast to other add-ons, educational expenses are not necessarily pro rated" (*Bradley v Bakal*, 180 AD3d 443, 445 [1st Dept 2020]; *see* § 240 [1-b] [c] [7]; *Castello*, 144 AD3d at 728; *cf.* § 240 [1-b] [c] [5] [v]). The wife and the husband contend that the matter should be remitted to clarify the parties' share of the children's college expenses. We reject those contentions. The Referee's decision, as adopted by the court and incorporated into the judgment, states that "[t]he parties shall *ratably contribute* to the cost of a 4-year undergraduate education," capped at the cost of a SUNY school (emphasis added). Inasmuch as the Referee's decision had already stated that the parties' pro rata percentages were 80% for the husband and 20% for the wife and previously used the phrase "ratably contribute" with respect to health care expenses, which must be prorated according to the parties' proportionate share of combined parental income (*see* § 240 [1-b] [c] [5] [v]), that decision and the judgment of divorce need not be clarified to determine the parties' share of the children's college expenses. The judgment of divorce likewise does not need to be modified to address the decisions of the Referee and the court inasmuch as those decisions were incorporated and merged into the judgment.

We agree with the wife on her cross-appeal, however, that the Referee, and by adoption the court, erred in failing to address in any respect the husband's failure to pay $12,622.27 in outstanding college debt for one of the parties' sons. The temporary order directed the husband to "pay the college tuition and expenses" for that child, without limitation or condition. We therefore direct the husband, upon receipt of either an invoice from the school or proof of payment by the wife, to pay that amount to either the school or the wife, as appropriate, and we modify the judgment accordingly.

We agree with the husband on his appeal that the Referee, and by adoption the court, failed to properly calculate how the proceeds of the sale of the marital home should be distributed. The parties entered into a stipulation concerning how to divide the proceeds from the sale of the marital residence, and that stipulation was ratified in writing by the parties. Pursuant to the terms of the stipulation, the husband "shall first be reimbursed $7,500 from the net sale proceeds" as a separate property claim, but it was also stated that the money would come from the wife's "share of the net proceeds." Thereafter, the husband was to be "reimbursed for one-half of the amount he expended following the recommendations of the realtor" regarding improvements or repairs to the marital residence before its sale (improvement costs). That amount was "*again* coming from [the wife's] share of the net proceeds" (emphasis added). There were several other items for which the parties were to be reimbursed, but it was noted that there was no agreement regarding their priority. They were to be deducted from the net sale proceeds and, after payment of those obligations, "any remaining sale proceeds . . . [would] be divided equally between the parties." The husband contends that the

proceeds should have been divided and *then* he should have been awarded credits from the wife's share for his separate property credit and improvement costs. Based on the clear terms of the stipulation, which control (*see generally Leiderman v Leiderman*, 50 AD3d 644, 644 [2d Dept 2008]), we agree with the husband that he should have been awarded his 50% share of improvement costs "from the wife's share" of the proceeds, and we further modify the judgment accordingly. However, we reject the remainder of his contentions on his appeal. With respect to the husband's separate property credit, the stipulation itself was ambiguous, stating first that the separate property credit would be reimbursed from the total net proceeds and then stating, inconsistently, that such credit would come from the wife's share of the net proceeds (*see generally Walker v Walker*, 42 AD3d 928, 928 [4th Dept 2007], *lv dismissed* 9 NY3d 947 [2007]). All of the remaining credits were to be determined by the Referee and the court, and the Referee, and by adoption the court, determined that those credits should be paid in a particular order out of the net proceeds. We conclude that the record establishes the parties' intent regarding distribution of the separate property credit and the remaining credits from the net proceeds of the sale of the marital residence (*see generally id.* at 828). As a result, the parties should have received credits for the remaining items out of the net proceeds of the sale of the marital residence; the husband should have received his separate property credit out of those net proceeds; the net proceeds should have thereafter been divided equally; and then the wife should have reimbursed the husband from her share of the net proceeds for his 50% share of the improvement costs.

The wife seeks clarification on the duration of health care payments for the children. That issue is being raised for the first time on appeal and is therefore not preserved for our review (*see generally Barrett*, 175 AD3d at 1070; *Zacharek*, 116 AD2d at 1005). In any event, inasmuch as Domestic Relations Law § 236 (B) (8) (a) provides that an award of health care costs may not "exceed such period of time as such party shall be obligated to provide maintenance, child support or make payments of a distributive award," we see no need for clarification of the judgment.

The wife further contends that the Referee, and by adoption the court, erred in failing to award her any attorneys' fees. We reject that contention. "The decision to award . . . attorney[s'] fees lies, in the first instance, in the discretion of the trial court and then in the Appellate Division whose discretionary authority is as broad as [that of] the trial court[ ]" (*O'Brien v O'Brien*, 66 NY2d 576, 590 [1985]; *see Juhasz v Juhasz* [appeal No. 2], 92 AD3d 1209, 1213 [4th Dept 2012]). Although "[t]here is a rebuttable presumption that attorneys' fees shall be awarded to the less monied spouse where a spouse seeks to enforce a prior order" (*Juhasz*, 92 AD3d at 1213; *see* Domestic Relations Law § 237 [b]), we discern no basis to modify the judgment to grant any award of attorneys' fees to the wife.

We have reviewed the wife's remaining contentions on her cross-appeal, and conclude that none warrants reversal or further modification of the judgment.

Entered: July 28, 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 19-01868
PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID WAGGONER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JOHN J. MORRISSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (AMBER L. PAYNE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered June 10, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). The conviction stems from an incident in which defendant shot and killed the victim following an altercation that occurred outside of defendant’s home. We affirm.

Defendant contends that County Court’s charge to the jury on the justification defense was insufficient because the jury was not instructed that a justification defense could include a defense of third parties. Defendant did not request that the jury be so charged and did not object to the justification charge as given on that ground. Therefore, defendant’s contention is not preserved for our review (*see People v Vazquez*, 206 AD3d 1621, 1623 [4th Dept 2022], *lv denied* 39 NY3d 965 [2022]; *People v Cruz*, 175 AD3d 1060, 1061 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the court erred in refusing to include an instruction for justification in defense of premises under Penal Law § 35.20 (3). “A trial court must instruct a jury on the defense of justification ‘if on any reasonable view of the evidence, the fact finder might have decided that the defendant’s actions were justified’ ” (*People v Cox*, 92 NY2d 1002, 1004 [1998]). Penal Law § 35.20 (3) provides, as relevant here, that “[a] person in possession

or control of . . . a dwelling . . . , who reasonably believes that another person is committing or attempting to commit a burglary of such dwelling . . . , may use deadly physical force upon such other person when he . . . reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary.” Here, the court did not err in refusing to charge justification under section 35.20 (3) inasmuch as “the evidence does not support defendant’s argument that he reasonably believed deadly force was necessary to prevent [the victim] from committing [a burglary]” (*Cox*, 92 NY2d at 1005). At the time defendant fired the fatal shot, he and the victim were in the street. Defendant had already “terminate[d] the alleged burglary by means not requiring deadly force” (*id.*). Thus, there is no reasonable view of the evidence under which the jury could have found that defendant’s actions were justified to prevent the victim from burglarizing the house (*see People v Ali*, 89 AD3d 1412, 1413-1414 [4th Dept 2011], *lv denied* 18 NY3d 881 [2012]; *People v Pine*, 82 AD3d 1498, 1501 [3d Dept 2011], *lv denied* 17 NY3d 820 [2011], *reconsideration denied* 17 NY3d 904 [2011]).

Defendant also contends that the court erred in failing to charge the jury that he had no duty to retreat if he was in his dwelling and was not the initial aggressor (*see* Penal Law § 35.15 [2] [a] [i]). That contention lacks merit inasmuch as the altercation occurred in the middle of a public street (*see People v Aiken*, 4 NY3d 324, 329-330 [2005]; *People v Daggett*, 150 AD3d 1680, 1682 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]; *People v Gaines*, 229 AD2d 448, 448 [2d Dept 1996], *lv denied* 88 NY2d 1020 [1996]).

Defendant additionally contends that the court erred in refusing to charge the jury on the lesser included offense of criminally negligent homicide. We reject that contention. A “lesser included offense must be charged only if, under any reasonable view of the evidence as seen in the light most favorable to defendant, the jury could find that defendant committed the lesser offense but not the greater” (*People v Randolph*, 81 NY2d 868, 869 [1993]). Here, there is no reasonable view of the evidence under which the jury could have determined that defendant “failed to perceive the substantial and unjustifiable risk” that shooting the victim in the head may result in the victim’s death (*id.*; *see People v Brown*, 269 AD2d 817, 817 [4th Dept 2000], *lv denied* 95 NY2d 794 [2000]; *People v Perkins*, 229 AD2d 981, 982 [4th Dept 1996], *lv denied* 88 NY2d 1023 [1996]).

Defendant further contends that the court erred in refusing to suppress evidence obtained as a result of a showup identification procedure. We reject that contention. Although “[s]howup identifications are disfavored, since they are suggestive by their very nature . . . , prompt showup identifications which are conducted in close geographic and temporal proximity to the crime are not presumptively infirm, and in fact have generally been allowed” (*People v Ortiz*, 90 NY2d 533, 537 [1997] [internal quotation marks omitted]). Here, the identification occurred approximately 30 minutes after the shooting, at the scene where the shooting took place. Further, although the officer conducting the showup identification procedure

asked the identifying witness, "Who is that sitting down over there?," we conclude that suppression was not required. "Inherent in any showup is the likelihood that an identifying witness will realize that the police are displaying a person they suspect of committing the crime, rather than a person selected at random" (*People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]), and the mere fact that defendant was sitting on the porch in the presence of one or two officers at the time of the identification did not render it unduly suggestive (*see People v Johnson*, 198 AD3d 1320, 1321 [4th Dept 2021]; *People v Stanley*, 108 AD3d 1129, 1130 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013]). In any event, even assuming, arguendo, that the identification procedure was unduly suggestive, we conclude that any error in admitting the witness's in-court identification of defendant is harmless beyond a reasonable doubt (*see People v Burton*, 191 AD3d 1311, 1313 [4th Dept 2021], *lv denied* 36 NY3d 1095 [2021]; *People v Parker*, 304 AD2d 146, 158 [4th Dept 2003], *lv denied* 100 NY2d 585 [2003]).

Defendant also contends that the court erred in refusing to suppress statements that he made to the police. Specifically, defendant contends that he was subjected to a custodial interrogation while at the scene and while being transported to the police station for questioning. Defendant further contends that, because his initial statements to the police were obtained in violation of his *Miranda* rights, his subsequent post-*Miranda* statements must also be suppressed. We reject those contentions. "In determining whether a defendant was in custody for *Miranda* purposes, [t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had [they] been in the defendant's position" (*People v Figueroa*, 156 AD3d 1348, 1348 [4th Dept 2017], *lv denied* 31 NY3d 1013 [2018] [internal quotation marks omitted]). "When a seizure of a person remains at the stop and frisk inquiry level and does not constitute a restraint on [their] freedom of movement of the degree associated with a formal arrest, *Miranda* warnings need not be given prior to questioning" (*People v Shelton*, 111 AD3d 1334, 1336 [4th Dept 2013], *lv denied* 23 NY3d 1025 [2014] [internal quotation marks omitted]; *see People v Bennett*, 70 NY2d 891, 893-894 [1987]). "[I]n reviewing the hearing court's finding that there was no custodial interrogation prior to the warnings being administered, and that admissions given were voluntary, great deference must be allowed the trier of fact" (*People v Yukl*, 25 NY2d 585, 588 [1969], *cert denied* 400 US 851 [1970]).

Here, defendant was questioned immediately after the incident while he was on the front porch of his home and not physically restrained in any way. "The fact that he might have been restrained, had he attempted to leave, is not controlling" (*People v Rodney P. [Anonymous]*, 21 NY2d 1, 10 [1967]). Although defendant was questioned about what happened, there was no reason for defendant to believe that the officers knew that he had shot the victim in the head; indeed, there was reason only for defendant to believe at that time that the police knew there was an injured man lying in the street. "Certainly in such circumstances law enforcement authorities would be expected to

investigate. That a guilty person may feel—as defendant may have here—threatened or restrained in the presence of police not because of objective police conduct but because of secret guilty knowledge does not render the situation custodial" (*People v Johnson*, 91 AD2d 327, 330 [4th Dept 1983], *affd* 61 NY2d 932 [1984]).

Defendant's statements to an officer during transport to the police station were likewise properly admitted against him at trial. "Volunteered statements are admissible provided the defendant spoke with genuine spontaneity and [the statements were] not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (*People v Ibarrondo*, 150 AD3d 1644, 1645 [4th Dept 2017]). Here, defendant prompted a conversation with the officer by making spontaneous statements and posing questions to him, and the officer's responses did not induce, provoke, or encourage defendant to make an incriminating statement (*see People v Rivers*, 56 NY2d 476, 479-480 [1982], *rearg denied* 57 NY2d 775 [1982]; *cf. People v Nichols*, 163 AD2d 904, 904 [4th Dept 1990]).

Our determination regarding defendant's pre-*Miranda* statements "disposes of defendant's further argument that [his] statement[s at the police station were] tainted by the alleged illegality of the . . . initial questioning" (*People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* — US —, 137 S Ct 298 [2016] [internal quotation marks omitted]; *see Johnson*, 91 AD2d at 331).

We reject defendant's contention that the court erred in admitting in evidence the .22 caliber revolver that police recovered after the shooting. Here, "reasonable assurances established that the gun sought to be admitted was the same weapon as was used in the crime and that it was unchanged, [and] any deficiencies in the chain of custody went only to the weight to be given to the evidence, not the admissibility" (*People v Williams*, 5 AD3d 705, 706 [2d Dept 2004], *lv denied* 2 NY3d 809 [2004]; *see People v Scott*, 189 AD3d 2110, 2112 [4th Dept 2020], *lv denied* 36 NY3d 1123 [2021]). The People established that the gun that was entered in evidence was the same gun that was recovered near the scene, despite the fact that it was in a changed condition. One officer testified that he had removed what appeared to be a homemade silencer from the weapon in order to safely test-fire it (*see People v Grant*, 194 AD2d 348, 351 [1st Dept 1993], *lv denied* 82 NY2d 754 [1993]). Further, the People presented sufficient evidence linking the gun to defendant and to the killing of the victim. Defendant's girlfriend testified that defendant retrieved a gun from their bedroom before going outside to confront the victim and that, shortly after she heard a bang, defendant returned with a gun and told her to "get rid of it."

We reject defendant's contention that the sentence is unduly harsh and severe.

We have considered defendant's remaining contentions and conclude

that none warrants modification or reversal of the judgment.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

395
CA 22-00763
PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

DYNISHA ENJOLI MASON,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

RAKEEM TAMAR MASON,
RESPONDENT-PETITIONER-RESPONDENT.

LEGAL SERVICES OF CENTRAL NEW YORK, SYRACUSE (ANNE F. AUGUSTINE OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered May 6, 2022, in a proceeding pursuant to Family Court Act article 6. The order denied the petition seeking permission to relocate with the subject children.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent mother appeals from an order that denied her petition seeking permission to relocate with the subject children to North Carolina. We agree with the mother that the determination of Supreme Court that the proposed relocation to North Carolina is not in the children's best interests lacks a sound and substantial basis in the record.

The parties previously had joint custody of the children with primary physical custody with respondent-petitioner father in Onondaga County and visitation with the mother, who then lived in North Carolina. When the father relocated to Georgia with the children in 2018, the mother moved back to Onondaga County in order to pursue an enforcement petition with respect to the prior custody order (*see generally* Domestic Relations Law § 76-a [1]). The parties thereafter stipulated to a new custody order pursuant to which joint custody would continue but the mother would have primary physical custody in Onondaga County. The mother subsequently filed the present modification petition seeking permission to relocate with the children to North Carolina, and the father cross-petitioned to modify the prior order to grant him primary physical custody of the children, who would then live with him in Georgia.

Generally, when one parent petitions to relocate out of state, "the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child" (*Matter of Tropea v Tropea*, 87 NY2d 727, 736 [1996]). Thus, factors to consider in assessing a parent's request to relocate include "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child[ren] and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child[ren]'s future contact with the noncustodial parent, the degree to which the custodial parent's and child[ren]'s life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and the child[ren] through suitable visitation arrangements" (*id.* at 740-741; *see Matter of Holtz v Weaver*, 94 AD3d 1557, 1557 [4th Dept 2012]).

The present case, however, is not one in which the custodial parent "seeks permission to move away from the area in which the noncustodial spouse resides" (*Tropea*, 87 NY2d at 732). Instead, both parents petitioned to relocate the primary residence of the children away from Onondaga County and closer to the other parent's preferred state of residence. To that end, the record reflects that, consistent with the course charted in the petition and cross-petition, the parties stipulated that the scope of the hearing would be "the issues of what plans are in place supporting the children's move to *either North Carolina or Georgia*" (emphasis added). Nonetheless, for reasons that are not clear from the record, the evidence at the hearing was limited to the mother's request to relocate to North Carolina, which the court subsequently denied without considering or resolving the father's cross-petition seeking primary physical custody of the children, who would then live with him outside of New York state.

Even assuming, arguendo, that it was appropriate for the court to apply *Tropea* where both parents seek to relocate the children out of state, we conclude that the court failed "to consider and give appropriate weight to all of the factors that may be relevant to the determination" (*id.* at 740). The court's determination was based almost exclusively on the mother's purported failure to establish that the children would be better off economically and educationally in North Carolina than in Onondaga County. The court failed to consider the impact of the children's relocation to North Carolina on the quantity and quality of their future contact with the father in Georgia; the potential emotional benefit to the children of being substantially closer to the father; and the potential for greater "suitable visitation arrangements" between the children and the father in Georgia (*id.* at 741). Further, although whether a noncustodial parent has a good faith basis for opposing a requested move is a factor bearing on a relocation determination (*see id.* at 740-741), the record here is devoid of any basis, other than his desire to have the children reside with him in Georgia, for the father's opposition to the mother's request to move away from Onondaga County. We thus conclude that, in ruling on the mother's relocation petition without considering the father's pending cross-petition for primary physical

custody of the children, the court failed to consider the mother's relocation request "with due consideration of *all the relevant facts and circumstances*," including the "central concern" of "the impact of the move on the relationship between the child[ren] and the [father]" (*id.* at 739 [emphasis added]).

Further, as previously noted, *both* parents petitioned to move the children's primary residence outside of New York state. In denying the mother's petition, the court gave weight to the children's purported preference to remain in Onondaga County, a primary residence in a state not pursued by either parent. We caution that " '[t]here is a significant difference between allowing children to express their wishes to the court and allowing their wishes' to chart the course of litigation" (*Matter of Kessler v Fancher*, 112 AD3d 1323, 1324 [4th Dept 2013]).

We therefore conclude that the determination lacks a sound and substantial basis in the record (*see generally Holtz*, 94 AD3d at 1558). Inasmuch as the record before us does not reflect whether or how the father's cross-petition was resolved, we remit the matter for a new hearing on the mother's petition and consideration of all the relevant facts and circumstances, including, if still pending, the father's cross-petition (*see generally Matter of Mills v Rieman*, 128 AD3d 1486, 1487 [4th Dept 2015]).

All concur except OGDEN, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent from the majority's conclusion that Supreme Court's determination to deny petitioner-respondent mother's relocation petition lacks a sound and substantial basis in the record. I would affirm the order.

Although the majority is correct that the present case is not the typical relocation case in which the custodial parent seeks permission to move away from the area in which the noncustodial parent resides, a factual determination of the best interests of the children, after consideration of the factors set forth in the governing case law, is nevertheless applicable.

In determining whether to permit a custodial parent to relocate with the children, "each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*Matter of Tropea v Tropea*, 87 NY2d 727, 739 [1996]).

The majority concludes that the record here is devoid of any basis, other than his desire to have the children reside with him in Georgia, for respondent-petitioner father's opposition to the mother's request to move. I disagree. After the mother rested her case, the father moved to dismiss the petition. His opposition to mother's relocation was made clear: the mother had not "laid forth a specific plan" and had not "been able to articulate . . . how the children . . . would benefit" from the move.

I also disagree with the majority’s impression that the court allowed the children’s wishes to chart the course of litigation. The court concluded in its decision and order that the mother had failed to establish that the children would receive a better education in North Carolina, that her life with the children would be enhanced economically by the move, or that she had comparable support in North Carolina. Although the court recognized that the children preferred to remain in New York, it also noted that their preference was not dispositive.

Taking into account the applicable *Tropea* factors and considering all of the relevant facts and circumstances, I conclude that the mother failed to meet her burden of establishing by a preponderance of the evidence that relocation was in the best interests of the children (*see id.* at 741). Thus, I conclude that the court’s determination had a sound and substantial basis in the record despite the atypical factual circumstances.

Finally, I note the majority’s concern with the father’s cross-petition to modify the prior order of custody to grant him primary physical custody of the children. I agree that the record before us does not reflect how the father’s cross-petition was resolved or if it was resolved. Contrary to the majority’s suggestion, that should not change the analysis. The mother had a full opportunity to be heard on her petition. The court conducted a full hearing on the mother’s request, and all parties had an opportunity to present evidence and make arguments. I would not disturb the court’s determination on the mother’s petition simply because of the enigma concerning the father’s cross-petition.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

398

CA 22-00390

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

IN THE MATTER OF MARK STEVEN WITKOWSKI, AS TRUSTEE OF THE EVA C. SMITH MEMORIAL TRUST FOR THE BENEFIT OF BETH L. HOSKINS, AND BETH L. HOSKINS, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

HS 570, INC., JOHN T. HOSKINS, JR. AND LIFE STORAGE, INC., RESPONDENTS-RESPONDENTS.

ADAMS LECLAIR LLP, ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JEFFREY C. STRAVINO OF COUNSEL), FOR RESPONDENT-RESPONDENT HS 570, INC.

BARCLAY DAMON, LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR RESPONDENT-RESPONDENT JOHN T. HOSKINS, JR.

PHILLIPS LYTLE LLP, BUFFALO (JAMES R. O’CONNOR OF COUNSEL), FOR RESPONDENT-RESPONDENT LIFE STORAGE, INC.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 16, 2022. The order vacated a temporary restraining order and dismissed the petition.

Now, upon reading and filing the stipulation discontinuing the proceeding insofar as it concerns respondent Life Storage, Inc., signed by the attorneys for the parties on February 27, 2023,

It is hereby ORDERED that the appeal insofar as it concerns respondent Life Storage, Inc. is unanimously dismissed upon stipulation, and the order is modified on the law by reinstating the petition against respondents HS 570, Inc. and John T. Hoskins, Jr., and as modified the order is affirmed without costs.

Memorandum: Respondent HS 570, Inc. (corporation) is a Delaware corporation that was at one time allegedly “controlled” by the father of petitioner Beth L. Hoskins (Beth Hoskins) and respondent John T. Hoskins, Jr. (John Hoskins). John Hoskins is an executive vice-president and director of the corporation. Petitioner Mark Steven Witkowski (Trustee), is the Trustee for the Eva C. Smith Memorial Trust for the benefit of Beth L. Hoskins (Trust), which held significant nonvoting shares of the corporation. Beth Hoskins is also

a beneficiary of several other trusts that allegedly held shares in the corporation.

In July 2021, the Trust commenced an action against the corporation in Delaware, seeking to inspect the books and records of the corporation. John Hoskins was not a named party in that action. While that action was pending, the Trustee, in the course of managing Beth Hoskins's account at a self-storage facility, had occasion to access a storage unit that was listed under her name in the storage facility's accounts. Unbeknownst to the Trustee, that particular unit was rented to John Hoskins, personally. Upon gaining entry to the storage unit, the Trustee observed numerous documents related to the corporation, as well as other documents related to Beth Hoskins, individually, and to other proceedings involving the siblings' parents.

Petitioners thereafter filed the instant petition pursuant to CPLR 3102 (c) seeking an order to preserve the evidence held in that storage unit. In opposition to the petition, John Hoskins and the corporation (collectively, respondents) contended, as relevant here, that the pending Delaware action was designed to produce all the documents that were being sought.

Petitioners now appeal from an order that, inter alia, dismissed the petition pursuant to CPLR 3211 (a) (4), which permits dismissal where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." We agree with petitioners that Supreme Court erred in dismissing the petition against respondents. Inasmuch as petitioners have stipulated to discontinue this proceeding against respondent Life Storage, Inc., we do not address any issues with respect to Life Storage, Inc.

In determining whether dismissal under CPLR 3211 (a) (4) is warranted, "we consider (1) [whether] both suits arise out of the same actionable wrong or series of wrongs[ ] and (2) as a practical matter, [whether] there [is] any good reason for two actions rather than one being brought in seeking the remedy" (*Red Barn Country*, *LLC v Trombley*, 120 AD3d 1537, 1538 [4th Dept 2014] [internal quotation marks omitted]; *see LaBuda v LaBuda*, 174 AD3d 1013, 1014 [3d Dept 2019]). A dismissal on such grounds is discretionary; it is "never mandatory" (Hon. Mark C. Dillon, 2021 Supp Prac Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:14, 2023 Pocket Part at 23). The statute provides that the court "need not dismiss upon this ground but may make such order as justice requires" (CPLR 3211 [a] [4]). "In other words, the trial court has discretion to fashion a remedy that best suits the circumstances of the parties and the case" (Hon. Mark C. Dillon, 2021 Supp Prac Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:14, 2023 Pocket Part at 23).

Here, although both this proceeding and the action in Delaware sought books and records related to the corporation, petitioners in this proceeding also sought to preserve documents unrelated to the

corporation, some of which dealt with potential breach of fiduciary duty claims against John Hoskins. In addition, some of petitioners' potential allegations were not part of the Delaware action, which was commenced against only the corporation.

"While complete identity of parties is not a necessity for dismissal under CPLR 3211 (a) (4) . . . , there must at least be a substantial identity of parties which generally is present when at least one plaintiff and one defendant is common in each action" (*Cellino & Barnes, P.C. v Law Off. of Christopher J. Cassar, P.C.*, 140 AD3d 1732, 1734 [4th Dept 2016] [internal quotation marks omitted]; *see generally Matter of Goodyear v New York State Dept. of Health*, 163 AD3d 1427, 1430 [4th Dept 2018], *lv denied* 32 NY3d 914 [2019]). "If the parties are not the same and even though plaintiffs seek much the same end by their actions, the subsequent action should not be dismissed" (*Forget v Raymer*, 65 AD2d 953, 954 [4th Dept 1978]; *see Red Barn Country, LLC*, 120 AD3d at 1538).

Inasmuch as the Delaware action involves only one of the same parties as this proceeding and does not "encompass[ ] all of the disputes between the parties" (*WYNIT, Inc. v Smartparts, Inc.*, 74 AD3d 1720, 1720-1721 [4th Dept 2010]; *see Red Barn Country, LLC*, 120 AD3d at 1538; *cf. Goodyear*, 163 AD3d at 1430; *see also Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975]), we conclude that the court erred in dismissing the petition.

We reject respondents' contention, raised as an alternate basis for affirmance (*see Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488 [1978]), that petitioners failed to meet a condition precedent to this proceeding in that they failed to bring their request prior to commencing related actions (*see Matter of Weitzman v Long Beach City Sch. Dist.*, 175 AD3d 504, 505 [2d Dept 2019]; *see generally Matter of Leff v Our Lady of Mercy Academy*, 150 AD3d 1239, 1240 [2d Dept 2017]). Although the Trust commenced an action against the corporation in Delaware, there is no evidence of any prior action commenced against John Hoskins (*cf. Weitzman*, 175 AD3d at 505-506; *Matter of Johnson v Union Bank of Switzerland, AG*, 150 AD3d 436, 436 [1st Dept 2017]).

We also reject respondents' assertion that this appeal has been rendered moot by the alleged settlement of the Delaware action or by the alleged fact that the documents, once contained in the storage unit, were removed from the storage unit following dismissal of the petition (*see generally Matter of Wellman v Surles*, 185 AD2d 464, 466 [3d Dept 1992]). The purported settlement of the Delaware action does not render moot petitioners' potential causes of action against John Hoskins, and we decline to assume that he would fail to obey a court order to preserve the documents that were once contained in the storage unit.

We therefore modify the order by reinstating the petition against respondents.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

399

CA 22-01660

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

BRIAN D. HENRY AND JILLIAN TOMER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BUFFALO MANAGEMENT GROUP, INC.,
DEFENDANT-APPELLANT.

GANNON, ROSENFARB & DROSSMAN, NEW YORK CITY (LISA L. GOKHULSINGH OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARSH ZILLER LLP, BUFFALO (LINDA J. MARSH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 6, 2022. The order denied defendant’s motion for summary judgment dismissing plaintiffs’ complaint.

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

Memorandum: Plaintiffs commenced this premises liability action arising from an incident wherein Brian D. Henry (plaintiff) fell from the second story of an apartment building owned by defendant. The incident occurred when plaintiff, while attempting to clean the exterior of a window, straddled the windowsill and held the bottom sash of the window with his right hand while using his left hand to clean the upper sash. The bottom sash detached and fell inward, causing plaintiff to lose his balance and fall. Defendant moved for summary judgment dismissing the complaint on the grounds that there was no dangerous or defective condition and that plaintiff’s own actions were the proximate cause of the accident. Supreme Court denied the motion, and defendant appeals. We affirm.

“[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury” (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]; *see Morris v Buffalo Gen. Health Sys.*, 203 AD3d 1692, 1693 [4th Dept 2022]; *Jackson v Rumpf*, 177 AD3d 1354, 1355 [4th Dept 2019]). Even assuming, arguendo, that defendant met its initial burden on its motion of establishing that there was no dangerous or defective condition, we conclude that

plaintiffs raised a triable issue of fact in opposition with respect to that issue (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Breau v Burdick*, 166 AD3d 1545, 1548 [4th Dept 2018]; *Smith v Szpilewski*, 139 AD3d 1342, 1342 [4th Dept 2016]).

Defendant failed to meet its initial burden on its motion with respect to the issue of proximate cause. "Questions concerning foreseeability and proximate cause are generally questions for the jury" (*Paul v Cooper*, 45 AD3d 1485, 1487 [4th Dept 2007] [internal quotation marks omitted]) and, here, defendant's own submissions, including plaintiff's deposition testimony indicating that an alleged defect in the bottom sash of the window caused his fall, raised issues of fact regarding proximate cause (*see generally Muraco v Fasbach*, 14 AD2d 898, 898 [2d Dept 1961], *affd* 11 NY2d 858 [1962]). Denial of the motion with respect to that issue was therefore required "regardless of the sufficiency of the opposing papers" (*Paul*, 45 AD3d at 1486 [internal quotation marks omitted]; *see generally Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Finally, to the extent that defendant contends that it is entitled to summary judgment because it neither created nor had actual or constructive notice of the allegedly dangerous condition, that contention is raised for the first time on appeal and is thus not preserved for our review (*see O'Hara v City of Buffalo*, 211 AD3d 1509, 1511 [4th Dept 2022]; *Rapini v New Plan Excel Realty Trust, Inc.*, 11 AD3d 890, 890 [4th Dept 2004]; *see also Docteur v Belleville Henderson Cent. School Dist.* [appeal No. 2], 307 AD2d 751, 751-752 [4th Dept 2003]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

401
CA 22-01048
PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF MICHAEL MIMASSI,
PETITIONER-PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF VILLAGE OF
NEW YORK MILLS, RICHARD LENART, ERNIE
TALERICO, JOHN CONSTAS AND TRUSTEES
OF VILLAGE OF NEW YORK MILLS,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

LAW OFFICE OF KEVIN T. O'BRIEN, WILLIAMSVILLE (KEVIN T. O'BRIEN OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

KATHRYN M. FESTINE, UTICA, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered June 23, 2022, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment dismissed in part the amended petition-complaint.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking various relief. In early 2020, petitioner purchased a home (property) in an R-1 district in the Village of New York Mills (Village). The property had previously been owned by members of petitioner's family since 1944 and was used as a multi-family dwelling. The Village's zoning ordinance, enacted in 1973, allowed one-family dwellings but not multi-family dwellings in an R-1 district. The ordinance further provided, however, that the lawful use of any land or building as of the time the zoning ordinance was adopted in 1973 may be continued as a nonconforming use, so long as the nonconforming use was not discontinued for a period of one year. After purchasing the property, petitioner was issued building permits from respondent-defendant John Constas, a code enforcement officer for the Village, to construct two decks on the property and renovate the interior of the residence. Upon inspection of the property, however, Constas issued an "order to remedy violation" and denied petitioner's application for a certificate of occupancy for the renovated four-family dwelling on the ground, inter alia, that the nonconforming use

of the building was discontinued. Petitioner appealed the denial of the certificate of occupancy to respondent-defendant Zoning Board of Appeals of Village of New York Mills (ZBA). After a hearing, the ZBA denied the appeal, finding that the property was a two-family dwelling at the time the zoning ordinance was adopted and had not maintained that nonconforming use status.

In his amended petition-complaint (amended petition), petitioner sought a declaration that the Village's zoning ordinance was invalid and further sought, inter alia, to annul the ZBA's determination that the property was not a four-family dwelling nonconforming use. In their amended answer, respondents-defendants asserted that, "in the interest of equity," they would allow the property to continue to be used as a two-family dwelling nonconforming use. Supreme Court granted the amended petition to the extent that it sought to annul the ZBA's determination that a continuous nonconforming use as a two-family dwelling did not exist and otherwise dismissed the amended petition. We affirm.

We agree with the court that petitioner's substantive challenge to the zoning ordinance is time-barred (*see* CPLR 213 [1]; *Almor Assoc. v Town of Skaneateles*, 231 AD2d 863, 863 [4th Dept 1996]; *see generally Westhampton Beach Assoc., LLC v Incorporated Vil. of Westhampton Beach*, 151 AD3d 793, 795-796 [2d Dept 2017], *lv dismissed* 31 NY3d 929 [2018]; *Schiener v Town of Sardinia*, 48 AD3d 1253, 1254 [4th Dept 2008]). The statute of limitations commenced in 1973 when the zoning ordinance was enacted (*see Matter of McCarthy v Zoning Bd. of Appeals of Town of Niskayuna*, 283 AD2d 857, 858 [3d Dept 2001]; *Almor Assoc.*, 231 AD2d at 863; *see generally New York Ins. Assn., Inc. v State of New York*, 145 AD3d 80, 88-89 [3d Dept 2016], *lv denied* 29 NY3d 910 [2017]) and not, as argued by petitioner, when he applied to rezone the property.

With respect to petitioner's challenge to the ZBA's determination that the property was not a four-family dwelling nonconforming use, the evidence before the ZBA showed that the property was a two-family dwelling prior to petitioner's renovations, and petitioner did not submit any evidence before the ZBA for it to conclude otherwise. Contrary to petitioner's contention, the court did not err in failing to conduct a hearing on whether there was a nonconforming use as a four-family dwelling. A determination of a zoning board "should be sustained on judicial review if it has a rational basis and is supported by substantial evidence" (*Matter of Pelican Point LLC v Hoover*, 50 AD3d 1497, 1498 [4th Dept 2008] [internal quotation marks omitted]; *see Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]), which is the case here. We reject petitioner's further contention that the ZBA is estopped from enforcing the zoning ordinance (*see generally Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988], *rearg denied* 71 NY2d 995 [1988], *cert denied* 488 US 801 [1988]).

We do not address petitioner's contentions that are raised for the first time in his reply brief (*see Becker-Manning, Inc. v Common

Council of City of Utica, 114 AD3d 1143, 1144 [4th Dept 2014]), and we have considered petitioner's remaining contentions in his main brief and conclude that they do not warrant modification or reversal of the judgment.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

404
KA 20-01608
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY MAULL, DEFENDANT-APPELLANT.

JONATHAN ROSENBERG, BROOKLYN, FOR DEFENDANT-APPELLANT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Cattaraugus County Court (Ronald D. Ploetz, J.), dated September 24, 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 reversed on the law and the matter is remitted to Cattaraugus County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals by permission of this Court from an order summarily denying his motion pursuant to CPL 440.10 seeking to vacate a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). In August 2014, a victim was killed by a single gunshot to the head. DNA evidence recovered at the crime scene was linked to defendant and the codefendant, Thomas Hall (Turtle). The People's theory of the victim's death was that defendant shot and killed the victim in retribution for the victim having purportedly informed on defendant. At the time of the killing, defendant already faced charges in connection with a June 2013 burglary and assault (2013 case). After the victim's death, but before defendant was indicted for killing the victim (murder case), he was arrested for bail jumping in connection with the 2013 case.

While defendant was being held at the Cattaraugus County Jail on the bail jumping charges, he spoke on the phone with the attorney representing him in the 2013 case. Unbeknownst to defendant or the attorney, however, at least three of their phone calls from jail were intercepted and eavesdropped on by the Cattaraugus County Sheriff's Office, including a detective who was the lead investigator in the murder case, and who ultimately testified at defendant's trial in that case. The detective prepared notes memorializing the contents of the intercepted calls, which occurred on September 29, and October 7 and 16, 2014. During those calls, defendant and his attorney seemingly discussed the murder case. For instance, in the first call, the attorney asked defendant "who [T]urtle was" and said that "he [would]

try to find out what [T]urtle [was] in [jail] for." In the second call, defendant and his attorney discussed "[h]ow the murder ties in," indicated that Turtle "was pissed," and that he had "very hard feelings" because money was being hidden from him. In the third call, defendant and his attorney discussed the bail jumping charges, and defendant indicated that someone would be testifying for him at an upcoming, yet unspecified, trial. The references to Turtle in the intercepted calls are significant because, by the time the first call occurred, Turtle had already provided law enforcement with a statement implicating defendant in the murder case.

Defendant was indicted in the murder case *after* the eavesdropping occurred, and was ultimately convicted, after a jury trial, of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). At sentencing, defendant informed County Court about law enforcement's eavesdropping, revealing that trial counsel had learned about the eavesdropping when Turtle's attorney shared with him the detective's notes, which Turtle's attorney had received as *Rosario* material. Trial counsel stated that, because of the victim's killing, "[t]here may have been a reason [for law enforcement] to listen to [the intercepted] calls," and explained that he chose not to use the eavesdropping as part of the defense because he "didn't think [the eavesdropping] was relevant" to the murder case. In response, the prosecutor stated that law enforcement is "not even able to access legal phone calls, none of us are . . . We can't [access those calls] under the software." The court took no action with respect to the eavesdropping allegations.

On direct appeal, we modified the judgment with respect to the sentence imposed and otherwise affirmed the judgment and, as relevant here, concluded that "the record [was] insufficient to establish that defendant's trial was affected by an alleged violation of defendant's right to counsel on the ground that law enforcement officers listened to at least three phone calls between defendant and [his attorney], or that [trial] counsel was ineffective for failing to seek a hearing on that matter" (*People v Maull*, 167 AD3d 1465, 1468 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]). We characterized the eavesdropping allegations as "alarming," but nonetheless noted that "the appropriate vehicle for challenging that conduct is a CPL 440.10 motion inasmuch as defendant's contention[s] concern[] matters outside the record on appeal" (*id.*).

Thereafter, defendant moved to vacate the judgment pursuant to CPL 440.10—both pro se and, subsequently, through assigned counsel (defense counsel)—on the grounds that, inter alia, he was deprived of his right to counsel due to the eavesdropping, and that trial counsel was ineffective by failing to take any action after learning about law enforcement's conduct. Among other things, defendant requested a factfinding hearing to ascertain whether any information gleaned from the eavesdropping was used by the People to develop and support the theory of the murder case at trial. Defendant now appeals from an order summarily denying the CPL 440.10 motion and concluding that defendant waived his entitlement to a factfinding hearing.

Initially, we conclude that the court erred to the extent that it determined that defendant waived his entitlement to a factfinding hearing. “Waiver is the voluntary and intentional relinquishment of a known right; knowledge and intent are essential elements and [a]t the very least the record should reflect an advised and knowing waiver entered into freely and voluntarily” (*People v Suttell*, 109 AD2d 249, 252 [4th Dept 1985], *lv denied* 66 NY2d 767 [1985] [internal quotation marks omitted]; *see People v Cox*, 71 AD2d 798, 798 [4th Dept 1979]; *see generally Johnson v Zerbst*, 304 US 458, 464 [1938]). Here, nothing in the record supports the court’s conclusion that defendant waived a factfinding hearing on the CPL 440.10 motion. In both his pro se and counseled motion papers, defendant *expressly* requested a factfinding hearing, with defense counsel stating that a hearing was needed to ascertain if and how any private information obtained by law enforcement through eavesdropping was used in the development of the People’s trial theory. Indeed, at no time during oral argument on the motion did defendant expressly waive or rescind his request for a hearing, and the court conducted no colloquy with defendant to ensure that he was voluntarily and intentionally agreeing to such a waiver.

Instead, the court’s ultimate conclusion that defendant waived the factfinding hearing is based on its insupportable interpretation of fleeting comments made by defense counsel at oral argument—i.e., that “the court doesn’t even need a fact-finding hearing” and that a “hearing is [not] even necessary.” Viewed in proper context, however, it is abundantly clear that defense counsel’s statements denying the need for a hearing were mere rhetorical hyperbole, not an express and intentional waiver of such a hearing. The obvious thrust of defense counsel’s argument was that the evidence contained in the motion papers was of such strength and quality that defendant had already met his burden on the motion. Supporting the argument that defense counsel’s statements were not an intentional waiver, we note that defense counsel additionally stated at oral argument that a hearing should nonetheless be held “if the [c]ourt thinks that it needs a hearing,” and—crucially—that she “certainly would think that [a hearing] would be better than just denying the motion.” In short, nothing about defense counsel’s statements at oral argument can be construed as an express waiver of the hearing. Given that conclusion, the court erred in determining that defendant waived the hearing by remaining silent during defense counsel’s aforementioned remarks. Moreover, we observe that defendant’s silence—particularly in light of defense counsel’s equivocal remarks—cannot be construed as a “voluntary and *intentional* relinquishment of” his entitlement to a hearing (*Suttell*, 109 AD2d at 252 [emphasis added and internal quotation marks omitted]).

We further conclude that the court erred in summarily denying the motion without conducting a factfinding hearing with respect to defendant’s deprivation of the right to counsel and ineffective assistance of counsel contentions. “On a CPL 440.10 motion pursuant to subdivision (1) (h), the burden is on defendant to demonstrate that [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States” (*People v Gross*, 26 NY3d 689, 693 [2016] [internal quotation marks omitted]).

When a CPL 440.10 motion is made, a hearing to develop additional background facts is not "invariably necessary" (*People v Satterfield*, 66 NY2d 796, 799 [1985]; *see generally* CPL 440.30 [5]). To be entitled to a hearing, defendant "must show that the nonrecord facts sought to be established [at a hearing] are material and would entitle him to relief" (*Satterfield*, 66 NY2d at 799). We review a court's summary denial of a CPL 440.10 motion for an abuse of discretion (*see People v Samandarov*, 13 NY3d 433, 436 [2009]).

On this record, the court abused its discretion in denying the motion without a hearing because there is ample evidence establishing that a factfinding hearing is necessary to determine whether law enforcement's eavesdropping violated defendant's right to counsel. It is well settled that "the fundamental right to counsel in a criminal case includes 'the right to consult counsel *in private*, without fear or danger that the People, in a criminal prosecution, will have access to what has been said' " (*People v Gamble*, 18 NY3d 386, 396 [2012] [emphasis added], *rearg denied* 19 NY3d 833 [2012], quoting *People v Cooper*, 307 NY 253, 259 [1954]). To that end, the courts "have often condemned, without reservation, any intrusion into private communications between counsel and client" (*People v Pobliner*, 32 NY2d 356, 369 n 2 [1972], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]; *see Glasser v United States*, 315 US 60, 76 [1942]; *Matter of Fusco v Moses*, 304 NY 424, 433 [1952]). Indeed, "[t]hat right, based as it is on a fundamental principle of justice, must be protected by the trial judge" (*People v McLaughlin*, 291 NY 480, 482 [1944]; *see People v Hollmond*, 191 AD3d 120, 138 [2d Dept 2020]). Nonetheless, granting a CPL article 440 motion and vacating the judgment of conviction is not automatically required where the court concludes that there has been an intrusion on a defendant's right to private consultation with defense counsel. To warrant vacatur of the judgment, the court must determine "whether the People's evidence on defendant's trial was 'tainted' by such improper eavesdropping" (*People v Morhouse*, 21 NY2d 66, 77 [1967]; *see also Pobliner*, 32 NY2d at 369; *see generally Weatherford v Bursey*, 429 US 545, 552 [1977]).

Here, it is undisputed that law enforcement eavesdropped on at least three of defendant's phone calls with the attorney representing him in the 2013 case. Moreover, it is evident from the detective's notes that defendant and his attorney discussed aspects of the murder case during the intercepted calls at a time when defendant was already a suspect in the murder investigation. As we observed on direct appeal, law enforcement's conduct in this regard was "alarming," and remains so (*Maull*, 167 AD3d at 1468). Still, the operative question for purposes of defendant's entitlement to vacatur of the judgment of conviction is whether the eavesdropping on defendant's conversations with his attorney "tainted" the People's evidence at trial (*Pobliner*, 32 NY2d at 369; *see Morhouse*, 21 NY2d at 77). Although the evidence in support of the motion does not "conclusively substantiate[] by unquestionable documentary proof" that vacatur is required due to a violation of defendant's right to counsel (CPL 440.30 [3]), it is nonetheless suggestive of that fact. Specifically, we observe that the detective's notes about the phone calls create a strong inference

that he was one of the individuals listening in. Thus, there is a question whether the eavesdropping tainted the People's case inasmuch as the detective was the lead investigator in the murder case, and ultimately testified at trial on the People's behalf. At the very least, a hearing on this issue could involve obtaining testimony from the detective to ascertain the circumstances and scope of the eavesdropping, and whether it led to evidence that was introduced at trial. Further, given the timing of the eavesdropping relative to the indictment—i.e., the calls were intercepted *before* defendant was charged in the murder case—a hearing is necessary to ascertain whether the People's decision to seek the indictment was influenced by what law enforcement learned from the intercepted calls. Moreover, the purported impossibility of the eavesdropping by law enforcement—as the People expressly professed at sentencing—plainly raises factual questions about how, precisely, law enforcement was able to eavesdrop on the phone calls in question, and whether there were additional eavesdropping instances involving defendant and his counsel. In short, this is precisely the type of case where a factfinding hearing is appropriate to fully flesh out the seriously concerning allegations made by defendant.

Additionally, we conclude that a factfinding hearing is warranted to consider whether trial counsel was ineffective in failing to take any steps in response to learning about the eavesdropping. In evaluating defense counsel's performance, we consider whether, "viewed in totality" it constituted "meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Turner*, 5 NY3d 476, 480 [2005]). "A defendant advancing an ineffective assistance of counsel claim must 'demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings' " (*People v Hogan*, 26 NY3d 779, 785 [2016]; *see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Rivera*, 71 NY2d 705, 709 [1988]). "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]).

Here, defendant alleges that trial counsel was ineffective by failing to respond at all to the revelations about law enforcement's eavesdropping. At sentencing, trial counsel admitted to knowing about the eavesdropping, but indicated, inter alia, that he did not incorporate that into his defense because he deemed the eavesdropping to be irrelevant to the murder case. That statement is belied by the contents of the detective's notes, which clearly show that law enforcement listened while defendant and his attorney discussed aspects of the murder case. As discussed above, defendant's right to counsel was not violated unless he can show that the eavesdropping tainted the People's case (*see Pobliner*, 32 NY2d at 369). Thus, it would seem incumbent on defense counsel, at the very least, to request a hearing on that issue once he learned about the eavesdropping and saw that some of the intercepted calls pertained to the murder case. In our view, on the record before us, there are seemingly no strategic reasons to justify trial counsel's express refusal to respond to the disclosure of the eavesdropping, and it is unclear why he deemed the intercepted calls irrelevant to the murder case—to say nothing of his

statement suggesting that law enforcement was justified in eavesdropping. Thus, we conclude that there are "sufficient questions of fact [on this record] as to whether [trial counsel] had an adequate explanation for his alleged deficiencies" (*People v Zeh*, 22 NY3d 1144, 1146 [2014]; *see People v Williams* [appeal No. 2], 175 AD3d 980, 982 [4th Dept 2019], *lv denied* 34 NY3d 1020 [2019]), and defendant is therefore entitled to a hearing on the ineffectiveness contention as well (*see generally People v Pendergraph*, 170 AD3d 1630, 1632 [4th Dept 2019]). Consequently, we reverse the order and direct that the court conduct a factfinding hearing on the motion with respect to defendant's deprivation of the right to counsel and ineffective assistance contentions to the extent that they pertain to the eavesdropping allegations.

Finally, we note that the Cattaraugus County District Attorney failed to file a brief in opposition to this appeal and therefore failed "to perform [her] duty to the people of [her] county" (*People v Coger*, 2 AD3d 1279, 1280 [4th Dept 2003], *lv denied* 2 NY3d 738 [2004] [internal quotation marks omitted]; *see generally* County Law § 700 [1]; *People v Herman*, 187 AD2d 1027, 1028 [4th Dept 1992]). The District Attorney is obligated to file a brief in opposition "unless the appeal is from a judgment which [s]he concedes should be reversed" (*Coger*, 2 AD3d at 1280 [internal quotation marks omitted]). No such concession has been made in this case.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

406
CAF 20-00815
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF FAITH LUCE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH BUEHLMAN, SR., RESPONDENT-APPELLANT.

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

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

WILLIAM D. BRODERICK, JR., ELMA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Donna M. Castiglione, R.), entered May 12, 2020, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted in part the amended petition for modification of a prior order of custody and visitation.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that, among other things, granted in part petitioner mother's amended petition to modify a prior order of custody and visitation by awarding the mother increased visitation.

Where an order of custody and visitation is entered on stipulation, a petitioner seeking to modify the prior order has the "burden of establishing a change in circumstances since the time of the stipulation sufficient to warrant an inquiry into whether a [modification of the prior order] is in the child's best interests" (*Werner v Kenney*, 142 AD3d 1351, 1351 [4th Dept 2016] [internal quotation marks omitted]; *see Matter of Jones v Laird*, 119 AD3d 1434, 1434 [4th Dept 2014], *lv denied* 24 NY3d 908 [2014]). "Upon determining that there has been a change in circumstances, [Family Court] must consider whether the requested modification is in the best interests of the child" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]).

Contrary to the father's contention, the mother established a change in circumstances sufficient to warrant an inquiry into the child's best interests. The mother's testimony at the hearing

established that the father had unilaterally arranged for the child's medical appointments to take place during the mother's scheduled visitation, which, in turn, required an adjustment to the visitation schedule, and that the father refused to communicate with her about the child (*see generally Werner*, 142 AD3d at 1351-1352).

We further conclude the court's determination that increased visitation for the mother is in the child's best interests is supported by a sound and substantial basis in the record (*see Matter of Sims v Starkey*, 158 AD3d 1077, 1077 [4th Dept 2018], *lv denied* 31 NY3d 906 [2018]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

415

CA 22-00884

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

JOSEPH A. ROSS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORTHEAST DIVERSIFICATION, INC., AND HAMBURG
CENTRAL SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

NORTHEAST DIVERSIFICATION, INC., AND HAMBURG
CENTRAL SCHOOL DISTRICT, THIRD-PARTY
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

E.J. MILITELLO CONCRETE, INC., THIRD-PARTY
DEFENDANT-APPELLANT-RESPONDENT.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT NORTHEAST DIVERSIFICATION, INC.

WALSH ROBERTS & GRACE, BUFFALO (ROBERT P. GOODWIN OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT HAMBURG CENTRAL SCHOOL DISTRICT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL M. CHELUS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (MARC C. PANEPINTO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered May 24, 2022. The order, inter alia, granted in part the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion in its entirety, granting those parts of the motions of defendants-third-party plaintiffs Northeast Diversification, Inc. and Hamburg Central School District for summary judgment dismissing the Labor Law § 240 (1) causes of action and the Labor Law § 241 (6) causes of action insofar as they are based on the alleged violation of 12 NYCRR 23-1.7 (b) (1) (i), and denying that part of the motion of Hamburg Central School District for summary judgment on its cause of action for contractual indemnification against third-party defendant E.J.

Militello Concrete, Inc., and as modified the order is affirmed without costs.

Memorandum: In this Labor Law and common-law negligence action, plaintiff seeks damages for injuries he allegedly sustained while he was working as a concrete finisher for third-party defendant E.J. Militello Concrete, Inc. (Militello) on a project to install concrete sidewalks and pavement at an elementary school owned by defendant-third-party plaintiff Hamburg Central School District (Hamburg). While performing that work, plaintiff allegedly slipped and tripped on a stone and fell into an 8-to-12-inch deep trench that had been cut into the blacktop to allow the installation of a curb. Defendant-third-party plaintiff Northeast Diversification, Inc. (Northeast) was hired by Hamburg as the general contractor, and Northeast subcontracted with Militello for the sidewalk work. Hamburg asserted cross-claims against Northeast for contractual and common-law indemnification and, in a third-party action, Northeast and Hamburg seek, inter alia, contractual and common-law indemnification from Militello.

Plaintiff moved for, inter alia, partial summary judgment on the issue of liability on his Labor Law § 240 (1) causes of action. Hamburg moved for summary judgment dismissing plaintiff's Labor Law § 240 (1), § 200, and common-law negligence causes of action against it, dismissing plaintiff's Labor Law § 241 (6) cause of action against it in part, and for summary judgment on its contractual and common-law indemnification cross-claims and third-party causes of action against Northeast and Militello. Northeast moved for summary judgment dismissing plaintiff's complaint against it, and moved separately for summary judgment on its third-party causes of action for contractual and common-law indemnification against Militello. Militello moved, in separate motions, for summary judgment dismissing the third-party complaints of Hamburg and Northeast. Supreme Court granted that part of plaintiff's motion seeking summary judgment with respect to liability under Labor Law § 240 (1), granted those parts of Hamburg's motion seeking summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against it and seeking contractual and common-law indemnification against Northeast and Militello, and otherwise denied the motions. Hamburg, Northeast, and Militello appeal.

We agree with Hamburg, Northeast, and Militello that the court erred in granting plaintiff's motion with respect to liability under Labor Law § 240 (1), and we agree with Hamburg and Northeast that the court erred in denying those parts of their motions seeking summary judgment dismissing the section 240 (1) causes of action. The statute applies only to the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (§ 240 [1]). Plaintiff's work involved only the demolition and restoration of a sidewalk and thus section 240 (1) is inapplicable (*see Orellana Siguenza v Cemusa, Inc.*, 127 AD3d 727, 728 [2d Dept 2015]; *see generally Martinez v City of New York*, 93 NY2d 322, 326 [1999]). Although plaintiff argues that the court properly determined that section 240 (1) is applicable because the sidewalk work was part of a

larger construction project, plaintiff and his employer had no other role in the project and the sidewalk work "constituted a separate and distinct phase of the overall project" (*Davis v City of New York*, 147 AD3d 904, 906 [2d Dept 2017]). We therefore modify the order by denying plaintiff's motion in its entirety and granting those parts of the motions of Hamburg and Northeast for summary judgment dismissing the section 240 (1) causes of action.

We further agree with Northeast, Hamburg, and Militello that the court erred in denying those parts of the motions of Northeast and Hamburg for summary judgment dismissing plaintiff's Labor Law § 241 (6) causes of action insofar as they are premised on an alleged violation of 12 NYCRR 23-1.7 (b) (1) (i), which applies to any "hazardous opening into which a person may step or fall . . . provided that [it is] one of significant depth and size" (*Wrobel v Town of Pendleton*, 120 AD3d 963, 966 [4th Dept 2014] [internal quotation marks omitted]; *see Ellis v J.M.G., Inc.*, 31 AD3d 1220, 1221 [4th Dept 2006]). Here, the trench into which defendant fell was of insufficient depth and size to constitute a hazardous opening (*see Palumbo v Transit Tech., LLC*, 144 AD3d 773, 774 [2d Dept 2016]; *Kobel v Niagara Mohawk Power Corp.*, 83 AD3d 1435, 1436 [4th Dept 2011]). We therefore further modify the order by granting those parts of the motions of Northeast and Hamburg for summary judgment dismissing the section 241 (6) causes of action insofar as they are based on the alleged violation of 12 NYCRR 23-1.7 (b) (1) (i).

Contrary to the further contentions of Northeast, Hamburg, and Militello, the court properly denied the respective motions of Northeast and Hamburg with respect to plaintiff's Labor Law § 241 (6) causes of action insofar as they are based on alleged violations of 12 NYCRR 23-1.7 (d) and (e) (2) and 12 NYCRR 23-2.1 (b). With respect to 12 NYCRR 1.7 (d) and (e) (2), issues of fact concerning who was responsible for clearing up the loose stones that allegedly caused plaintiff to slip and trip, and whether those stones constituted a "foreign substance which may cause slippery footing," preclude a determination as a matter of law whether those regulations were violated (*see Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 407 [1st Dept 2020]; *Ventura v Lancet Arch*, 5 AD3d 1053, 1054 [4th Dept 2004]). Contrary to Northeast's further contention, 12 NYCRR 23-2.1 (b) is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Finocchi v Live Nation Inc.*, 141 AD3d 1092, 1094 [4th Dept 2016]; *DiPalma v State of New York*, 90 AD3d 1659, 1661 [4th Dept 2011]).

Contrary to Northeast's contention, it was not entitled to a conditional order of contractual indemnification against Militello. The indemnification clause in the contract between Northeast and Militello required Militello to indemnify Northeast from claims "arising out of or resulting from performance of [Militello's] Work . . . but only to the extent caused by the negligent acts or omissions of [Militello]" or its employees. Inasmuch as there are triable issues of fact whether the claims here arose from negligent acts or omissions of Militello, the court properly denied that part of Northeast's motion for summary judgment on its third-party cause of

action for contractual indemnification (*see Divens v Finger Lakes Gaming & Racing Assn., Inc., LP*, 151 AD3d 1640, 1643 [4th Dept 2017]; *Krajnik v Forbes Homes, Inc.*, 120 AD3d 902, 904 [4th Dept 2014]). Inasmuch as Hamburg's cause of action for contractual indemnification against Militello likewise rests upon the same provision in the contract between Northeast and Militello, we also agree with Militello that the court erred in granting that part of Hamburg's motion for summary judgment on its third-party cause of action for contractual indemnification against Militello. We therefore further modify the order accordingly.

Contrary to Militello's contention, however, the court properly granted that part of Hamburg's motion for summary judgment granting a conditional order of common-law indemnification against Militello. The right of common-law indemnification " 'belongs to parties determined to be vicariously liable without proof of any negligence or active fault on their part' " (*Brickel v Buffalo Mun. Hous. Auth.*, 280 AD2d 985, 985 [4th Dept 2001]; *see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). Hamburg established as a matter of law that it was not negligent and did not actually supervise or control the injury-producing work, and therefore Hamburg was required to establish either that Militello was negligent or that it exercised actual supervision or control over the injury-producing work (*see McCarthy*, 17 NY3d at 378; *Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1327 [4th Dept 2014]). We conclude that Hamburg established, as a matter of law, that Militello exercised actual supervision or control over the work, and the court therefore properly determined that Hamburg is entitled to a conditional order of common-law indemnification against Militello (*see Colyer v K Mart Corp.*, 273 AD2d 809, 810 [4th Dept 2000]). We reject the contention of Northeast, however, that it is likewise entitled to a conditional order of common-law indemnification against Militello inasmuch as there are issues of fact with respect to whether Northeast was negligent (*see McKay v Weeden*, 148 AD3d 1718, 1721 [4th Dept 2017]). We have reviewed the parties' remaining contentions and conclude that none warrants reversal or further modification of the order.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

431
CA 22-00541
PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

DAN'S HAULING & DEMO, INC.,
PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

GMMM HICKLING, LLC, HICKLING POWER
DEVELOPMENT, LLC, POWER DEVELOPMENT
HOLDINGS, LLC, AND JOHN PACHECO,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

THE STEELE LAW FIRM, P.C., OSWEGO (KIMBERLY A. STEELE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Steuben County (J. Scott Odorisi, J.), entered March 28, 2022. The order, among other things, granted that part of the motion of defendants seeking to vacate a preliminary injunction.

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

Same memorandum as in *Dan's Hauling & Demo, Inc. v GMMM Hickling, LLC* ([appeal No. 2] — AD3d — [July 28, 2023] [4th Dept 2023]).

Entered: July 28, 2023   Ann Dillon Flynn
Clerk of the Court

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

432
CA 22-01588
PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

DAN'S HAULING & DEMO, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GMMM HICKLING, LLC, HICKLING POWER
DEVELOPMENT, LLC, POWER DEVELOPMENT
HOLDINGS, LLC, AND JOHN PACHECO,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

THE STEELE LAW FIRM, P.C., OSWEGO (KIMBERLY A. STEELE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Steuben County (J. Scott Odorisi, J.), entered September 29, 2022. The order, among other things, granted the motion of defendant John Pacheco for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant John Pacheco in part and reinstating the fourth through sixth causes of action against that defendant, and as modified the order is affirmed without costs.

Memorandum: These appeals arise from an asset purchase and sale agreement (agreement) between plaintiff and defendant GMMM Hickling, LLC (GMMM). The other defendants are associated with GMMM. Pursuant to the agreement, plaintiff agreed to remove hazardous materials from defendants' power plant, perform demolition work, and pay a sum of money to defendants. In exchange, plaintiff was allowed to remove salvaged metal generated by the project, which plaintiff would then sell to others, and plaintiff agreed to pay defendants the "purchase price" in four installments. Defendants terminated the agreement on the ground that plaintiff failed to comply with the terms of the payment clause. Plaintiff thereafter commenced this action, and Supreme Court (Bradstreet, J.) issued an order granting plaintiff a preliminary injunction, directing defendants to open the property and allow plaintiff to continue its work and ordering plaintiff to file an undertaking in the amount of $375,000 (2018 order). In that order, the court also denied plaintiff's application for the appointment of a

receiver but granted plaintiff's application for attorney's fees related to the preliminary injunction.

Defendants filed a motion for leave to reargue the 2018 order, and plaintiff cross-moved for summary judgment on its complaint. Defendants later withdrew their motion "with the exception of [their] objection to any award of attorney's fees." The court (Rosenbaum, J.) denied plaintiff's cross-motion, searched the record and granted defendants summary judgment on the breach of contract cause of action and on defendants' first counterclaim, for breach of contract, with respect to liability (2019 order). In a prior appeal, we concluded, inter alia, that the payment clause was ambiguous and that the court erred in granting defendants summary judgment dismissing plaintiff's breach of contract cause of action and with respect to liability on defendants' first counterclaim (*Dan's Hauling & Demo, Inc. v GMMM Hickling, LLC*, 193 AD3d 1404, 1408 [4th Dept 2021]).

Following our decision, defendants moved to vacate the preliminary injunction (September 2021 motion). Plaintiff opposed the motion and cross-moved, in the alternative, for either the appointment of a receiver or the issuance of an attachment (November 2021 cross-motion). Plaintiff also sought an order "awarding [p]laintiff its reasonable attorney['s] fees and costs incurred" as a result of the new motion and cross-motion. Plaintiff further reminded the court that it had failed to set the amount of attorney's fees awarded in the 2018 order.

Insofar as relevant here, the court (Odorisi, J.), in the order in appeal No. 1, granted defendants' September 2021 motion with respect to their request to vacate the preliminary injunction and denied plaintiff's November 2021 cross-motion with respect to its requests to appoint a receiver and for attorney's fees and costs.

Following the order in appeal No. 1, plaintiff's attorney sent a letter to the court reminding it that there was still an outstanding award for attorney's fees that needed to be addressed. Based on the fact that the preliminary injunction had been vacated, defendants sent a letter contending that the 2018 award for attorney's fees should likewise be vacated. Plaintiff then moved for leave to renew or reargue the issue related to the appointment of a receiver, or for a stay of the order in appeal No. 1 pending appeal (April 2022 motion). Defendants cross-moved to vacate the 2018 order insofar as it awarded plaintiff attorney's fees (May 2022 cross-motion). In addition, defendant John Pacheco moved for summary judgment dismissing the complaint against him, contending that, inasmuch as he acted solely as an authorized and disclosed agent of defendants, he could not be personally or individually liable for any of the causes of action.

In the order in appeal No. 2, the court (Odorisi, J.), inter alia, denied plaintiff's April 2022 motion insofar as it sought leave to renew or reargue its November 2021 cross-motion, but granted plaintiff's April 2022 motion insofar as it sought a stay of the order in appeal No. 1 pending appeal; granted defendants' May 2022 cross-motion with respect to their request to vacate the 2018 award of

attorney's fees; and granted Pacheco's motion, dismissing the entire complaint against him. Plaintiff appeals from the orders in both appeals.

Contrary to plaintiff's contention in appeal No. 1, the court properly granted defendants' September 2021 motion with respect to their request to vacate the preliminary injunction inasmuch as plaintiff failed to post the required undertaking (*see Price v Erie County Bd. of Elections*, 72 AD2d 969, 970 [4th Dept 1979]; *see also Cade v New York Community Bank*, 18 AD3d 489, 491 [2d Dept 2005]; *Metropolis Seaport Assoc. v South St. Seaport Corp.*, 253 AD2d 663, 664 [1st Dept 1998]). We reject plaintiff's contention that defendants waived their right to challenge plaintiff's failure to post the undertaking by failing to appeal the 2018 order. Defendants are not challenging the propriety of the 2018 order granting the preliminary injunction; instead, they contend, correctly, that changed circumstances warrant vacatur of the preliminary injunction. The 2018 order required the undertaking, and plaintiff never paid that undertaking.

Plaintiff further contends, in appeal No. 1, that the court erred in refusing to appoint a receiver. We reject that contention. "The appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits . . . , and should be granted only where the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests" (*Suissa v Baron*, 107 AD3d 689, 689 [2d Dept 2013] [internal quotation marks omitted]; *see Cyngiel v Krigsman*, 192 AD3d 760, 761-762 [2d Dept 2021]; *Vardaris Tech, Inc. v Paleros Inc.*, 49 AD3d 631, 632 [2d Dept 2008]). It is well established that "[t]he appointment of a receiver is a matter of judicial discretion" (*R. G. Kenny Elec. v Village Mall at Hillcrest*, 50 AD2d 802, 802 [2d Dept 1975]; *see 64 B Venture v American Realty Co.*, 194 AD2d 504, 504 [1st Dept 1993]).

Here, although plaintiff established an interest in the property subject to the agreement, plaintiff did not establish a necessity for a receiver to conserve the property. Under the circumstances, we cannot conclude that the court abused its discretion in refusing to appoint a receiver (*see Phoenix Grantor Trust v Exclusive Hospitality, LLC*, 172 AD3d 926, 926 [2d Dept 2019]; *see also Matter of Brady v Brady*, 193 AD3d 1434, 1435 [4th Dept 2021]; *Silvestri v Ferrara*, 270 AD2d 19, 19 [1st Dept 2000], *lv dismissed* 95 NY2d 825 [2000]).

We further reject plaintiff's contention in appeal No. 2 that the court erred in denying its April 2022 motion insofar as it sought leave to renew its November 2021 cross-motion with respect to the appointment of a receiver. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and . . . shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]). Regardless of whether the new facts alleged by plaintiff could have been discovered or whether plaintiff

had a reasonable excuse for failing to submit that evidence in the November 2021 cross-motion (*see generally Foxworth v Jenkins*, 60 AD3d 1306, 1307 [4th Dept 2009]), the court properly concluded that the new facts were "cumulative of other evidence considered by the court on the [November 2021 cross-]motion" (*Doe v Roe*, 210 AD2d 932, 933 [4th Dept 1994]; *see Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off.*, 175 AD3d 882, 883 [4th Dept 2019], *appeal dismissed* 34 NY3d 1145 [2020]) and would not have changed the result of that cross-motion (*see Boreanaz v Facer-Kreidler*, 2 AD3d 1481, 1482 [4th Dept 2003]; *see also Cole v North Am. Adm'rs, Inc.*, 11 AD3d 974, 975 [4th Dept 2004]; *see generally Schachtler Stone Prods., LLC v Town of Marshall*, 209 AD3d 1316, 1320 [4th Dept 2022]; *Doe*, 210 AD2d at 932-933).

Plaintiff further contends in appeal No. 2 that the court erred in granting Pacheco's motion insofar as it sought summary judgment dismissing the tort causes of action asserted against him. We agree and note that plaintiff, by not raising any challenge to the court's dismissal of the remaining causes of action against Pacheco, has abandoned any contention that the court erred in dismissing those causes of action against him (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Plaintiff correctly contends that Pacheco's moving papers failed to address any potential liability with respect to the tort causes of action against him. As a result, we conclude that he failed to meet his initial burden on his motion with respect to those causes of action, and the burden never shifted to plaintiff to raise a triable issue of fact with respect thereto (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We therefore modify the order in appeal No. 2 accordingly. We note that the documents submitted and the arguments raised for the first time in reply have not been considered in determining whether Pacheco met his initial burden of proof (*see generally Jackson v Vatter*, 121 AD3d 1588, 1589 [4th Dept 2014]; *Covanta Niagara, L.P. v Town of Amherst*, 70 AD3d 1440, 1443 [4th Dept 2010]).

Finally, we conclude in appeal No. 2 that the court did not abuse its discretion in granting defendants' May 2022 cross-motion with respect to their request to vacate the award of attorney's fees arising from the preliminary injunction that has since been lifted (*see generally* CPLR 5015 [a] [5]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

436

CA 23-00203

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

ARTHUR SAMODOVITZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNITED HEALTH SERVICES HOSPITALS, INC.,
LEVENE, GOULDIN & THOMPSON AND ELIZABETH
SOPINSKI, DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

ARTHUR SAMODOVITZ, PLAINTIFF-APPELLANT,

V

LEVENE, GOULDIN & THOMPSON AND JORDAN
CHARNETSKY, DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)

ARTHUR SAMODOVITZ, PLAINTIFF-APPELLANT PRO SE.

BARCLAY DAMON, LLP, ALBANY (MARK T. WHITFORD, JR., OF COUNSEL) FOR DEFENDANT-RESPONDENT UNITED HEALTH SERVICES HOSPITALS, INC.

LEVENE GOULDIN & THOMPSON, LLP, VESTAL (JARED R. MACK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS LEVENE, GOULDIN & THOMPSON, ELIZABETH SOPINSKI AND JORDAN CHARNETSKY.

Appeal from an order of the Supreme Court, Broome County (Jeffrey A. Tait, J.), entered February 2, 2022. The order directed plaintiff to pay $17,789.62 to defendant United Health Services Hospitals, Inc., and to pay $15,447.08 to defendant Levene, Gouldin & Thompson.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reducing the award of attorney's fees and costs payable to defendant United Health Services Hospitals, Inc. to $10,000 and to defendant Levene, Gouldin & Thompson to $10,000, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced these actions sounding in fraud and negligence and seeking damages arising from allegedly false affidavits filed by defendant Levene, Gouldin & Thompson (LGT), a law firm, on behalf of its client, defendant United Health Services Hospitals, Inc. (UHSH), in a previous action between UHSH and plaintiff. Supreme Court dismissed the actions, found them to be frivolous, and awarded attorney's fees and costs to UHSH in the amount

of $17,789.62 and to LGT in the amount of $15,447.08. Although we reject plaintiff's contention that the court abused its discretion in finding the actions frivolous, we agree with plaintiff that the court erred in awarding costs and fees pursuant to 22 NYCRR 130-1.1 rather than CPLR 8303-a (*see Neroni v Follender*, 137 AD3d 1336, 1339 [3d Dept 2016], *appeal dismissed* 27 NY3d 1147 [2016], *rearg denied* 28 NY3d 1024 [2016]; *see generally Pilatich v Town of New Baltimore*, 188 AD3d 1386, 1387-1388 [3d Dept 2020]; *Patane v Griffin*, 164 AD2d 192, 197 [3d Dept 1990], *lv denied* 77 NY2d 810 [1991]). Moreover, inasmuch as " '[b]y the express terms of CPLR 8303-a (a), an award [to a successful party] of costs and reasonable [attorney's] fees for frivolous litigation may not exceed [$10,000]' " (*Pilatich*, 188 AD3d at 1388; *see Zysk v Kaufman, Borgeest & Ryan, LLP*, 53 AD3d 482, 483 [2d Dept 2008]), we further agree with plaintiff that the awards must be reduced. We therefore modify the order by reducing the "award to a total of $20,000, representing $10,000 for" UHSH and $10,000 for LGT (*Pilatich*, 188 AD3d at 1389).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

437
CA 22-01626
PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND GREENWOOD, JJ.

PENN HYDRO, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

B.V.R. CONSTRUCTION COMPANY, INC., AND
UNITED STATES FIRE INSURANCE COMPANY,
DEFENDANTS-APPELLANTS.

ADAMS LECLAIR LLP, ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BABST CALLAND, PITTSBURGH, PENNSYLVANIA (DAVID E. WHITE, ADMITTED PRO HAC VICE, OF COUNSEL), AND BARCLAY DAMON LLP, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered October 6, 2022. The order denied the motion of defendants for summary judgment dismissing the amended complaint and for costs and attorney's fees.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, that part of the motion seeking summary judgment dismissing the amended complaint is granted, the amended complaint is dismissed and the matter is remitted to Supreme Court, Monroe County, to determine that part of the motion seeking costs and attorney's fees.

Memorandum: In anticipation of bidding for a large public works project, defendant B.V.R. Construction Company, Inc. (BVR) sought proposals from subcontractors. Plaintiff, Penn Hydro, Inc., submitted a proposal for concrete demolition work on the project, which stated that the pricing was "based on removal of approximately 4,000 psi concrete." That pricing proposal was later attached as an exhibit to the subcontract executed between BVR and plaintiff, and plaintiff agreed to accept the prices set forth in that exhibit. The subcontract further provided that plaintiff accepted responsibility for inspecting the "conditions that could affect the [s]ubcontract [w]ork at the [p]roject site" and was not relying on any representations made by BVR or its officers, agents, or employees regarding those conditions. Defendant United States Fire Insurance Company (USFIC) is the surety of a payment bond related to the subcontract.

After plaintiff commenced work, it learned that the psi strength

of the concrete at various locations was greater than 4,000, and it sought additional compensation from BVR for its work. When additional compensation was not forthcoming, plaintiff commenced this action, asserting a breach of contract cause of action against BVR, a cause of action against BVR and USFIC under the payment bond, and a cause of action against BVR and USFIC seeking recovery under a mechanic's lien. Following discovery, defendants moved for summary judgment dismissing the amended complaint and for costs and attorney's fees. Supreme Court denied the motion. Defendants appeal, and we now reverse.

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent . . . The best evidence of what parties to a written agreement intend is what they say in their writing . . . Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms . . . A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion . . . Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract" (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002] [internal quotation marks omitted]; *see G.M. Crisalli & Assoc., Inc. v Prestige Contr., Inc.*, 199 AD3d 1307, 1308-1309 [4th Dept 2021]).

Here, we agree with defendants that the subcontract is "reasonably susceptible of only one meaning" and, as a result, we are "not free to alter the [sub]contract" (*G.M. Crisalli & Assoc., Inc.*, 199 AD3d at 1309 [internal quotation marks omitted]). We note that the exhibit attached to the subcontract provided only one estimate of pricing. Although that was "based on" 4,000 psi, the subcontract provided no further statement regarding any "cognizable formula" by which a different price could be ascertained (*Dahm v Miele*, 136 AD2d 586, 587 [2d Dept 1988]). We thus agree with defendants that the price established in the subcontract was a set price, and not contingent on psi strength.

Where, as here, the contract establishes a set price, and a party assumes responsibility for inspecting the construction site to determine what conditions could affect the work, that party is charged with the knowledge such an inspection would have revealed (*see Mid-State Indus., Ltd. v State of New York*, 117 AD3d 1255, 1256-1257 [3d Dept 2014]; *Kenaidan Constr. Corp. v County of Erie*, 4 AD3d 756, 757 [4th Dept 2004]; *Costanza Constr. Corp. v City of Rochester*, 147 AD2d 929, 929 [4th Dept 1989], *appeal dismissed* 74 NY2d 714 [1989], 83 NY2d 950 [1994]), even if the pricing is based on approximations of the quantity of the material or labor needed to complete the work (*see Owners Realty Mgt. & Constr. Corp. v Board of Educ. of City of N.Y. [P.S. 41 Manhattan]*, 192 AD2d 471, 472 [1st Dept 1993]). Inasmuch as defendants established as a matter of law that plaintiff was bound by the set pricing of the subcontract, we conclude that defendants met their burden of establishing that plaintiff was not entitled to any additional compensation when it learned that the psi strength was much greater than 4,000 psi. It follows that the court erred in denying

defendants' motion insofar as it sought summary judgment dismissing the causes of action for breach of contract and for recovery under the payment bond.

Based on our determination on the first and second causes of action, we do not address defendants' contention that plaintiff failed to comply with the notice provisions of the subcontract.

Defendants further contend that the court erred in denying that part of their motion with respect to the mechanic's lien due to the fact that plaintiff did not file a notice of pendency and therefore failed to comply with Lien Law § 18. We agree.

As a preliminary matter, we conclude that the court erred in determining that defendants waived the defense of failure to comply with Lien Law § 18 by failing to raise the issue in their answer as an affirmative defense. CPLR 3018 (b) provides that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." It is well settled that "[a] court may grant summary judgment based upon an unpleaded defense where[, as here,] reliance upon that defense neither surprises nor prejudices the plaintiff" (*D&M Concrete, Inc. v Wegmans Food Mkts., Inc.*, 133 AD3d 1329, 1330 [4th Dept 2015], *lv denied* 27 NY3d 901 [2016] [internal quotation marks omitted]; *see HSBC Bank USA, N.A. v Prime, L.L.C.*, 125 AD3d 1307, 1308 [4th Dept 2015]). We conclude that any allegation that plaintiff failed to comply with Lien Law § 18 would not have taken plaintiff by surprise or prejudiced plaintiff.

As a further preliminary matter, we conclude that the court erred in determining that defendants waived the defense of failure to comply with Lien Law § 18 by failing to raise the lack of a notice of pendency in their initial motion. We conclude that defendants raised the absence of a notice of pendency in their memorandum of law in support of the motion.

With respect to the merits, we note that Lien Law § 18 provides, in pertinent part, that where, as here, a lien is filed with respect to labor or materials related to "a public improvement," the lien "shall not continue for a longer period than one year from the time of filing the notice of such lien, unless an action is commenced to foreclose such lien within that time, *and* a notice of the pendency of such action is filed with the comptroller of the state or the financial officer of the public corporation with whom the notice of such lien was filed; or unless an extension to such lien is filed with the comptroller of the state or the financial officer of the public corporation with whom the notice of such lien was filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing such extension" (emphasis added; *see also* Lien Law §§ 17, 19).

"The notice of pendency is clearly an indispensable requirement to the continuation of a lien and the lack of any notice of pendency is a fatal omission" (*Kellett's Well Boring v City of New York*, 292

AD2d 179, 181 [1st Dept 2002]). If neither an extension to the lien nor a notice of pendency of an action to foreclose is filed within the statutory period, and an extension of the lien is not obtained by order of a court, then "the lien *automatically expires by operation of law*, becoming a nullity and requiring its discharge" (*Aztec Window & Door Mfg., Inc. v 71 Vil. Rd., LLC*, 60 AD3d 795, 796 [2d Dept 2009] [emphasis added]; *see Gallo Bros. Constr. v Peccolo*, 281 AD2d 811, 813 [3d Dept 2001]).

Where, as here, a plaintiff has timely commenced an action, yet failed to timely file a notice of pendency, the lien expires as a matter of law (*see Aztec Window & Door Mfg., Inc.*, 60 AD3d at 796; *Luzon v Perlman*, 255 AD2d 162, 162 [1st Dept 1998]). It is undisputed that plaintiff never filed a notice of pendency, and plaintiff does not contend that it filed a timely extension, or sought and received a court-ordered extension of the lien. We thus conclude that defendants were entitled to summary judgment dismissing the third cause of action.

Finally, because the court did not reach that part of defendants' motion seeking costs and attorney's fees, we remit the matter to Supreme Court to determine that part of the motion.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

446
KA 20-00259
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS FERNANDEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 20, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree and attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]), arising from the execution of a search warrant at the apartment of defendant's codefendant following a months-long narcotics investigation. We affirm.

Preliminarily, we agree with defendant that, contrary to the People's assertion, the waiver of the right to appeal is invalid. Defendant orally waived his right to appeal and executed a written waiver thereof. The language in the written waiver is inaccurate and misleading insofar as it purports to impose "an absolute bar to the taking of a direct appeal" and to deprive defendant of his "attendant rights to counsel and poor person relief, [as well as] all postconviction relief separate from the direct appeal" (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Rumph*, 207 AD3d 1209, 1210 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]; *People v Hunter*, 203 AD3d 1686, 1686 [4th Dept 2022], *lv denied* 38 NY3d 1033 [2022]; *People v Hughes*, 199 AD3d 1332, 1333 [4th Dept 2021]). Although Supreme Court's colloquy "referred to issues that would still be preserved for appeal, including 'constitutional issues' and 'jurisdictional issues,' " the

court's verbal statements " 'did nothing to counter the other inaccuracies set forth in the written appeal waiver' " (*Hunter*, 203 AD3d at 1686; *see Rumph*, 207 AD3d at 1210; *Hughes*, 199 AD3d at 1333). A waiver "cannot be upheld . . . on the theory that the offending language can be ignored and that [it is] enforceable based on the court's few correctly spoken terms" (*Thomas*, 34 NY3d at 566; *see Rumph*, 207 AD3d at 1210; *Hunter*, 203 AD3d at 1686; *Hughes*, 199 AD3d at 1333).

Contrary to defendant's contention, however, we conclude that the court "did not abuse its discretion in denying, without an evidentiary hearing, that branch of defendant's motion which was to suppress the physical evidence recovered upon the search of the apartment pursuant to a search warrant . . . , because the allegations in the motion papers were insufficient to warrant a hearing" (*People v Ibarguen*, 37 NY3d 1107, 1108 [2021], *cert denied* — US —, 142 S Ct 2650 [2022]). In particular, defendant "failed to sufficiently allege standing to challenge the search of the subject premises" (*id.* at 1109 [internal quotation marks omitted]; *see People v Smith*, 155 AD3d 1674, 1675 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]; *People v Fields*, 294 AD2d 916, 916 [4th Dept 2002], *lv denied* 98 NY2d 696 [2002]).

Defendant also contends that he was denied effective assistance of counsel because defense counsel failed to move to suppress the contents of intercepted communications or evidence derived therefrom. According to defendant, defense counsel should have made such a motion on the ground that the People's timely CPL 700.70 notice was incomplete insofar as it purportedly omitted additional eavesdropping warrants and accompanying applications under which interception of defendant's communications was authorized or approved. Defendant's contention survives his guilty plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; *see People v Barzee*, 204 AD3d 1422, 1423 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]; *People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019], *lv denied* 37 NY3d 974 [2021]). Here, defendant's contention "is based, in part, on matter appearing on the record and, in part, on matter outside the record, and, thus, constitutes a mixed claim of ineffective assistance" (*Barzee*, 204 AD3d at 1423; *see People v Johnson*, 195 AD3d 1420, 1421-1422 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]). Where, as here, "the 'claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the [mixed] claim' " to the extent it survives the guilty plea (*People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]; *see Barzee*, 204 AD3d at 1423; *Johnson*, 195 AD3d at 1422; *see generally People v Maffei*, 35 NY3d 264, 269-270 [2020]).

Defendant contends that his plea was not knowing, intelligent, and voluntary because he was coerced into pleading guilty by the

court's denial of his request for new counsel. Defendant did not move to withdraw his plea or to vacate the judgment of conviction and therefore, as defendant correctly concedes, he failed to preserve his contention for our review (*see People v Hobart*, 286 AD2d 916, 916 [4th Dept 2001], *lv denied* 97 NY2d 683 [2001]; *see also People v Campbell*, 210 AD3d 1509, 1510 [4th Dept 2022], *lv denied* 39 NY3d 1071 [2023]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Relatedly, defendant contends that the court erred in denying his request for new counsel without conducting the requisite minimal inquiry into his complaints about defense counsel. Defendant's contention "is encompassed by the plea . . . except to the extent that the contention implicates the voluntariness of the plea" (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012] [internal quotation marks omitted]; *see People v Seymore*, 188 AD3d 1767, 1769 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Harris*, 182 AD3d 992, 994 [4th Dept 2020], *lv denied* 35 NY3d 1066 [2020]). As previously stated, however, defendant's challenge to the voluntariness of the plea is not preserved for our review (*see Seymore*, 188 AD3d at 1769; *People v Rolfe*, 83 AD3d 1219, 1220 [3d Dept 2011], *lv denied* 17 NY3d 809 [2011]). In any event, to the extent that defendant's contention implicates the voluntariness of the plea, and assuming, arguendo, that defendant's expressed desire to relieve retained defense counsel constituted a request for an opportunity to retain new counsel or for substitution of assigned counsel for retained counsel (*see generally People v Harris*, 151 AD3d 1720, 1721 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]), we conclude that defendant abandoned that request when he decided to plead guilty while still being represented by the same attorney (*see People v Williams*, 210 AD3d 1507, 1507 [4th Dept 2022], *lv denied* 39 NY3d 1081 [2023]; *People v Clemons*, 201 AD3d 1355, 1355 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022]). During the plea proceeding, defense counsel represented that defendant was willing to withdraw his prior complaints, defendant did not express dissatisfaction with defense counsel and, upon questioning by the court, defendant expressly declined to assert any disapproval of defense counsel's representation (*see Williams*, 210 AD3d at 1507; *People v Turner*, 197 AD3d 997, 1000 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]).

Defendant further contends that his sentence is unduly harsh and severe; however, 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]). Finally, although the certificate of conviction and uniform sentence and commitment form correctly reflect that defendant was sentenced as a second violent felony offender on the class D violent felony offense of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]; *see* § 70.02 [1] [b], [c]), those documents must be amended to also reflect defendant's sentencing as a second felony drug offender previously convicted of a violent felony on the class A-I felony of criminal possession of a controlled substance in the first

degree (§ 220.21 [1]; *see* § 70.71 [4] [a], [b] [i]; *People v Manners*, 196 AD3d 1125, 1127 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]; *see generally People v Lewis*, 208 AD3d 989, 992 [4th Dept 2022], *lv denied* 39 NY3d 941 [2022]).

Entered: July 28, 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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CAF 23-00016
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF ERIN S. KELLEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT CRAMMOND, RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Peter Angelini, R.), entered July 6, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed petitioner's violation petitions and granted in part petitioner's petition to modify an existing custody and visitation order.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that, inter alia, dismissed her violation petitions against respondent father and granted her petition seeking to modify an existing custody and visitation order to the extent of requiring that the child not be in the presence of the father's wife without "other adult supervision unless . . . [the father] is substantially present." Contrary to the mother's contention, Family Court did not err in dismissing the violation petitions inasmuch as the mother failed to establish that the father's conduct "defeated, impaired, impeded, or prejudiced any right or remedy to which she was entitled" (*Matter of Hall v Hawthorne*, 99 AD3d 1237, 1238 [4th Dept 2012] [internal quotation marks omitted]; *see Matter of Oravec v Oravec*, 89 AD3d 1475, 1475 [4th Dept 2011]).

The mother further contends that the court abused its discretion in failing to prohibit the father's wife from having any contact with the child and instead allowing contact with other adult supervision. We reject that contention. "Family Court is afforded wide discretion in crafting an appropriate visitation schedule . . . and has the power to impose restrictions on [a] child[ ]'s interactions with third parties during visitation if it is in the child[ ]'s best interests to do so" (*Matter of Santana v Barnes*, 203 AD3d 1561, 1561 [4th Dept 2022]; *see Matter of Chromczak v Salek*, 173 AD3d 1750, 1751-1752 [4th Dept 2019]). We see no basis to disturb the court's determination inasmuch as it "is supported by a sound and substantial basis in the

record," including the *Lincoln* hearing (*Santana*, 203 AD3d at 1561; *see Matter of Carr v Stebbins*, 123 AD3d 1164, 1165 [3d Dept 2014]; *see generally Matter of Allen v Boswell*, 149 AD3d 1528, 1529 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

451
CA 22-00151
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, AND MONTOUR, JJ.

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

V MEMORANDUM AND ORDER

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

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

DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered December 27, 2021. The order, insofar as appealed from, granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs, attorney Joy E. Miserendino (Miserendino) and her law firm, commenced this action against defendants, cardiologist John J. Cai (Cai) and his medical practice, seeking damages for alleged defamatory statements that Cai—who had been romantically involved with Miserendino and had also performed work for the law firm while he and Miserendino operated their businesses out of a building owned by Cai—made about Miserendino after their relationship ended. Plaintiffs appeal from an order insofar as it granted the motion of defendants for summary judgment dismissing the complaint. We now reverse the order insofar as appealed from.

As a preliminary matter, we note our difficulty in reviewing this case inasmuch as Supreme Court did not set forth its reasoning for its determination that defendants were entitled to summary judgment (*see One Flint St., LLC v Exxon Mobil Corp.*, 169 AD3d 1392, 1393 [4th Dept 2019]).

" 'The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute

defamation per se' " (*D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 962 [4th Dept 2014]). "[A] false statement 'that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation' " (*Davis v Boeheim*, 24 NY3d 262, 268 [2014], quoting *Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]). "Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, ' . . . only statements alleging facts can properly be the subject of a defamation action' " (*Gross v New York Times Co.*, 82 NY2d 146, 152-153 [1993]; *see Davis*, 24 NY3d at 268). "A defamatory statement of fact is in contrast to 'pure opinion' which under our laws is not actionable because '[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation' " (*Davis*, 24 NY3d at 269, quoting *Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]). "While a pure opinion cannot be the subject of a defamation claim, an opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, . . . is a mixed opinion and is actionable" (*id.* [internal quotation marks omitted]). "This requirement that the facts upon which the opinion is based are known 'ensure[s] that the reader has the opportunity to assess the basis upon which the opinion was reached in order to draw [the reader's] own conclusions concerning its validity' " (*id.*). "What differentiates an actionable mixed opinion from a privileged, pure opinion is 'the implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental to the person' being discussed" (*id.*). "Distinguishing between fact and opinion is a question of law for the courts, to be decided based on 'what the average person hearing or reading the communication would take it to mean' " (*id.*, quoting *Steinhilber v Alphonse*, 68 NY2d 283, 290 [1986]).

We agree with plaintiffs that, contrary to defendants' assertion, the court erred to the extent that it determined that Cai's alleged oral statements to Miserendino's former law partner, with whom Miserendino was in litigation concerning the distribution of fees earned by their prior, co-owned law practice, constituted pure opinion and were thus not actionable as a matter of law. Here, at a meeting he arranged during the pendency of that litigation, Cai allegedly advised the former law partner that Miserendino had dissipated the fee recovered in a case that originated with the co-owned law practice, that Miserendino was hiding money and frequently used a money transfer company to send money elsewhere, and that Miserendino was "manipulative and ethically 'sketchy.' " Shortly after the meeting, the former law partner used Cai's alleged oral statements as the basis for his request in the pending litigation against Miserendino for the appointment of a temporary receiver and for injunctive relief. We conclude on this record that, "[a]lthough [Cai's] comments were mixed statements of opinion and fact, the [former law partner] could reasonably infer, in light of [Cai's personal and] working relationship with [Miserendino], that such statements were 'based upon certain facts known to [Cai] that are undisclosed to the [former law partner] and are detrimental to [Miserendino]' " (*Zulawski v Taylor* [appeal No. 2], 63 AD3d 1552, 1553 [4th Dept 2009]). Defendants thus

failed to meet their initial burden on the motion of establishing a privilege sufficient to warrant judgment as a matter of law with respect to Cai's alleged oral statements to the former law partner (*see id.*; *see generally Caruso v City of Buffalo Urban Renewal Agency*, 162 AD2d 974, 975 [4th Dept 1990]).

We also agree with plaintiffs that, contrary to defendants' assertion, the court erred to the extent that it determined that Cai's written statements to a federal judge, who was presiding over a bench trial in a case being litigated by plaintiffs against parties that included the federal government, did not constitute statements of fact. The record establishes that opposing counsel in the federal case had inadvertently disclosed to plaintiffs documents containing confidential information that, according to Miserendino, were returned to opposing counsel and not used by plaintiffs in litigating the federal case. A few months after the end of his relationship with Miserendino, Cai wrote a letter to the federal judge claiming that he had discovered documents in Miserendino's possession that belonged to opposing counsel and the federal government and that he "strongly believe[d] that [plaintiffs] used these documents during the trial and the submission of arguments" in the federal case. Cai further explained in the letter that he felt an "ethical obligation to give the[ ] documents to [the federal judge]" and that he was willing to discuss his claims with the federal judge in the presence of his attorney. Upon "look[ing] to the over-all context in which the assertions were made" and "consider[ing] the content of the [letter] as a whole, as well as its tone and apparent purpose," which was serious and seemingly designed to alert the federal judge to purported wrongdoing, we conclude that " 'the reasonable reader would have believed that the challenged statements were conveying facts about . . . plaintiff[s]' " (*Brian v Richardson*, 87 NY2d 46, 51 [1995]), namely, that plaintiffs actually retained possession of documents containing confidential information that had been inadvertently disclosed by opposing counsel in the federal case and that plaintiffs had used such documents to their advantage during the course of litigating the federal case. Additionally, in the context of Cai's submission of the letter to the federal judge, "the defamatory nature of the statement[s] cannot be immunized by [their] pairing" with the preface that Cai strongly believed that plaintiffs had retained and used the documents (*Thomas H.*, 18 NY3d at 585; *see Gross*, 82 NY2d at 155).

Plaintiffs further contend that, contrary to defendants' assertion, the court erred to the extent that it determined that Cai's alleged oral and written statements did not constitute defamation per se and that plaintiffs were thus required, and failed, to plead special damages. We agree with plaintiffs. A false statement constitutes defamation per se where, as relevant here, the statement "charge[s] a person with committing a serious crime or . . . would tend to cause injury to a person's profession or business" (*Geraci v Probst*, 15 NY3d 336, 344 [2010]; *see Liberman v Gelstein*, 80 NY2d 429, 435 [1992]). "A statement imputing incompetence or dishonesty to the plaintiff is defamatory per se if there is some reference, direct or indirect, in the words or in the circumstances attending their

utterance, which connects the charge of incompetence or dishonesty to the particular profession or trade engaged in by plaintiff" (*Van Lengen v Parr*, 136 AD2d 964, 964 [4th Dept 1988]). "Whether [a] particular statement[is] considered defamatory per se is a question of law" (*Geraci*, 15 NY3d at 344). Here, we conclude that Cai's oral and written statements—which conveyed that Miserendino secreted money to avoid sharing with her former law partner fees earned by their co-owned law practice and that she acted unethically by retaining, and using to her advantage, inadvertently disclosed confidential information in the federal case—are "actionable as words that tend to injure another in his or her profession" inasmuch as the statements are "more than a general reflection upon [Miserendino's] character or qualities" and, instead, "reflect on her performance or [are] incompatible with the proper conduct of her business [and profession]" as an attorney operating law practices (*Golub v Enquirer/Star Group, Inc.*, 89 NY2d 1074, 1076 [1997]; *see generally Liberman*, 80 NY2d at 436).

Next, plaintiffs contend that, contrary to defendants' assertion, the court erred to the extent that it determined that defendants are immune from defamation liability for Cai's written statements in the letter on the ground that such statements are absolutely privileged. Plaintiffs further contend that, although defendants established that Cai's written statements are subject to a qualified privilege, plaintiffs raised an issue of fact whether the statements were made with malice, which would render the statements unprotected. We again agree with plaintiffs.

"Absolute privilege, which entirely immunizes an individual from liability in a defamation action, regardless of the declarant's motives, is generally reserved for communications made by 'individuals participating in a public function, such as judicial, legislative, or executive proceedings. The absolute protection afforded such individuals is designed to ensure that their own personal interests—especially fear of a civil action, whether successful or otherwise—do not have an adverse impact upon the discharge of their public function' " (*Stega v New York Downtown Hosp.*, 31 NY3d 661, 669 [2018]; *see Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007]; *Toker v Pollak*, 44 NY2d 211, 219 [1978]). "On the other hand, a statement is subject to a qualified privilege when it 'is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his [or her] interest is concerned' " (*Stega*, 31 NY3d at 669-670, quoting *Toker*, 44 NY2d at 219). "When subject to this form of conditional privilege, statements are protected if they were not made with 'spite or ill will' or 'reckless disregard of whether [they were] false or not' . . . , i.e., malice" (*id.* at 670, quoting *Liberman*, 80 NY2d at 437-438). "A qualified privilege 'places the burden of proof on this issue [of malice] upon the plaintiff' " (*id.*, quoting *Toker*, 44 NY2d at 219). "Whether allegedly defamatory statements are subject to an absolute or a qualified privilege 'depend[s] on the occasion and the position or status of the speaker' . . . , a complex assessment that must take into account the specific character of the proceeding in which the communication is made" (*id.*). "In judicial proceedings[,]

the protected participants include the Judge, the jurors, the attorneys, the parties and the witnesses," who are granted the protection of absolute privilege "for the benefit of the public, to promote the administration of justice, and only incidentally for the protection of the participants" (*Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 209 [1983]). "The immunity does not attach solely because the speaker is a Judge, attorney, party or a witness, but because the statements are . . . 'spoken in office' " (*id.* at 210). Thus, for example, "statements made by counsel and parties in the course of 'judicial proceedings' are [absolutely] privileged as long as such statements 'are material and pertinent to the questions involved . . . irrespective of the motive' with which they are made" (*Wiener v Weintraub*, 22 NY2d 330, 331 [1968], quoting *Marsh v Ellsworth*, 50 NY 309, 311 [1872]; *see Stega*, 31 NY3d at 669). The Court of Appeals has nonetheless "reiterated that '[a]s a matter of policy, the courts confine absolute privilege to a very few situations' " (*Stega*, 31 NY3d at 670).

Here, we conclude that absolute privilege does not apply. Cai was not a party, a witness, or an attorney in the federal case and, although he may have performed some work on plaintiffs' behalf during the course of the federal case, his professional and personal relationship with Miserendino had ended months before his submission of the letter to the federal judge. Cai thus "had no 'office' in the [federal] judicial proceedings and therefore . . . was not entitled to the immunity received by those who did" (*Park Knoll Assoc.*, 59 NY2d at 210; *see Silverman v Clark*, 35 AD3d 1, 12 [1st Dept 2006]; *Garson v Hendlin*, 141 AD2d 55, 59 [2d Dept 1988], *lv denied* 74 NY2d 603 [1989]). Moreover, viewing the evidence in the light most favorable to plaintiffs and drawing every available inference in their favor (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we conclude that plaintiffs' submissions—including Miserendino's sworn statement that she had informed Cai prior to his submission of the letter that she had returned any confidential information inadvertently disclosed by opposing counsel in the federal case and text messages in which Cai arguably threatened Miserendino's career and livelihood by alluding to his ability to jeopardize a potential verdict in the federal case if she did not agree to repay debts he believed she owed—"raised an issue of fact whether [Cai's written] statements were motivated solely by malice and thus are not protected by a qualified privilege" (*Stevenson v Cramer*, 151 AD3d 1932, 1934 [4th Dept 2017]; *see O'Neil v Peekskill Faculty Assn.*, 120 AD2d 36, 43 [2d Dept 1986], *appeal dismissed* 69 NY2d 984 [1987]).

Based on the foregoing, we conclude that the court erred in granting defendants' motion for summary judgment dismissing the complaint.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

454
OP 22-00885
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF WILLIAM J. COKE, SR.,
PETITIONER,

V ORDER

NIAGARA COUNTY DISTRICT ATTORNEY, RESPONDENT.

WILLIAM J. COKE, SR., PETITIONER PRO SE.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT, FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to compel the disclosure of purported evidence and seeking vacatur of a criminal conviction.

It is hereby ORDERED that said petition is unanimously dismissed without costs (*see* CPLR 7801 [2]; 7803; *see generally Matter of Hennessy v Gorman*, 58 NY2d 806, 807 [1983]; *Matter of Thompson v Annucci* [appeal No. 2], 136 AD3d 1408, 1409 [4th Dept 2016], *lv denied* 27 NY3d 909 [2016]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

455
CA 21-01132
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

DEBRA D. SMITH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS P. AZZARELLA, DEFENDANT-RESPONDENT.

DEBRA D. SMITH, PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered January 11, 2021. The order, inter alia, referred the matter to a referee to oversee and determine the distribution of personal property.

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

Memorandum: To the extent that the appeal has not been rendered moot, the order is not appealable as of right (*see Valiotis v Bekas*, 191 AD3d 1038, 1040 [2d Dept 2021]; *Selinger v Selinger*, 232 AD2d 471, 471 [2d Dept 1996], *lv dismissed* 89 NY2d 981 [1997], *lv dismissed* 90 NY2d 842 [1997], *rearg denied* 90 NY2d 937 [1997]; *Crowley v Hazen*, 85 AD2d 928, 928 [4th Dept 1981]; *see generally* CPLR 5701 [a]), and we decline to treat the notice of appeal as an application for leave to appeal (*see* CPLR 5701 [c]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

460
CA 22-00859
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

EMMANUEL SANTIAGO, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 132357.)

GOLDSTEIN & HANDWERKER, LLP, NEW YORK CITY (JASON LEVINE OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALEXANDRIA TWINEM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Francis T. Collins, J.), entered March 23, 2022. The order granted the motion of defendant to dismiss the claim and dismissed the claim and denied claimant’s cross-motion seeking leave to serve a late claim.

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

Memorandum: Claimant appeals from an order granting the motion of defendant, State of New York (State), to dismiss the claim and denying claimant’s cross-motion seeking leave to file a late claim. We affirm.

On October 13, 2018, claimant, who was incarcerated at a correctional facility, was slashed in the face by another inmate. Although he filed a claim with the Court of Claims, within 90 days of the accrual of the underlying claim as required by Court of Claims Act § 10 (3), claimant did not serve the Attorney General until January 30, 2019—109 days after the claim accrued. In November 2021, the State moved to dismiss the claim as untimely and, in January 2022, claimant cross-moved for leave to file a late claim pursuant to section 10 (6). The court denied the cross-motion, on the ground that it was not filed until after “an action asserting a like claim against a citizen of the state would be barred under the provisions of [CPLR article 2]” (§ 10 [6]), granted the motion, and dismissed the claim.

Court of Claims Act § 10 (6) gives a court “discretionary power to allow the late filing of a claim upon consideration of a number of factors, including the merits of the case” (*Lichtenstein v State of New York*, 93 NY2d 911, 912 [1999]; *see Stirnweiss v State of New York*, 186 AD3d 1444, 1445 [2d Dept 2020]). The application for such relief,

however, must be made before the expiration of the applicable statute of limitations under article two of the CPLR (*see* §§ 10 [6]; 12 [2]; *Shah v State of New York*, 178 AD3d 871, 872 [2d Dept 2019], *appeal dismissed* 35 NY3d 982 [2020], *lv dismissed in part & denied in part* 35 NY3d 1107 [2020], *rearg denied* 36 NY3d 1047 [2021]; *Campos v State of New York*, 139 AD3d 1276, 1278 [3d Dept 2016]). Once the statute of limitations has expired on the proposed claims, a court is without discretion to entertain an application for leave to file a late claim (*see generally Matter of Goffredo v City of New York*, 33 AD3d 346, 347 [1st Dept 2006]).

Initially, we agree with claimant that the court erred in concluding that it lacked authority to grant the cross-motion. Here, the court concluded that it lacked the power to consider the cross-motion because it was filed in January 2022, which was after the three-year statute of limitations applicable to negligence claims would have expired based on the accrual date of October 13, 2018 (*see generally* CPLR 214 [5]). However, as claimant argues, and the State correctly concedes, the statute of limitations was tolled by Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) and several subsequent executive orders (*see* Executive Order [A. Cuomo] No. 202.72 [9 NYCRR 8.202.72]) from March 20, 2020 until November 3, 2020 in response to the COVID-19 pandemic (*see Murphy v Harris*, 210 AD3d 410, 411-412 [1st Dept 2022]; *Matter of Roach v Cornell Univ.*, 207 AD3d 931, 932-933 [3d Dept 2022]; *Little v Steelcase, Inc.*, 206 AD3d 1597, 1599-1600 [4th Dept 2022], *lv denied* 39 NY3d 911 [2023]). After accounting for the tolling of the applicable statute of limitations during part of the original limitations period, we conclude that the cross-motion was timely. Consequently, we conclude that the court did, in fact, have the authority to consider claimant's cross-motion (*see Carey v State of New York*, 207 AD3d 1194, 1196-1197 [4th Dept 2022]).

The State nonetheless contends, as a properly raised alternative ground for affirmance on claimant's appeal (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), that there is a different reason supporting the denial of the cross-motion. We agree with the State. In considering whether to grant an application to file a late claim, the court must consider, inter alia, the six factors contained in Court of Claims Act § 10 (6) (*see Lichtenstein*, 93 NY2d at 912; *Phillips v State of New York*, 179 AD3d 1497, 1498 [4th Dept 2020]; *Collins v State of New York*, 69 AD3d 46, 48-49 [4th Dept 2009]). The most significant of those factors is "whether the claim appears to be meritorious" (§ 10 [6]), because "it would be futile to permit the filing of a legally deficient claim which would be subject to immediate dismissal, even if the other factors tend to favor the granting of the request" (*Phillips*, 179 AD3d at 1498 [internal quotation marks omitted]; *see Ortiz v State of New York*, 78 AD3d 1314, 1314-1315 [3d Dept 2010]).

Here, we conclude that claimant's proposed cause of action lacks any appearance of merit (*see generally Matter of Martinez v State of New York*, 62 AD3d 1225, 1227 [3d Dept 2009]). It is well settled that "[t]he State's duty to an incarcerated person encompasses protection

from the *foreseeable* risk of harm at the hands of other prisoners. Because the State is not an insurer of an inmate's safety, it will be liable in negligence for an assault by another inmate only upon a showing that it failed to exercise adequate care to prevent that which was reasonably foreseeable" (*Melvin v State of New York*, 101 AD3d 1654, 1654-1655 [4th Dept 2012] [emphasis added and internal quotation marks omitted]). Here, there are no facts asserted in the claim supporting the allegation that the State's employees failed to protect claimant against a foreseeable threat. At most, the claim merely contains general and conclusory allegations of negligence, which are insufficient to show that the claim appears meritorious (*see Matter of Sandlin v State of New York*, 294 AD2d 723, 724-725 [3d Dept 2002], *lv dismissed* 99 NY2d 589 [2003]; *Scarver v State of New York*, 233 AD2d 858, 858 [4th Dept 1996]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

464
KA 21-01759
PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PABLO M. SANTIAGO, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.), rendered October 27, 2021. The judgment convicted defendant, upon a jury verdict, of driving while ability impaired and aggravated unlicensed operation of a motor vehicle in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and the indictment is dismissed without prejudice to the People to file any appropriate charges.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of driving while ability impaired (Vehicle and Traffic Law § 1192 [1]), as a lesser included offense of driving while intoxicated (§ 1192 [3]), and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). The conviction arose from a traffic stop during which defendant, who was driving without a valid license with his seven-year-old son in a vehicle that contained open containers of alcoholic beverages, exhibited signs of being under the influence of alcohol and acknowledged consuming alcohol earlier in the evening.

Contrary to defendant's contention, we conclude that County Court properly refused to suppress the physical evidence resulting from the traffic stop and defendant's arrest (*see People v Russ*, 183 AD3d 1238, 1238 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]; *see generally People v Prochilo*, 41 NY2d 759, 761 [1977]). Next, viewing the evidence in light of the elements of driving while ability impaired as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to that crime is against the weight of the evidence (*see People v Gibson*, 173 AD3d 1785, 1785-1786 [4th Dept 2019], *lv denied* 34 NY3d 931 [2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that the court erred in denying his challenge for cause to prospective juror No. 2 on the second panel of prospective jurors. "It is well settled that 'a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the [prospective] juror states unequivocally on the record that he or she can be fair and impartial' " (*People v Odum*, 67 AD3d 1465, 1465 [4th Dept 2009], *lv denied* 14 NY3d 804 [2010], *reconsideration denied* 15 NY3d 755 [2010], *cert denied* 562 US 931 [2010], quoting *People v Chambers*, 97 NY2d 417, 419 [2002]). Although CPL 270.20 (1) (b) "does not require any particular expurgatory oath or 'talismanic' words . . . , [a prospective] juror[ ] must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*People v Arnold*, 96 NY2d 358, 362 [2001]; *see People v Harris*, 19 NY3d 679, 685 [2012]).

Here, viewing the prospective juror's statements "in totality and in context" (*People v Warrington*, 28 NY3d 1116, 1120 [2016]; *see People v Johnson*, 94 NY2d 600, 615-616 [2000]; *People v Clark*, 171 AD3d 1530, 1531 [4th Dept 2019]), we conclude that those statements cast serious doubt on her ability to render an impartial verdict because, during discussions of the allegations against defendant, the prospective juror twice indicated that the mere presence of a child in the vehicle could influence her ability to fairly and impartially evaluate the evidence (*see Warrington*, 28 NY3d at 1117, 1120; *People v Valdez*, 138 AD3d 1151, 1153 [2d Dept 2016], *lv denied* 28 NY3d 938 [2016]; *People v Henriques*, 307 AD2d 937, 937-938 [2d Dept 2003], *lv denied* 100 NY2d 642 [2003]; *People v Webster*, 177 AD2d 1026, 1028 [4th Dept 1991], *lv denied* 79 NY2d 866 [1992]). The prospective juror initially stated in response to follow-up questioning that, despite the allegation that a child was present in the vehicle, she would still require the People to prove beyond a reasonable doubt that defendant was intoxicated. However, she later retreated from that assurance upon further questioning by acknowledging that the mere fact that defendant had imbibed alcohol or had alcoholic beverages in the vehicle would, even in the absence of proof of intoxication, possibly influence her ability to evaluate the evidence, and then added, without prompting, that such influence on her decision-making would be especially so given that a child was involved (*see Clark*, 171 AD3d at 1531; *People v Betances*, 147 AD3d 1352, 1353-1354 [4th Dept 2017]). "[N]othing less than a personal, unequivocal assurance of impartiality can cure a [prospective] juror's prior indication that [they are] predisposed against a particular defendant or particular type of case" (*Arnold*, 96 NY2d at 364), and our review of the record here establishes that the prospective juror "did not g[i]ve the requisite unequivocal assurances that her prior state of mind would not influence her verdict and that she could be fair and impartial" (*Clark*, 171 AD3d at 1531 [internal quotation marks omitted]).

Inasmuch as defendant exercised a peremptory challenge with respect to the prospective juror and exhausted all of his peremptory challenges before the completion of jury selection, the denial of his challenge for cause constitutes reversible error (*see* CPL 270.20 [2]; *People v Padilla*, 191 AD3d 1347, 1348 [4th Dept 2021]; *Clark*, 171 AD3d

at 1531-1532). Therefore, under the circumstances of this case, we reverse the judgment and dismiss the indictment without prejudice to the People to file any appropriate charge (*see People v Kniffin*, 176 AD3d 1601, 1602 [4th Dept 2019]; *People v Crombleholme*, 8 AD3d 1068, 1071 [4th Dept 2004], *lv denied* 3 NY3d 672 [2004]; *see generally People v Gonzalez*, 61 NY2d 633, 635 [1983]). In light of our determination, we do not address defendant's remaining contentions.

Entered: July 28, 2023 Ann Dillon Flynn
Clerk of the Court

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

469
KA 20-00080
PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAHHAILE R. REID, ALSO KNOWN AS RAEQUAN,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered July 31, 2019. The judgment convicted defendant, upon a jury verdict, of failure to register and/or verify status as a sex offender.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant, a level one sex offender, appeals from a judgment convicting him, upon a jury verdict, of failure to register and/or verify his status as a sex offender by failing to personally appear for an updated photograph (Correction Law §§ 168-f [2] [b-3], [c-1]; 168-t). The gravamen of defendant's contention on appeal is that the evidence at trial is legally insufficient to support the conviction because it varied from the theory contained in the indictment, which alleged in relevant part that defendant, on or about December 10, 2018, failed to personally appear at the law enforcement agency having jurisdiction within 20 days of the third anniversary of his initial registration and every three years thereafter during the period of registration for the purpose of providing a current photograph of himself. We agree with defendant.

In light of the contention advanced by defendant here, "[o]ur analysis begins with the State constitutional provision that '[n]o person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury' " (*People v Grega*, 72 NY2d 489, 495 [1988], quoting NY Const, art I, § 6; *see also* CPL 210.05). "The Constitution further provides that an accused 'shall be informed of the nature and cause of the accusation' " (*Grega*, 72 NY2d

at 495, quoting NY Const, art I, § 6; *see also* CPL 200.50). "An indictment serves three important purposes" (*Grega*, 72 NY2d at 495). " 'First and foremost, an indictment . . . provid[es] the defendant with fair notice of the accusations against [the defendant], so that [the defendant] will be able to prepare a defense' " (*id.*). "Second, the indictment prevents the prosecutor from usurping the powers of the Grand Jury by ensuring that the crime for which [the] defendant is tried is the same crime for which [the defendant] was indicted, 'rather than some alternative seized upon by the prosecution in light of subsequently discovered evidence' " (*id.* at 495-496). "Finally, an indictment prevents later retrials for the same offense in contravention of the constitutional prohibition against double jeopardy" (*id.* at 496).

"Proof at trial that varies from the indictment potentially compromises two of the functions of the indictment—notice to the accused and the exclusive power of the Grand Jury to determine the charges" (*id.*). "Where [the] defendant's right to fair notice of the charges or [the] right to have those charges preferred by the Grand Jury rather than by the prosecutor at trial has been violated, reversal is required" (*id.*). Critically, " '[w]here there is a variance between the proof and the indictment, and where the proof is directed exclusively to a new theory rather than the theory charged in the indictment, the proof is deemed insufficient to support the conviction' " (*People v Duell*, 124 AD3d 1225, 1227 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015]; *see People v Bradley*, 154 AD3d 1279, 1279-1281 [4th Dept 2017]; *People v Smith*, 161 AD2d 1160, 1161 [4th Dept 1990], *lv denied* 76 NY2d 865 [1990]).

With respect to the subject offense charged in the indictment here, the statute provides in relevant part that, "[i]f the sex offender has been given a level one or level two designation, he or she shall personally appear at the law enforcement agency having jurisdiction within [20] days of the third anniversary of the sex offender's initial registration and every three years thereafter during the period of registration for the purpose of providing a current photograph of such offender" (Correction Law § 168-f [2] [b-3]). The statute further provides that if the sex offender to whom proper notice had been mailed "fails to personally appear at the law enforcement agency having jurisdiction . . . within [20] days of the anniversary of the sex offender's initial registration, or an alternate later date scheduled by the law enforcement agency having jurisdiction, he or she shall be in violation of this section" (§ 168-f [2] [c-1]). For criminal enforcement of a violation, another part of the statute authorizes a felony charge if the sex offender "fails to register or verify in the manner and within the time periods provided for in this article" (§ 168-t).

Preliminarily, we note that defendant preserved for our review his contention that the conviction is not supported by legally sufficient evidence on the ground that the evidence presented at trial varied from the theory alleged in the indictment (*see Bradley*, 154 AD3d at 1280; *cf. People v Davis*, 15 AD3d 920, 921 [4th Dept 2005], *lv denied* 4 NY3d 885 [2005], *reconsideration denied* 5 NY3d 787 [2005];

see generally People v Faison, 198 AD3d 1263, 1264 [4th Dept 2021]). On the merits, defendant contends on appeal that "[t]he proof at trial showed that the occurrence date alleged, December 10, 2018, does not correspond, even approximately, to any time period in which [he] was obligated to appear" for an updated photograph. We agree.

The evidence presented at trial established that defendant initially registered as a sex offender on July 13, 2004, which meant that he was obligated to appear in the summer every three years thereafter to update his photograph and that the most recent appearance window prior to his arrest and indictment was between June 23 and August 2, 2016. The evidence further established that defendant failed to appear during the 2016 appearance window, and that an officer from the police department having jurisdiction thereafter sought to remind defendant that he was required to update his photograph. There was no evidence, however, that law enforcement ever scheduled "an alternate later date" by which defendant could appear for an updated photograph (Correction Law § 168-f [2] [c-1]). Thus, as defendant correctly contends, any punishable violation of the statute was complete on August 2, 2016, at which point defendant had failed to appear "within the time periods provided" (§ 168-t), i.e., within 20 days of defendant's triennial registration anniversary (*see* § 168-f [2] [b-3]), thereby completing the actus reus of the crime (*see generally People v Couser*, 28 NY3d 368, 376 n 3 [2016]).

Consequently, although the evidence is legally sufficient to establish that defendant violated the statute by failing to personally appear at the subject police station within 20 days of the 2016 triennial anniversary of his initial registration, i.e., between June 23 and August 2, 2016, the indictment did not allege that defendant's failure to appear occurred during that specified time period and instead charged that the failure to appear occurred 2½ years later on or about December 10, 2018 (*see People v Morgan*, 111 AD3d 1254, 1258 [4th Dept 2013]). Inasmuch as there was a variance between the People's trial evidence and the indictment, and the evidence was insufficient to support the theory that defendant failed to appear within 20 days of any triennial registration anniversary in December 2018, defendant was essentially tried and convicted on a charge for which he had not been indicted (*see Bradley*, 154 AD3d at 1281; *see also Morgan*, 111 AD3d at 1257-1258).

To address the discrepancy, the People argued below and reiterate on appeal, and County Court agreed, that defendant was both indicted and tried for a continuing offense, i.e., the indictment charged and the proof established that defendant continued to violate the statute up through December 10, 2018. We agree with defendant, however, that the People's position is factually and legally unsustainable.

As defendant correctly contends, the indictment does not contain language alleging that he failed to appear within 20 days of his triennial anniversary or at any point thereafter up through December 10, 2018. Instead, the criminal omission specified in the indictment is defendant's alleged failure to personally appear at the law enforcement agency having jurisdiction within 20 days of his triennial

registration anniversary, and the date upon which that failure allegedly occurred was on or about December 10, 2018. We agree with defendant that, without additional language that is absent from the indictment, the only coherent reading of the indictment is that defendant committed a discrete statutory violation when the relevant appearance window closed on or about December 10, 2018 (*cf. People v Rodriguez*, 88 AD3d 600, 601 [1st Dept 2011]; *People v Chiles*, 70 AD3d 1453, 1453 [4th Dept 2010]).

Inasmuch as the indictment charges a discrete statutory violation in December 2018, we further agree with defendant that the court erred in allowing the People to proceed on a theory that the violation actually occurred in August 2016 and thereafter continued to occur up through December 2018. " 'It is well settled that except where time is a material ingredient of the crime the prosecution is not confined in its evidence to the precise date laid in the indictment, but may prove that the offense was committed at any time prior to the commencement of the prosecution and such proof does not constitute a material variance' " (*People v Cunningham*, 48 NY2d 938, 940 [1979]). Here, however, the date *is* a material element of the crime inasmuch as the offense is defined as the failure to appear "within the time periods provided in this article" (Correction Law § 168-t) and, specifically, within 20 days of the sex offender's triennial registration anniversary (§ 168-f [2] [b-3]) or an alternate later date scheduled by law enforcement (§ 168-f [2] [c-1]; *cf. People v Erle*, 83 AD3d 1442, 1444 [4th Dept 2011], *lv denied* 17 NY3d 794 [2011]). Moreover, the 2½-year variance here is not minor or inconsequential (*see People v Bigda*, 184 AD2d 993, 994 [4th Dept 1992]; *see also Morgan*, 111 AD3d at 1257-1258). Indeed, by allowing the People to proceed on a theory that defendant's failure occurred on an ongoing basis up through December 2018, the court permitted the People to undercut defendant's defense that he was unaware of his photograph update obligation by arguing that defendant became aware of that obligation at some later point during the extended period.

In an attempt to salvage the conviction, the People invite us to determine that a violation of Correction Law § 168-f (2) (b-3) constitutes a continuing crime as a matter of law. We decline that invitation. Where, as here, "the language of [a] statute does not unambiguously express a legislative determination that the crime should be considered a continuing one," the statute should be afforded the interpretation that "best protects the rights of a person charged with an offense" (*People v Landy*, 125 AD2d 703, 704 [2d Dept 1986], *lv denied* 69 NY2d 882 [1987] [internal quotation marks omitted]; *see generally Toussie v United States*, 397 US 112, 115 [1970]). The text of the statute imposes criminal liability when a sex offender fails to register or verify "within the time periods provided for in this article" (§ 168-t), including by failing to personally appear to provide an updated photograph within 20 days of the sex offender's triennial registration anniversary or an alternate date (*see* § 168-f [2] [b-3], [c-1]). In other words, the crime at issue here "becomes a completed crime" (*Landy*, 125 AD2d at 704) when the sex offender fails to appear for an updated photograph within 20 days of the sex

offender’s triennial registration anniversary (*see* § 168-f [2] [b-3]) or an alternate later date scheduled by law enforcement (*see* § 168-f [2] [c-1]). Additionally, we agree with defendant that, inasmuch as the legislature provided a means of charging a failure to make an overdue appearance—i.e., where the sex offender fails to appear within 20 days of a scheduled alternate date—it would be incongruent to read section 168-f (2) (b-3) as creating a continuing crime that includes the failure to make an overdue appearance. We thus reject the People’s assertion that the conviction may be sustained on that basis.

Based on the foregoing, we conclude that the evidence is legally insufficient to sustain defendant’s conviction, and thus the judgment should be reversed and the indictment should be dismissed (*see Bradley*, 154 AD3d at 1280-1281).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

470

KA 22-00354

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA M. SANFORD, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered October 1, 2021. The judgment convicted defendant upon a plea of guilty of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the plea is vacated, and the matter is remitted to Steuben County Court for further proceedings on the superior court information.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), defendant contends that County Court erred in accepting his *Alford* plea (*see North Carolina v Alford*, 400 US 25 [1970]) because the record lacks the requisite strong evidence of his actual guilt (*see generally Matter of Silmon v Travis*, 95 NY2d 470, 475 [2000]). By failing to move to withdraw the plea or vacate the judgment of conviction on that ground, defendant failed to preserve his contention for our review, and this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *People v Crittleton*, 202 AD3d 1488, 1488 [4th Dept 2022], *lv denied* 39 NY3d 939 [2022]; *People v Johnson*, 167 AD3d 1512, 1514 [4th Dept 2018], *lv denied* 33 NY3d 949 [2019]). We nevertheless exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

During the plea allocution, defendant maintained that there was insufficient evidence that he struck the victim, i.e., the evidence relating to the physical contact element of criminal contempt in the first degree under Penal Law § 215.51 (b) (v). The court's further inquiry, however, failed to ascertain the strength of the evidence as

to that element of the crime. Because the record on appeal does not contain the requisite strong evidence of defendant's guilt of criminal contempt in the first degree, we conclude that the court erred in accepting the plea (*see Alford*, 400 US at 37; *People v Alexander*, 97 NY2d 482, 486 n 3 [2002]). We therefore reverse the judgment of conviction, vacate the plea, and remit the matter to County Court for further proceedings on the superior court information.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

472
CAF 21-01782
PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF KAROLINE DIEDRICHS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER G. MCAVOY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

JOSEPH S. DRESSNER, CANANDAIGUA, FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered November 16, 2021, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 6 seeking to modify a prior custody and visitation order entered on stipulation by awarding her "joint custody [and] placement" of the child with visitation to respondent father. The mother appeals from an order that effectively granted the father's motion to dismiss the petition.

It is well settled that "[w]here an order of custody and visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the child[ ]" (*Matter of Berg v Stoufer-Quinn*, 179 AD3d 1544, 1544 [4th Dept 2020] [internal quotation marks omitted]; *see Matter of McKenzie v Polk*, 166 AD3d 1529, 1529 [4th Dept 2018]; *Matter of Hight v Hight*, 19 AD3d 1159, 1160 [4th Dept 2005]). "[O]ne who seeks to modify an existing order of [custody and] visitation is not automatically entitled to a hearing [and] must make some evidentiary showing sufficient to warrant it" (*Matter of Moreno v Elliott*, 170 AD3d 1610, 1612 [4th Dept 2019] [internal quotation marks omitted]; *see Berg*, 179 AD3d at 1545). Here, we conclude that the mother failed to establish the requisite change in circumstances, and Family Court therefore did not err in granting the father's motion to

dismiss the petition (*see Matter of Jessica EE. v Joshua EE.*, 188 AD3d 1479, 1481-1482 [3d Dept 2020]; *see also Berg*, 179 AD3d at 1545; *Matter of De Cicco v De Cicco*, 29 AD3d 1095, 1096 [3d Dept 2006]; *see generally Matter of Chrysler v Fabian*, 66 AD3d 1446, 1447 [4th Dept 2009], *lv denied* 13 NY3d 715 [2010]).

The mother also contends that the court erred in failing to modify the prior custody and visitation order by setting forth an appropriate supervised visitation schedule for her with the child. However, the mother did not request that relief in her petition (*see generally Matter of Sharon V. v Melanie T.*, 85 AD3d 1353, 1356 [3d Dept 2011]; *Matter of Moorhead v Coss*, 17 AD3d 725, 726 [3d Dept 2005]; *Matter of Michael G.B. v Angela L.B.*, 219 AD2d 289, 295 [4th Dept 1996]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

477
CAF 21-01780
PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF KAROLINE DIEDRICHS,
PETITIONER-APPELLANT,

V ORDER

CHRISTOPHER G. MCAVOY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

JOSEPH S. DRESSNER, CANANDAIGUA, FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered November 29, 2021, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

486
TP 22-00292
PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF WASHINGTON CENTER FOR REHABILITATION AND NURSING HOME, AND ALBERT B. NOLETTE, WASHINGTON COUNTY TREASURER, AS TEMPORARY LIMITED ADMINISTRATOR FOR THE ESTATE OF SALLY BARDEN, DECEASED, PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

COWART DIZZIA LLP, NEW YORK CITY (JENNIFER SWEENEY OF COUNSEL), FOR PETITIONERS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Bernadette T. Clark, J.], entered January 18, 2022) to review a determination of respondent. The determination imposed a penalty period upon an application for Medicaid for nursing facility services.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul a determination of respondent, which upheld after a fair hearing the finding of the Oneida County Department of Social Services (DSS) that Sally Barden (decedent) made uncompensated transfers during the look-back period (*see* Social Services Law § 366 [5] [a], [e] [1] [vi]), but modified the finding as to the amount of uncompensated transfers and the resulting penalty period, during which she was ineligible for Medicaid nursing facility services. We now confirm the determination.

"When reviewing a Medicaid eligibility determination made after a fair hearing, we must determine whether the agency's decision is supported by substantial evidence and [is] not affected by an error of law, bearing in mind that the petitioner bears the burden of demonstrating eligibility" (*Matter of Flannery v Zucker*, 136 AD3d 1385, 1385 [4th Dept 2016] [internal quotation marks omitted]). "We will uphold the agency's determination when it is 'premised upon a reasonable interpretation of the relevant statutory provisions and is

consistent with the underlying policy of the Medicaid statute' " (*id.*, quoting *Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 658 [1998]).

Contrary to petitioners' contention, substantial evidence supported respondent's determination that decedent's son made the uncompensated transfers on behalf of decedent as power of attorney for her, rather than in his capacity as the executor of his father's estate, and that those uncompensated transfers were made, at least in part, in order for decedent to qualify for Medicaid (*see Matter of Underwood v Zucker*, 191 AD3d 1438, 1441 [4th Dept 2021]; *Matter of Burke*, 145 AD3d 1589, 1589-1590 [4th Dept 2016]; *Matter of Conners v Berlin*, 105 AD3d 1208, 1211 [3d Dept 2013]).

Petitioners further contend that respondent's determination with respect to the effective date of an undue hardship waiver is arbitrary and capricious or contrary to law because there was inadequate notice to decedent of the opportunity to apply for such a waiver. We reject that contention. The evidence established that DSS provided adequate notice pursuant to Social Services Law § 366 (5) (e) (4) (iv) by letter dated October 23, 2018, which was well before it issued its first determination granting decedent's application for Medicaid limited coverage with a penalty period. Notwithstanding that notice, petitioners did not apply for an undue hardship waiver until December 19, 2019, more than three months after the transfer penalty period had expired. Respondent properly concluded that, pursuant to Administrative Directive 06 OMM/ADM-5, the undue hardship waiver period could extend no more than three months prior to the month in which the application for an undue hardship waiver was made, and any undue hardship waiver would have no effect here because it would not overlap with the penalty period (*see Matter of Anand v New York State Dept. of Health*, 196 AD3d 563, 564-565 [2d Dept 2021]; *see generally Matter of Blue v Zucker*, 192 AD3d 1693, 1695-1696 [4th Dept 2021]).

We do not review petitioners' remaining contentions, which are not properly before us inasmuch as petitioners failed to raise them in the administrative hearing (*see Burke*, 145 AD3d at 1590; *Matter of Vacari v Wing*, 244 AD2d 974, 976 [4th Dept 1997]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

487
CA 22-00989
PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF RICHARD R., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), entered June 15, 2022, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner to a secure treatment facility.

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

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

We reject petitioner's contention that the evidence is legally insufficient to establish that he is currently a dangerous sex offender requiring confinement. Pursuant to the Mental Hygiene Law, a person may be found to be a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). The Mental Hygiene Law defines a mental abnormality as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]).

Contrary to petitioner's contention, viewing the evidence in the light most favorable to respondent (*see Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014], *rearg denied* 24 NY3d 933 [2014]), we

conclude that the evidence is legally sufficient to establish by clear and convincing evidence " 'the predisposition prong of the mental abnormality test' " (*Matter of State of New York v Anthony B.*, 180 AD3d 688, 691 [2d Dept 2020], *lv denied* 35 NY3d 913 [2020]; *see Matter of Edward T. v State of New York*, 185 AD3d 1423, 1424 [4th Dept 2020]). Respondent's expert diagnosed petitioner with pedophilic disorder and other specified personality disorder with antisocial features, which, when viewed in combination, predispose him to commit sex offenses and were sufficiently connected to his sex offending behavior (*see Matter of Charles B. v State of New York*, 192 AD3d 1583, 1585 [4th Dept 2021], *lv denied* 37 NY3d 913 [2021]).

We further conclude that the evidence is legally sufficient to establish by clear and convincing evidence that petitioner has "serious difficulty in controlling" his sexual conduct (Mental Hygiene Law § 10.03 [i]; *see Matter of State of New York v James R.C.*, 165 AD3d 1612, 1613 [4th Dept 2018]). Respondent established that petitioner failed to attend treatment groups, failed to have a relapse prevention plan, and had high scores on his risk assessment instruments (*see Charles B.*, 192 AD3d at 1585-1586; *Matter of State of New York v Scott W.*, 160 AD3d 1424, 1426 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]). For the aforementioned reasons, we also conclude that respondent met its burden of establishing that petitioner has " 'such an inability to control [his] behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility' " (*Edward T.*, 185 AD3d at 1425, quoting § 10.03 [3]; *see Charles B.*, 192 AD3d at 1585-1586).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

488
CA 22-01242
PRESENT: PERADOTTO, J.P., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

UTICA MUTUAL INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AMERICAN RE-INSURANCE COMPANY, NOW KNOWN AS
MUNICH REINSURANCE AMERICA, INC.,
DEFENDANT-APPELLANT.

RUBIN, FIORELLA, FRIEDMAN & MERCANTE LLP, NEW YORK CITY (BRUCE M. FRIEDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

HUNTON ANDREWS KURTH LLP, WASHINGTON, D.C. (SYED S. AHMAD, ADMITTED PRO HAC VICE, OF COUNSEL), AND FELT EVANS, LLP, CLINTON, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Gregory R. Gilbert, J.), entered June 29, 2022. The order, inter alia, granted plaintiff's motion for summary judgment dismissing defendant's first counterclaim.

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

Memorandum: The facts and prior procedural history of this case are fully set forth in our decision on the prior appeal (*Utica Mut. Ins. Co. v American Re-Insurance Co.*, 211 AD3d 1587 [4th Dept 2022]). As relevant to this appeal, plaintiff issued primary and umbrella policies of insurance to nonparty Burnham Corporation (Burnham) covering a period from 1977 to 1984. Plaintiff obtained from defendant reinsurance coverage for the same period related to the umbrella policies. When Burnham was sued, plaintiff paid certain defense costs under the umbrella policies after plaintiff allegedly exhausted the primary policies and sought reimbursement from defendant for those defense costs. After paying plaintiff approximately $2,000,000 for defense costs, defendant concluded that it was not obligated to cover those costs because those costs were not covered under the umbrella policies and ceased future payments. Plaintiff thereafter commenced this action. Defendant answered and asserted counterclaims, including its first counterclaim alleging that plaintiff had breached the reinsurance contracts by billing defendant for defense costs that defendant did not owe, causing defendant to pay plaintiff for amounts it was not obligated to cover. Defendant sought reimbursement of the amounts paid to plaintiff for defense costs.

Plaintiff moved for summary judgment dismissing defendant's first counterclaim, and defendant moved for summary judgment on its first counterclaim. Supreme Court granted plaintiff's motion, denied defendant's motion, and dismissed the first counterclaim. Defendant appeals.

We agree with defendant that, to the extent the court determined that defendant was collaterally estopped from obtaining reimbursement of the improperly paid defense costs based upon the ruling in *Utica Mut. Ins. Co. v Munich Reinsurance Am., Inc.* (381 F Supp 3d 185 [ND NY 2019], *affd* 7 F4th 50 [2d Cir 2021] [*Munich Reinsurance Am., Inc.*]), any such determination was error. Collateral estoppel "applies only 'if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the [party] had a full and fair opportunity to litigate the issue in the earlier action' " (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128 [2007], quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]; *see Plumley v Erie Blvd. Hydropower, L.P.*, 114 AD3d 1249, 1249 [4th Dept 2014]). Thus, collateral estoppel will not apply to cases where the prior determination was based upon different facts (*see Matter of Henson v City of Syracuse*, 119 AD3d 1340, 1341 [4th Dept 2014]; *see generally Jones v Town of Carroll*, 122 AD3d 1234, 1238 [4th Dept 2014], *lv denied* 25 NY3d 910 [2015]). *Munich Reinsurance Am., Inc.*, which was decided after a bench trial, involved policies issued to a different insured, as well as communications between plaintiff and defendant regarding those policies that raised concerns regarding the policy language long before the disputed payments were made (381 F Supp 3d at 189-190, 220-221). The decision in *Munich Reinsurance Am., Inc.* was "[b]ased upon [those] facts" specific to the insured and the policy at issue (*id.* at 221). Although there are certainly similarities between those facts and the present matter, the issue presented on this appeal is not identical to the issue previously raised and collateral estoppel does not apply.

Nevertheless, we conclude that plaintiff established its entitlement to summary judgment dismissing the first counterclaim based upon the voluntary payment doctrine. The voluntary payment doctrine is a common-law principle that bars recovery for "payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003]; *see Hedley's, Inc. v Airwaves Global Logistics, LLC*, 130 AD3d 872, 873 [2d Dept 2015], *lv denied* 26 NY3d 911 [2015]; *Merchants Mut. Ins. Group v Travelers Ins. Co.*, 24 AD3d 1179, 1180 [4th Dept 2005]). Under that doctrine, "[t]he onus is on a party that receives what it perceives as an improper demand for money to take its position at the time of the demand, and litigate the issue before, rather than after, payment is made" (*DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 403 [1st Dept 2015] [internal quotation marks omitted]; *see Lonner v Simon Prop. Group, Inc.*, 57 AD3d 100, 109 [2d Dept 2008]). "There is a presumption that payments are voluntary," and any protest thereto must be made "at the time of payment" (*Overbay, LLC v Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.*, 185 AD3d 707, 709 [2d Dept 2020]; *see*

ECI Fin. Corp. v Resurrection Temple of Our Lord, Inc., 213 AD3d 735, 736 [2d Dept 2023]).

Although a "mistake of material fact or law" is an exception to the voluntary payment doctrine (*Dillon*, 100 NY2d at 526), if a payment is made based upon a party's own lack of diligence, the voluntary payment doctrine will bar recovery (*see Eighty Eight Bleecker Co., LLC v 88 Bleecker St. Owners, Inc.*, 34 AD3d 244, 246 [1st Dept 2006]; *Gimbel Bros. v Brook Shopping Ctrs.*, 118 AD2d 532, 535 [2d Dept 1986]; *see also Citicorp N. Am., Inc. v Fifth Ave. 58/59 Acquisition Co., LLC*, 70 AD3d 408, 409 [1st Dept 2010]). Here, plaintiff's submissions on its motion established that defendant never made "any effort to learn what [its] legal obligations were," and instead simply made payments without objection, assuming that the charges submitted to it were covered by language in the umbrella policies that defendant never obtained prior to making those payments (*Citicorp N. Am., Inc.*, 70 AD3d at 409; *see Munich Reinsurance Am., Inc.*, 381 F Supp 3d at 221-222). In opposition, defendant failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Defendant contends that the voluntary payment doctrine is inapplicable here in light of plaintiff's alleged bad faith. We reject that contention. To the extent that defendant relies on *Metropolitan Prop. & Cas. Ins. Co. v GEICO Gen. Ins. Co.* (186 AD3d 1513 [2d Dept 2020]), its reliance is misplaced because, unlike here, that case involved an excess insurer that contributed to a settlement of the underlying action while reserving its rights against the primary insurer and thereafter sought to recover that contribution, not, as here, a voluntary payment to the primary insurer (*see id.* at 1514-1515).

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

Inasmuch as plaintiff met its initial burden on its motion by establishing that the voluntary payment doctrine applied and defendant failed to raise a triable issue of fact in opposition, the court properly granted plaintiff's motion (*cf. Eighty Eight Bleecker Co., LLC*, 34 AD3d at 246-247; *see also Munich Reinsurance Am., Inc.*, 381 F Supp 3d at 221-222; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). For the same reasons, we conclude that defendant failed to meet its initial burden on its motion and that the court therefore properly denied that motion.

In light of our determination, we need not address plaintiff's alternative grounds for affirmance.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

492

KA 22-01491

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

SHAWN CONWAY, DEFENDANT-RESPONDENT.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (ERIK D. BENTLEY OF COUNSEL), FOR APPELLANT.

NATHANIEL L. BARONE, II, PUBLIC DEFENDER, MAYVILLE (HEATHER R. BURLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Chautauqua County Court (David W. Foley, J.), dated June 27, 2022. The order granted that part of defendant's omnibus motion seeking suppression of tangible evidence seized pursuant to a search warrant.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress tangible evidence is denied, and the matter is remitted to Chautauqua County Court for further proceedings on the indictment.

Memorandum: The People appeal pursuant to CPL 450.20 (8) from an order granting that part of defendant's omnibus motion seeking suppression of tangible evidence seized pursuant to a search warrant. The record establishes that a police officer assigned as an investigator to a regional drug task force submitted a search warrant application to a town justice seeking authorization to search a specified room at a hotel that was occupied by defendant. In sum, the investigator averred that there was probable cause to believe that evidence of a drug crime, including methamphetamine, cocaine, and drug paraphernalia, would be found at the subject location based on, inter alia, the task force's month-long investigation of narcotics sales at the hotel and information from a particular confidential informant (CI) who had recently made observations of various drugs inside the hotel room and reported that defendant was selling certain drugs there. To establish the veracity of the CI, the investigator also averred regarding the nature of the CI's past collaborations with the police. After the town justice signed the search warrant, the police executed it and seized, among other things, methamphetamine, cocaine, fentanyl, nearly $600 in cash, multiple digital scales and cell phones, and boxes of packaging material.

Defendant was subsequently charged by indictment with criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [2]) and criminal possession of a controlled substance in the third degree (§ 220.16 [7]). In his omnibus motion, defendant sought suppression of the tangible evidence seized upon execution of the search warrant on the ground that the search warrant application failed to establish the CI's veracity and basis of knowledge. Defendant also requested a *Darden* hearing to confirm the existence of the CI. The People opposed that part of the omnibus motion on the ground that the search warrant application satisfied the *Aguilar-Spinelli* test, but they consented to a *Darden* hearing.

County Court, without conducting a hearing, granted that part of defendant's omnibus motion seeking suppression of the tangible evidence. The court first determined that the basis of knowledge component of the *Aguilar-Spinelli* test was met by the CI's observations in the hotel room. The court further determined, however, that the veracity component of the test had not been satisfied. The court reasoned that, although the investigator minimally recited the CI's track record of reliability, the remainder of the application consisted of conclusory statements that the investigator and other officers had been investigating the narcotics operation for approximately one month, and did not provide details of any direct observations made by law enforcement officers during the investigation. The court rejected the People's contention that the CI's track record of reliability was enough on its own to satisfy the veracity prong. According to the court, the People's position was inconsistent with *People v DiFalco* (80 NY2d 693 [1993]). The court concluded that the information provided by the CI failed to meet the *Aguilar-Spinelli* test and therefore that the search warrant was not supported by probable cause.

The People now contend on appeal that, contrary to the court's determinations, the information in the search warrant application satisfied the veracity component of the *Aguilar-Spinelli* test because it sufficiently established the CI's track record of reliability, and independent corroboration of the information provided by the CI was not required in this case. We agree.

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" (*People v Moxley*, 137 AD3d 1655, 1656 [4th Dept 2016]; *see generally People v Mercado*, 68 NY2d 874, 875-876 [1986], *cert denied* 479 US 1095 [1987]) 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 (*see People v Bigelow*, 66 NY2d 417, 423 [1985]; *People v Pitcher*, 199 AD3d 1493, 1493 [4th Dept 2021]). "[P]robable cause may be supplied, in whole or in part, [by] hearsay information, provided [that] it satisfies the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted" (*People v Flowers*, 59 AD3d 1141, 1142 [4th Dept 2009] [internal quotation marks omitted]; *see Pitcher*, 199 AD3d at

1493-1494). Consequently, "in evaluating hearsay information[,] the [m]agistrate must find some minimum, reasonable showing that the informant was reliable and had a basis of knowledge" (*People v Griminger*, 71 NY2d 635, 639 [1988]).

"Only the veracity component of the test is at issue here" (*DiFalco*, 80 NY2d at 696). That component "concerns the trustworthiness of the person supplying the information and requires the affiant to set forth the reasons which led [the affiant] to conclude that the informer was credible or that [the] information was reliable" (*People v Hanlon*, 36 NY2d 549, 556 [1975]). The veracity component thus "relates to the validity of the information and requires a showing *either* that the informant is credible and that the information supplied may, for that reason, be accepted as true *or*, in the absence of such showing, that the specific information given is reliable" (*DiFalco*, 80 NY2d at 696-697). Regarding the "informant credibility" basis for establishing veracity, "the veracity component may be met by showing that the informant was credible because [the informant] had a 'track-record' " (*id.* at 697 n 2), which refers to the informant's "past performance as a supplier of information" (*People v Johnson*, 66 NY2d 398, 403 [1985]; *see People v Rodriguez*, 52 NY2d 483, 489 [1981]).

With respect to judicial review of the validity of search warrants, it is well established that "search warrant applications should not be read in a hypertechnical manner as if they were entries in an essay contest"; rather, such applications "must be considered in the clear light of everyday experience and accorded all reasonable inferences" (*Hanlon*, 36 NY2d at 559; *see Griminger*, 71 NY2d at 640; *People v Hightower*, 207 AD3d 1199, 1201 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]). Indeed, "reviewing courts should accord the process proper deference and not defeat search warrants (or discourage law enforcement officials from seeking them) by imposing overly technical requirements or interpreting them incompatibly with common sense" (*People v Cahill*, 2 NY3d 14, 41 [2003]). In that regard, "[a]pproval by a reviewing magistrate cloaks a search warrant with 'a presumption of validity' " (*People v DeProspero*, 91 AD3d 39, 44 [4th Dept 2011], *affd* 20 NY3d 527 [2013], quoting *People v Castillo*, 80 NY2d 578, 585 [1992], *cert denied* 507 US 1033 [1993]; *see People v Socciarelli*, 203 AD3d 1556, 1557-1558 [4th Dept 2022], *lv denied* 38 NY3d 1035 [2022]). "In reviewing the validity of a search warrant to determine whether it was supported by probable cause . . . , the critical facts and circumstances for the reviewing court are those which were made known to the issuing [m]agistrate at the time the warrant application was determined" (*People v Nieves*, 36 NY2d 396, 402 [1975]; *see Pitcher*, 199 AD3d at 1494).

Here, regarding the veracity of the CI, the investigator averred in support of the search warrant application that the CI, who had been assigned a particular confidential informant number, was found to be honest, trustworthy, and reliable based on the CI's past work with the investigator. The investigator specified that prior information supplied by the CI had led to search warrants, one of which led to the arrest of an individual. Additionally, the investigator averred that

the CI had performed controlled drug transactions on behalf of law enforcement that had resulted in the arrests of other suspects. Applying the requisite standard of review to the search warrant application, we conclude that "[t]he reliability of the CI was established by the [investigator's] statements that the CI had given credible and accurate information in the past" (*People v Colon*, 192 AD3d 1567, 1568 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]).

In reaching that conclusion, we reject defendant's assertion that information from a registered confidential informant leading to a single prior arrest cannot be indicative of reliability (*see People v Walters*, 187 AD2d 472, 473 [2d Dept 1992], *lv denied* 81 NY2d 849 [1993]). Indeed, "[a]pplying a quantitative rather than a qualitative analysis of an informant's reliability places a burden on the police in using confidential informants not contemplated by the standard articulated by the Court of Appeals, of 'some minimum, reasonable showing that the informant was reliable' " (*People v Proctor*, 155 AD2d 624, 625 [2d Dept 1989], *lv denied* 75 NY2d 923 [1990], quoting *Griminger*, 71 NY2d at 639; *see Walters*, 187 AD2d at 473). Contrary to defendant's related assertion, although information leading to prior arrests *and convictions* would certainly strengthen an informant's reliability, information leading to search warrants or arrests alone may be considered positively in evaluating the reliability of an informant, along with other indicia (*see e.g. Hanlon*, 36 NY2d at 554; *People v Patterson*, 199 AD3d 1072, 1073 [3d Dept 2021], *lv denied* 37 NY3d 1163 [2022]; *People v Stephens*, 209 AD2d 999, 999 [4th Dept 1994], *lv denied* 84 NY2d 1039 [1995]; *People v Collier*, 89 AD2d 1041, 1042 [3d Dept 1982]). Here, in addition to the prior tip that had led to the issuance of a search warrant and an arrest, the CI had also successfully worked with law enforcement on other narcotics investigations inasmuch as the CI had performed controlled drug transactions that had resulted in the arrests of suspects, which provided further indicia of the CI's reliability (*see generally People v Baptista*, 130 AD3d 1541, 1542 [4th Dept 2015], *lv denied* 27 NY3d 991 [2016]; *Flowers*, 59 AD3d at 1142; *People v Johnson*, 237 AD2d 916, 917 [4th Dept 1997], *lv denied* 90 NY2d 859 [1997]).

Defendant questions the lack of detail provided about the prior arrests that resulted from the CI's collaborations with the police, and contends that the investigator's "representations lacked sufficient specificity because no details were provided as to the legality of the arrests, whether evidence was seized and whether prosecutions resulted from them" (*People v Calise*, 256 AD2d 64, 66 [1st Dept 1998], *lv denied* 93 NY2d 851 [1999]). We reject that contention. Instead, "[a]ll that is required is a sworn statement by the applicant regarding a 'verified history of success with this informant' . . . , and that is exactly what occurred here" (*id.*).

The court recognized that the investigator had made some minimum, reasonable showing of the CI's track record of reliability, but nonetheless determined that, in light of "the holding of *DiFalco*," the veracity component of the *Aguilar-Spinelli* test had not been satisfied because the application did not include any independent corroboration

of the CI's information through investigation and direct observations by the police. That was error inasmuch as *DiFalco* states that the veracity component "requires a showing *either* that the informant is credible and that the information supplied may, for that reason, be accepted as true *or*, in the absence of such showing, that the specific information given is reliable" (80 NY2d at 696-697). Here, for the reasons previously set forth, we conclude that "the [CI's] track record alone provided a sufficient basis for the issuing [town justice's] determination of reliability" (*Calise*, 256 AD2d at 66).

Based on the foregoing, we reverse the order, deny that part of the omnibus motion seeking suppression of tangible evidence, and remit the matter to County Court for further proceedings on the indictment. We note that, upon remittal, defendant should be allowed to renew that part of his omnibus motion seeking a *Darden* hearing to challenge the existence of the CI (*see People v Scavone*, 59 AD2d 62, 66 [3d Dept 1977]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

495

KA 18-01291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NELSON B. CARDOZA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 22, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts) and reckless endangerment 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 two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of reckless endangerment in the first degree (§ 120.25). We affirm.

Defendant contends that Supreme Court erred in admitting an audio recording captured by ShotSpotter, an acoustic gunfire detection and location system, in evidence inasmuch as the system was able to identify the location of gunshots within a 25-meter margin of error but the location of the shooting was more than 25 meters from the location identified by ShotSpotter. We disagree. Although a senior technical support engineer for ShotSpotter testified that the system's margin of error was 25 meters, he also explained that additional factors could influence the margin of error. Here, one such factor involved the location of the ShotSpotter sensors in relation to the shooting, an issue that was testified to by the witness and explored by defense counsel in front of the jury. Any inconsistency or discrepancy in relation to the accuracy of the ShotSpotter system went to the weight to be accorded to the evidence and not its admissibility (*see generally People v Garces*, 158 AD3d 413, 414 [1st Dept 2018], *lv denied* 31 NY3d 1081 [2018]; *People v Shinebarger*, 110 AD3d 1478, 1479 [4th Dept 2013], *lv denied* 24 NY3d 1088 [2014]; *People v Dean*, 28 AD3d 1118, 1119 [4th Dept 2006], *lv denied* 7 NY3d 787 [2006]).

Defendant further contends that the court erred in admitting in evidence his arrest photograph. We reject that contention. It is well settled that "[a]n arrest photograph may be admitted into evidence in order to establish that a defendant's appearance was different at the time of the commission of the crime than at trial" (*People v Grady*, 204 AD3d 1524, 1524 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022] [internal quotation marks omitted]). The court must weigh the probative value of the evidence against its prejudice to defendant (*see People v Buskey*, 13 AD3d 1058, 1059 [4th Dept 2004]). Here, defendant's appearance had changed in the several months between his arrest and trial inasmuch as, at the time of the crime, defendant had a mustache and goatee and his hair was longer. We conclude that the court "properly admitted the photograph in evidence to show defendant's appearance at the time of the crime" (*Grady*, 204 AD3d at 1525).

Defendant also contends that the court erred in admitting in evidence a compilation video of surveillance footage inasmuch as it lacked a proper foundation and the time stamps of the original videos that were used to create the compilation did not align. "The decision to admit or exclude videotape evidence generally rests, to be sure, within a trial court's founded discretion" (*People v Patterson*, 93 NY2d 80, 84 [1999]). "Similar to a photograph, a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted" (*id.*). Although the evidentiary foundation at the time the compilation video was entered into evidence was weak, any deficiency in that foundation was later remedied by the testimony of witnesses who confirmed the accuracy of the events depicted in the compilation. Accordingly, even assuming, arguendo, that the compilation video was improperly admitted before that later testimony, any such error was harmless (*see People v Daniels*, 36 AD3d 502, 503 [1st Dept 2007], *lv denied* 9 NY3d 842 [2007]; *see generally People v Cannon*, 236 AD2d 294, 294 [1st Dept 1997], *lv denied* 90 NY2d 902 [1997]) inasmuch as the evidence of defendant's guilt is overwhelming and there is no significant probability that the jury would have acquitted defendant but for the court's error (*see People v Lawrence*, 141 AD3d 1079, 1083 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Additionally, although defendant is correct that the time stamps in the video footage used for the compilation video did not match each other, that discrepancy went to the weight of the evidence and not its admissibility (*see People v Sanders*, 185 AD3d 1280, 1283 [3d Dept 2020], *lv denied* 35 NY3d 1115 [2020]; *People v Yanez*, 180 AD3d 816, 816 [2d Dept 2020], *lv denied* 38 NY3d 931 [2022], *reconsideration denied* 38 NY3d 1075 [2022]).

Defendant next contends that the photo array was unduly suggestive and that the court erred in admitting in evidence any identification based on it. We disagree. Contrary to defendant's contention, this is not a case where the suspect was the only one wearing distinctive clothing identified by witnesses to the crime (*cf. People v Owens*, 74 NY2d 677, 678 [1989]); rather, defendant and one

other individual included in the array were wearing a black hooded sweatshirt, which is “a ‘generic and common article of clothing’ ” (*People v McBride*, 14 NY3d 440, 448 [2010], *cert denied* 562 US 931 [2010]; *see People v Williams*, 177 AD3d 536, 536 [1st Dept 2019], *lv denied* 34 NY3d 1164 [2020]).

Defendant further contends that the court erred in admitting the surveillance video footage in evidence because the initial identifications of defendant by police officers as the person seen in the video footage were based on secondhand or hearsay information from fellow officers. We disagree. After the *Rodriguez* hearing, the court ruled that the identifications of defendant by two officers were confirmatory, based upon their extensive prior contacts with defendant. Inasmuch as the court’s findings are supported by the record, they should not be disturbed (*see People v Allen*, 231 AD2d 900, 901 [4th Dept 1996], *lv denied* 89 NY2d 918 [1996]; *see generally People v Abrams*, 100 AD3d 1458, 1459 [4th Dept 2012]). Contrary to defendant’s related contention, a *Wade*-type hearing was unnecessary (*see People v Williams*, 128 AD3d 1522, 1523-1524 [4th Dept 2015], *lv denied* 25 NY3d 1209 [2015]). Similarly, the People were not required to provide CPL 710.30 notice with respect to the officers’ identifications (*see People v Boyer*, 6 NY3d 427, 431-432 [2006]).

Nor did the court err in permitting the witnesses to testify to defendant’s presence in the video footage. “A lay witness may give an opinion concerning the identity of a person depicted in a surveillance [video] if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury” (*People v Harlow*, 195 AD3d 1505, 1507 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021] [internal quotation marks omitted]; *see People v Brown*, 145 AD3d 1549, 1549 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]; *cf. People v Oquendo*, 152 AD3d 1220, 1221 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]). Here, the officer was more likely to correctly identify defendant from the video based upon his prior 30 to 50 interactions with defendant (*see People v Griffin*, 203 AD3d 1608, 1612 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022]). Similarly, the two people who were in the vehicle that was shot at had previously observed defendant in the vicinity of the shooting, and therefore were more likely to identify him correctly in the video than the jury was.

Defendant next contends that the court erred in giving an expanded jury charge on the issue of intent and in denying his request for a circumstantial evidence charge. We reject those contentions. In instructing the jury on intent, the court provided almost verbatim the expanded charge set forth in the Criminal Jury Instructions (*see* CJI2d[NY] Expanded Charge on Intent, https://www.nycourts.gov/judges/cji/1-General/CJI2d.Intent.pdf [last accessed June 28, 2023]). The court’s language did not improperly shift the burden of proof to defendant (*see Sandstrom v Montana*, 442 US 510, 524 [1979]) but “merely described a permissive inference” (*People v Shutter*, 163 AD2d 871, 871 [4th Dept 1990]). We further conclude that defendant was not entitled to a charge on circumstantial evidence, inasmuch as the proof at trial regarding the identity of the perpetrator was not entirely

circumstantial (*cf. People v James*, 147 AD3d 1211, 1212-1214 [3d Dept 2017], *lv denied* 29 NY3d 1128 [2017]; *see generally People v Bretagna*, 298 NY 323, 325-326 [1949], *cert denied* 336 US 919 [1949], *reh denied* 336 US 922 [1949]; *People v Duffy*, 124 AD2d 258, 260 [3d Dept 1986], *lv denied* 69 NY2d 710 [1986]).

Defendant also contends that the court erred in denying his pro se motion pursuant to CPL 330.30, which was adopted and supplemented by defendant's new counsel in an affirmation, and which was largely based on the alleged ineffectiveness of defendant's trial counsel for failing to call as a witness the owner of the vehicle that was shot at. We disagree. Here, the record supports the conclusion that defense counsel's decision not to call the owner was a matter of trial strategy and therefore does not constitute ineffective assistance of counsel (*see People v Bermudez*, 38 AD3d 1325, 1326 [4th Dept 2007], *lv denied* 9 NY3d 840 [2007]). We note that, in order to elicit testimony from the vehicle owner that was allegedly favorable to defendant, defense counsel would have to impeach the owner's credibility by having her repudiate a statement to the police that she had signed (*see People v Lewis-Bush*, 204 AD3d 1424, 1426 [4th Dept 2022], *lv denied* 38 NY3d 1072 [2022]). Further, defendant's allegation of ineffective assistance was based entirely on hearsay and, therefore, the moving papers did not "contain sworn allegations of all facts essential to support the motion" (CPL 330.40 [2] [e] [ii]; *see People v Porter*, 184 AD3d 1014, 1018 [3d Dept 2020], *lv denied* 35 NY3d 1069 [2020]). To the extent that defendant's CPL 330.30 motion contained additional grounds, we deem those contentions abandoned inasmuch as defendant has failed to brief any specific arguments with respect thereto on appeal (*see People v Butler*, 2 AD3d 1457, 1458 [4th Dept 2003], *lv denied* 3 NY3d 637 [2004]).

To the extent that defendant's contention that prosecutorial misconduct on summation deprived him of a fair trial is preserved (*see* CPL 470.05 [2]), we conclude that any improprieties were not so egregious as to deprive defendant of a fair trial (*see People v Boyd*, 31 NY3d 953, 955 [2018]; *People v Conley*, 192 AD3d 1616, 1621 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they lack merit.

Entered: July 28, 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 19-00780

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

MATTHEW MOORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered February 1, 2019. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree, and attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), criminal possession of a controlled substance in the third degree (§ 220.16 [12]), and attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]). We affirm.

Contrary to defendant's contention, Supreme Court properly refused to suppress evidence recovered upon execution of the search warrant. We conclude that the search warrant was supported by probable cause. The court "properly determined that there was a reasonable belief, based on . . . controlled buy operations, that it was likely that further evidence of [narcotics trafficking] could be found . . . at [the] residence [sought to be searched]" (*People v Hightower*, 207 AD3d 1199, 1200-1201 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]). Moreover, we conclude that the search warrant was not overbroad, because it was "specific enough to leave no discretion to the executing officer[s]" (*People v Brown*, 96 NY2d 80, 84 [2001] [internal quotation marks omitted]). The warrant was limited to a seizure of evidence related to the sale and distribution of narcotics, and did not permit the officers to search for evidence of general criminality (*cf. People v Herron*, 199 AD3d 1476, 1479 [4th Dept

2021]). The record also demonstrates that the court properly tested the reliability of the information received from the confidential informants at the *Darden* hearing (*see People v Allen*, 298 AD2d 856, 856 [4th Dept 2002], *lv denied* 99 NY2d 579 [2003]).

Contrary to defendant's further contention, the court properly refused to suppress defendant's statements to the police. We reject defendant's contention that he did not validly waive his *Miranda* rights. "Great weight must be accorded to the determination of the suppression court because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous or unsupported by the hearing evidence" (*People v Coleman*, 306 AD2d 941, 941 [4th Dept 2003], *lv denied* 1 NY3d 596 [2004]). After reopening the *Huntley* hearing and taking defendant's testimony, the court credited the investigator's testimony. Defendant's contrary testimony "merely raised an issue of credibility that the court was entitled to resolve in favor of the People" (*id.*). Defendant also contends that the court abused its discretion in declining to consider failure of the police to record the interrogation. We reject that contention because "[t]here is no Federal or State due process requirement that interrogations and confessions be electronically recorded" (*People v De Micco*, 39 AD3d 1262, 1263 [4th Dept 2007], *lv denied* 9 NY3d 864 [2007]). We also reject defendant's contention that the court failed to make an express finding with respect to the statements that defendant sought to suppress. We conclude that, "[a]lthough the court's statement was terse, . . . it was in substantial compliance with the statutory requirement," given the court's adherence to its previous written order, which set forth the basis for its ruling (*People v Miller*, 191 AD3d 1373, 1375 [4th Dept 2021], *lv denied* 36 NY3d 1121 [2021]).

Contrary to defendant's contention that the court imposed civil asset forfeiture as part of his sentence, the record before us reveals that the court merely recited that a civil forfeiture "by the federal government" had occurred and did not impose a forfeiture.

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

499
CAF 22-01591
PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF JOEY L.F., PETITIONER,

V MEMORANDUM AND ORDER

JERID A.F., RESPONDENT-RESPONDENT.

JASON J. CAFARELLA, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

JASON J. CAFARELLA, NIAGARA FALLS, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

Appeal from an order of the Family Court, Niagara County (Erin P. DeLabio, J.), entered June 17, 2022, in a proceeding pursuant to Family Court Act article 8. The order granted the motion of respondent to dismiss the petition.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, petitioner filed a family offense petition on behalf of her son (subject child) against respondent. Respondent moved to dismiss the petition on the ground that it was facially insufficient. The Attorney for the Child (AFC) appeals from an order granting the motion.

We conclude that, under the circumstances of this case, the AFC lacks standing to bring an appeal on behalf of the subject child (*cf. Matter of Sloma v Saya*, 210 AD3d 1494, 1494 [4th Dept 2022]; *see generally Matter of McDermott v Bale*, 94 AD3d 1542, 1543 [4th Dept 2012]). Generally speaking, the legislature has "demonstrated [its] preference for natural guardians," such as petitioner, to represent their minor children in a proceeding (*Bluntt v O'Connor*, 291 AD2d 106, 113 [4th Dept 2002], *lv denied* 98 NY2d 605 [2002] [internal quotation marks omitted]; *see Sutherland v City of New York*, 107 AD2d 568, 568 [1st Dept 1985], *affd* 66 NY2d 800 [1985]; *see generally* CPLR 1201). Given that preference, we conclude that an AFC cannot, in most Family Court Act article 8 proceedings, unilaterally take an appeal where a parent or guardian who is an aggrieved party has not done so.

In this case, petitioner did not appeal even though it was her petition that was dismissed. We also note that there is no evidence that petitioner has "an interest adverse to the" subject child that

would warrant termination of her role as guardian in the proceeding, thereby permitting the AFC to bring an appeal on the child's behalf (*Bluntt*, 291 AD2d at 113 [internal quotation marks omitted]; *see generally Stahl v Rhee*, 220 AD2d 39, 44 [2d Dept 1996]). To conclude that the AFC has standing to appeal where petitioner has not done so would effectively force a parent—the individual who originated the proceeding on the subject child's behalf—to litigate a position that they have abandoned (*see generally Matter of Kessler v Fancher*, 112 AD3d 1323, 1323-1324 [4th Dept 2013]). This would, in some cases, override a parent's reasonable decision-making authority. For instance, a parent who commenced a Family Court Act article 8 proceeding as the child's guardian may decide that further litigation is unwise because, to substantiate the petition, the child would have to testify and be retraumatized in the process. In short, absent unusual circumstances not present here, an AFC cannot overrule the decision-making authority of a parent, the party the legislature prefers to act as the child's guardian, and take an appeal where the parent has not done so. Consequently, because the AFC lacks standing here, we dismiss the appeal.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

500
CA 22-01020
PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, AND OGDEN, JJ.

JOHN CORSI AND CYNTHIA EVANS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CATHERINE ALLEN, DEFENDANT-APPELLANT.

ALLEN & MAINES, ITHACA (RUSSELL E. MAINES OF COUNSEL), FOR DEFENDANT-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (KEITH A. O’HARA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered June 17, 2022. The order granted plaintiffs’ motion for a preliminary injunction, and denied defendant’s motion to dismiss the complaint.

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

> It is ADJUDGED and DECLARED that the restrictive covenant does not bar defendant from completing the proposed construction.

Memorandum: Plaintiffs and defendant own adjacent properties on Cayuga Lake that are subject to a restrictive covenant recorded in 1929. At the time defendant came into possession of her property, there was a preexisting structure on the shoreline that included “a kitchen and dining area, two bedrooms, a bathroom and a sleeping porch at the upper level, and a boat mooring area at the lower level.” In March 2020, defendant demolished that structure, intending to replace it with a new structure along the shoreline including a boat mooring area and, above that, a bedroom, kitchen, dining room, and living room, as well as a third-floor bedroom and bathroom. Shortly after the preexisting structure was demolished, but prior to the start of construction on the replacement structure, plaintiffs informally sought to prevent the construction, informing defendant that they believed that such a structure would violate the terms of the restrictive covenant, which prohibits any building from being “erected between the lake shore and the highway upon any of said lots or parcels, except a suitable boat house with rooms above if desired.”

When plaintiffs and defendant were unable to come to a resolution regarding the proposed construction, plaintiffs commenced this action seeking, inter alia, a declaration that the proposed construction is in violation of the restrictive covenant and a permanent injunction enjoining defendant from constructing the proposed structure. Plaintiffs also moved by order to show cause for a preliminary injunction enjoining defendant from taking any action in furtherance of the planned construction. Defendant filed a pre-answer motion to dismiss the complaint pursuant to, inter alia, CPLR 3211 (a) (1) and (7). Supreme Court granted plaintiffs' motion for a preliminary injunction and denied defendant's motion to dismiss. Defendant appeals.

As a preliminary matter, in this declaratory judgment action, we treat defendant's motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7) as a motion for a declaration in her favor (*see Matter of Kerri W.S. v Zucker*, 202 AD3d 143, 153-155 [4th Dept 2021], *lv dismissed* 38 NY3d 1028 [2022]; *New Yorkers for Constitutional Freedoms v New York State Senate*, 98 AD3d 285, 288, 297 [4th Dept 2012], *lv denied* 19 NY3d 814 [2012]).

We agree with defendant that the court erred in failing to grant her motion. "Restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy" (*Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 431 [2004]). The "party seeking to enforce a restriction on land must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction" (*Kleist v Stern*, 174 AD3d 1451, 1453 [4th Dept 2019]). "The presence of an ambiguity in a restrictive covenant . . . requires the court to construe the covenant to limit, rather than extend, its restriction" (*Ludwig v Chautauqua Shores Improvement Assn.*, 5 AD3d 1119, 1120 [4th Dept 2004], *lv denied* 3 NY3d 601 [2004] [internal quotation marks omitted]). "Moreover, where the language used in a restrictive covenant is equally susceptible of two interpretations, the less restrictive interpretation must be adopted" (*id.*). Here, the presence of ambiguity requires us to utilize the interpretation that "limits the restriction" (*Matter of Gedney Assn., Inc. v Common Council of the City of White Plains*, 209 AD3d 1019, 1021 [2d Dept 2022] [internal quotation marks omitted]; *see Ludwig*, 5 AD3d at 1120), and we agree with defendant that the restrictive covenant does not prohibit the construction of the proposed structure on the shoreline.

Specifically, we conclude that the use of the phrase "suitable boat house with rooms above" is capable of more than one interpretation, including the interpretation advocated by defendant—i.e., that the permitted rooms may be used as a residence inasmuch as the restrictive covenant does not expressly limit the use of such rooms. Defendant's proposed construction, which includes a a boat mooring area and, above that, a kitchen, dining room, living room, bedrooms, and bathrooms, is "not unequivocally prohibited by the language of the covenant" (*Turner v Caesar*, 291 AD2d 650, 652 [3d Dept 2002]). Indeed, the disputed phrase renders the scope of the covenant

"uncertain, doubtful, or debatable, thus rendering it unenforceable" as applied to defendant's proposed construction (*Ludwig*, 5 AD3d at 1120 [internal quotation marks omitted]; *see Kleist*, 174 AD3d at 1453; *Turner*, 291 AD2d at 652; *cf. Ford v Rifenburg*, 94 AD3d 1285, 1285-1286 [3d Dept 2012]).

We therefore reverse the order, deny plaintiffs' motion, and grant judgment in favor of defendant, declaring that the restrictive covenant does not bar defendant from completing the proposed construction.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

502
CA 22-00391
PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, AND OGDEN, JJ.

DAVID KAPLAN AND LUELLA KAPLAN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MENLO REALTY INCOME PROPERTIES 28, LLC, NOW
KNOWN AS REALTY INCOME PROPERTIES 28, LLC,
REALTY INCOME CORPORATION, DEFENDANTS-APPELLANTS,
ALLIED BUILDERS, INC., BRUCE RONAYNE HAMILTON
ARCHITECTS, INC., DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

SEGAR & SCIORTINO PLLC, ROCHESTER (STEPHEN A. SEGAR OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

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

THE LAW OFFICES OF JORDAN DIPALMA PLLC, PALMYRA (L. DAMIEN COSTANZA OF
COUNSEL), FOR DEFENDANT-RESPONDENT ALLIED BUILDERS, INC.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, NEW YORK CITY (PATRICK
J. LAWLESS OF COUNSEL), FOR DEFENDANT-RESPONDENT BRUCE RONAYNE
HAMILTON ARCHITECTS, INC.

Appeals from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered December 7, 2021. The order granted the motions of defendants Bruce Ronayne Hamilton Architects, Inc. and Allied Builders, Inc. for summary judgment.

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

Memorandum: Plaintiffs commenced this negligence action seeking damages for injuries allegedly sustained by David Kaplan (plaintiff) when, after obtaining supplies from the second-floor storage area of a drugstore where he worked as a pharmacist, he fell down the interior stairway leading to that storage area. Plaintiffs allege that plaintiff’s fall was caused by the absence of non-slip or abrasive treads and nosings on the stairway. Plaintiffs sought to impose liability on the basis that defendant 9187 Group, LLC (9187 Group) was the owner of the property when the store was constructed approximately 10 years before the incident; defendant 10 Ellicott Square Court

Corporation (Ellicott) was the property manager at that time; defendant Bruce Ronayne Hamilton Architects, Inc. (BRH) was the architectural firm that contracted with the drugstore to design the stairway; defendant Allied Builders, Inc. (Allied) was the contractor that constructed the stairway; and defendants Menlo Realty Income Properties 28, LLC, now known as Realty Income Properties 28, LLC, and Realty Income Corporation (collectively, Realty defendants) were the owners of the building at the time of the incident. In appeal No. 1, plaintiffs and the Realty defendants each appeal from an order that granted the respective motions of BRH and Allied for summary judgment dismissing the complaint and all cross-claims against them. In appeal No. 2, plaintiffs and the Realty defendants each appeal from an order that granted the motion of defendants 9187 Group and Ellicott for summary judgment dismissing the complaint and all cross-claims against them. We affirm in each appeal.

With respect to appeal No. 1, we reject the contentions of plaintiffs and the Realty defendants that Supreme Court (Ciaccio, A.J.) erred in granting BRH's motion insofar as it sought summary judgment dismissing the complaint against it. Inasmuch as "a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). In this case, any duty that BRH had with respect to the stairway on the subject property arose exclusively out of its contract with the drugstore to provide architectural design services (*see Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). It is well settled, however, that " 'a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries' " (*Espinal*, 98 NY2d at 140), and "will generally not give rise to tort liability in favor of a third party," i.e., a person who is not a party to the contract (*id.* at 138; *see Church*, 99 NY2d at 111). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm' . . . ; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140).

Here, there are no allegations in plaintiffs' pleadings that would establish the applicability of the second and third *Espinal* exceptions. Moreover, even assuming, arguendo, that plaintiffs' allegations in the pleadings are sufficient to require BRH to negate the possible applicability of the first *Espinal* exception in order to establish its prima facie entitlement to summary judgment (*see Lingenfelter v Delevan Terrace Assoc.*, 149 AD3d 1522, 1523 [4th Dept 2017]), we conclude that BRH met its initial burden of establishing that it did not launch a force or instrument of harm by negligently creating or exacerbating a dangerous condition (*see generally Espinal*, 98 NY2d at 142-143). BRH submitted the affidavit of its senior vice

president, who averred that the stairway design complied with all state and local regulations and that the provisions of the building code in effect at the time of the design and construction did not require treads or nosings to be slip resistant (*see e.g.* 2007 Bldg Code of NY St § 1009). The architect further averred that OSHA standards were separate from building code requirements and were not referenced or included as part of architectural drawings. More importantly, while a violation of OSHA regulations can, in some cases, be considered as some evidence of common-law negligence (*see Landry v General Motors Corp., Cent. Foundry Div.*, 210 AD2d 898, 898 [4th Dept 1994]), it is well settled under New York law that, "[i]n the absence of evidence of a negligent application of floor wax or polish [or other substance], the mere fact that a smooth floor [including stairs] may be slippery does not support a cause of action to recover damages for negligence" (*Flynn v Haddad*, 109 AD3d 1209, 1209 [4th Dept 2013] [internal quotation marks omitted]; *see Kline v Abraham*, 178 NY 377, 379-381 [1904]; *Wong v 15 Monroe Realty Inc.*, 194 AD3d 534, 534 [1st Dept 2021]; *Kapoor v Randlett*, 144 AD3d 984, 984-985 [2d Dept 2016]; *Kociecki v EOP-Midtown Props., LLC*, 66 AD3d 967, 967-968 [2d Dept 2009]). Plaintiffs' negligence claim here is not based on the presence of any substance on the stairway; rather, plaintiffs' theory of liability is premised on the *absence* of non-slip or abrasive treads and nosings on the stairway. Thus, as the court properly determined, the first *Espinal* exception does not apply because BRH's alleged failure to design the stairway with non-slip or abrasive treads and nosings results " 'merely in withholding a benefit . . . where inaction is at most a refusal to become an instrument for good' " (*Church*, 99 NY2d at 112).

Plaintiffs and the Realty defendants failed to raise an issue of fact whether BRH negligently created or exacerbated a dangerous condition (*see Lingenfelter*, 149 AD3d at 1523-1524; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to the substantive assertions of plaintiffs and the Realty defendants, the fact that the stairway was finished with a smooth surface such as a powder coating or paint does not, without more, establish a basis for liability sounding in negligence (*see e.g. Flynn*, 109 AD3d at 1209; *Werner v Neary*, 264 AD2d 731, 731 [2d Dept 1999]). Additionally, plaintiffs' reliance on 2007 Building Code of New York State § 1003.4 is misplaced because that section stated that "[w]alking surfaces of the means of egress shall have a slip-resistant surface and be securely attached" and the relevant definitional section defined the term "means of egress" as "[a] continuous and unobstructed path of vertical [or] horizontal egress travel from any occupied portion of a building or structure *to a public way*," i.e., "[a] street, alley or other parcel of land open to the outside air leading to a street" (2007 Building Code of NY St § 1002.1 [emphasis added]). Section 1003.4, as the court properly determined, is inapplicable here because it is undisputed that the subject surface consists of an *interior* stairway leading to a storage area, not to a public way. Contrary to the procedural assertion of plaintiffs and the Realty defendants that BRH's motion should have been denied as premature, we conclude that they "failed to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify

opposition to the motion were exclusively within the knowledge and control of [BRH]" and that "the [m]ere hope that somehow . . . plaintiff[s and the Realty defendants] will uncover evidence that will prove a case is insufficient for denial of the motion" (*Chambers v Town of Shelby*, 211 AD3d 1456, 1457 [4th Dept 2022] [internal quotation marks omitted]; *see* CPLR 3212 [f]).

We also reject the contentions of plaintiffs and the Realty defendants in appeal No. 1 that the court erred in granting Allied's motion insofar as it sought summary judgment dismissing the complaint against it. It has long been settled law that "[a] builder or contractor is justified in relying upon the plans and specifications which [the builder or contractor] has contracted to follow unless they are so apparently defective that an ordinary builder [or contractor] of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury" (*Ryan v Feeney & Sheehan Bldg. Co.*, 239 NY 43, 46 [1924], *rearg denied* 239 NY 604 [1924]; *see Dentico v Turner Constr. Co.*, 207 AD3d 1036, 1037 [4th Dept 2022]; *Rechlin v Allweather Contrs.*, 298 AD2d 907, 907-908 [4th Dept 2002]).

Here, Allied met its initial burden through the submission of the affidavit of its vice president, the BRH design plans, and BRH's certification letter, which collectively established that Allied relied on the plans and specifications of BRH and constructed the stairway in compliance therewith (*see Rechlin*, 298 AD2d at 908). Allied further established that "those plans and specifications were not 'so patently defective' as to place [Allied] on notice that the project was potentially dangerous if completed according to the plans and specifications" (*id.*). In particular, Allied submitted the requisite provisions of the building code, which, as Allied's vice president opined, did not refer to the surfacing of treads and nosings with non-slip materials.

In opposition, plaintiffs and the Realty defendants "failed to submit any evidence that the plans and specifications were blatantly defective and that [Allied] was, therefore, unjustified in relying upon them" (*Pioli v Town of Kirkwood*, 117 AD2d 954, 955 [3d Dept 1986], *lv denied* 68 NY2d 601 [1986]; *see Dentico*, 207 AD3d at 1038; *Rechlin*, 298 AD2d at 908). Additionally, we conclude that plaintiffs and the Realty defendants have "presented no more than the mere hope that further [discovery] would disclose evidence essential to oppose the motion . . . , and thus they failed to demonstrate that the motion should have been denied on that basis" (*Lowes v Anas*, 195 AD3d 1579, 1580 [4th Dept 2021] [internal quotation marks omitted]; *see* CPLR 3212 [f]).

With respect to appeal No. 2, we reject the contentions of plaintiffs and the Realty defendants that Supreme Court (Valleriani, J.) erred in granting the motion of 9187 Group and Ellicott insofar as it sought summary judgment dismissing the complaint against them. It is well settled that, as a general rule, "[o]ne's liability in negligence for the condition of land ceases when the premises pass out of one's control before injury results" (*Kilmer v White*, 254 NY 64, 69 [1930]; *see Powers v City of Geneva*, 192 AD3d 1632, 1633 [4th Dept

2021]). Thus, under that general rule, the liability of 9187 Group and Ellicott for negligence based on a dangerous condition on the property ended when they relinquished control of the property (*see Powers*, 192 AD3d at 1633). Under these circumstances, liability may nevertheless be imposed upon 9187 Group and Ellicott "if the allegedly dangerous condition of the [stairway] existed at the time [they] relinquished possession and control of the premises 'and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known' " (*Morris v Freudenheim*, 273 AD2d 885, 885-886 [4th Dept 2000]). Here, even assuming, arguendo, that the condition of the stairway could constitute a dangerous condition, we conclude that 9187 Group and Ellicott established that the new owner had a reasonable time to discover any such condition and remedy it, given that 9187 Group and Ellicott relinquished control of the building nearly four years before plaintiff's fall (*see generally id.* at 886). Plaintiffs and the Realty defendants failed to raise a triable issue of fact in that regard (*see id.*). 9187 Group and Ellicott also established that the narrow exception applicable "when a former owner who is also acting as a construction contractor is alleged to have affirmatively created a dangerous condition" (*Scheffield v Vestal Parkway Plaza, LLC*, 139 AD3d 1161, 1163 [3d Dept 2016]) does not apply inasmuch as they had no involvement in the design or construction of the stairway, and plaintiffs and the Realty defendants failed to raise an issue of fact (*see id.* at 1163). In addition, we conclude that there is no basis upon which to conclude that the motion of 9187 Group and Ellicott should have been denied as premature (*see* CPLR 3212 [f]).

Finally, contrary to the Realty defendants' assertions in appeal Nos. 1 and 2, we conclude that the court properly granted the respective motions of BRH, Allied, and 9187 Group and Ellicott insofar as they sought summary judgment dismissing the Realty defendants' cross-claims against them (*see Grove v Cornell Univ.*, 151 AD3d 1813, 1815-1816 [4th Dept 2017]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

503

CA 22-00765

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

DAVID KAPLAN AND LUELLA KAPLAN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MENLO REALTY INCOME PROPERTIES 28, LLC, NOW
KNOWN AS REALTY INCOME PROPERTIES 28, LLC,
REALTY INCOME CORPORATION, DEFENDANTS-APPELLANTS,
9187 GROUP, LLC, 10 ELLICOTT SQUARE COURT
CORPORATION, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

SEGAR & SCIORTINO PLLC, ROCHESTER (STEPHEN A. SEGAR OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

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

RICOTTA, MATTREY, CALLOCCHIA, MARKEL & CASSERT, BUFFALO (JILL L.
CASSERT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeals from an order of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered April 26, 2022. The order granted the motion of defendants 9187 Group, LLC and 10 Ellicott Square Court Corporation for summary judgment.

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

Same memorandum as in *Kaplan v Menlo Realty Income Props. 28, LLC* ([appeal No. 1] — AD3d — [July 28, 2023] [4th Dept 2023]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

505
OP 23-00057
PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF NIAGARA FALLS REDEVELOPMENT, LLC,
AND BLUE APPLE PROPERTIES INC., PETITIONERS,

V MEMORANDUM AND ORDER

THE CITY OF NIAGARA FALLS, RESPONDENT.

HARTER SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR PETITIONERS.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENT.

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

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

Memorandum: Petitioners commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent, City of Niagara Falls (City), authorizing the condemnation of property owned by petitioners for the development of a park and associated recreational facilities. The City held public hearings on June 29 and September 6, 2022, and, on November 22, 2022, it adopted its resolution authorizing the acquisition. The City published its brief synopsis of its determination and findings as required by EDPL 204 (A) on December 7, 2022.

The power of eminent domain—i.e., “[t]he right to take private property for public use”—“is an inherent and unlimited attribute of sovereignty whose exercise may be governed by the [l]egislature within constitutional limitations and by the [l]egislature within its power delegated to municipalities” (*Matter of Mazzone*, 281 NY 139, 146-147 [1939], *rearg denied* 281 NY 671 [1939]). Thus, in the context of an eminent domain proceeding, the courts have recognized “the structural limitations upon our review of what is essentially a legislative prerogative” (*Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 526 [2009], *rearg denied* 14 NY3d 756 [2010]). Consistent with that limited scope of review, there also is a “longstanding policy of deference to legislative judgments in this field” (*Kelo v New London*, 545 US 469, 480 [2005]; *see Matter of Kaur v New York*

State Urban Dev. Corp., 15 NY3d 235, 262 [2010]). Thus, a reasonable difference of opinion between the judiciary and the legislative body lawfully exercising the State's eminent domain power—in this case the City—is an insufficient predicate for the courts to supplant what is essentially a legislative determination (*see Goldstein*, 13 NY3d at 526). Ultimately, "a court may only substitute its own judgment for that of the legislative body [exercising the eminent domain power] when such judgment is irrational or baseless" (*Kaur*, 15 NY3d at 254).

Pursuant to EDPL 207 (C), this Court "shall either confirm or reject the condemnor's determination and findings." Our scope of review is limited to "whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with[, inter alia,] EDPL article 2; and (4) the acquisition will serve a public use" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546 [2006]; *see* EDPL 207 [C]; *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]). More specifically, "[t]he burden is on the party challenging the condemnation to establish that the determination was without foundation and baseless" (*Matter of Butler v Onondaga County Legislature*, 39 AD3d 1271, 1271 [4th Dept 2007] [internal quotation marks omitted]; *see 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]). "If an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the . . . determination should be confirmed" (*Matter of Waldo's, Inc. v Village of Johnson City*, 74 NY2d 718, 720 [1989] [internal quotation marks omitted]; *see Butler*, 39 AD3d at 1271-1272).

Initially, we reject petitioners' contention that the condemnation at issue 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" (*Syracuse Univ.*, 71 AD3d at 1433 [4th Dept 2010] [internal quotation marks omitted]; *see Matter of Byrne v New York State Off. of Parks, Recreation & Historic Preserv.*, 101 AD2d 701, 702 [4th Dept 1984]; *see also Matter of PSC, LLC v City of Albany Indus. Dev. Agency*, 200 AD3d 1282, 1285 [3d Dept 2021], *lv denied* 38 NY3d 909 [2022]). Here, the City's condemnation of the property serves the public uses of, inter alia, developing parkland and other recreational space (*see County of Monroe v Morgan*, 83 AD2d 777, 778 [4th Dept 1981]; *see generally Matter of United Ref. Co. of Pa. v Town of Amherst*, 173 AD3d 1810, 1811 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]; *Matter of Pfohl v Village of Sylvan Beach*, 26 AD3d 820, 821 [4th Dept 2006]) and revitalizing and redeveloping a longstanding vacant lot, which was a blight on the City (*see Matter of Court St. Dev. Project, LLC v Utica Urban Renewal Agency*, 188 AD3d 1601, 1602-1603 [4th Dept 2020]; *GM Components Holdings, LLC*, 112 AD3d at 1351-1352). We therefore conclude that the City'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 petitioners' contentions that the determination should be annulled because the City has failed to establish how it plans to pay for the project and because it failed to conduct a market study as required by the City's comprehensive plan, inasmuch as those contentions do not fall within the limited scope of this Court's statutory review (*see* EDPL 207 [C]; *see generally Grand Lafayette Props. LLC*, 6 NY3d at 546). Petitioners further contend that the determination must be annulled because it purportedly does not comply with the City's comprehensive plan to the extent it sets forth a predetermined public use of the property involving petitioners. We reject that contention inasmuch as the comprehensive plan—even assuming that the relevant parts thereof remain in effect—could not bind a future City council to act in accordance therewith (*see Freeman v Lamb*, 33 AD2d 331, 333 [4th Dept 1970], *appeal dismissed* 26 NY2d 612 [1970]; *Edsall v Wheler*, 29 AD2d 622, 622-623 [4th Dept 1967]). In any event, the provisions of the City's comprehensive plan contemplating future development of the property with petitioners amounted to, at most, an unenforceable agreement to agree (*see Anderson v Kernan*, 133 AD3d 1234, 1235 [4th Dept 2015]; *see generally Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109-110 [1981]).

We reject petitioners' 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 City in determining the scope of the taking (*see United Ref. Co. of Pa.*, 173 AD3d at 1811-1812).

Petitioners further contend that the determination must be annulled because the City failed to adequately describe the property in accordance with EDPL article 2. We reject that contention. EDPL 202 (A) requires the condemnor, in supplying notice to petitioners and the public, to state the "proposed location of the public project" (*see also* EDPL 203). Additionally, in issuing its determination, a condemnor is merely required to specify "the approximate location for the proposed public project" (EDPL 204 [B] [2]; *see Matter of Wechsler v New York State Dept. of Envtl. Conservation*, 76 NY2d 923, 927 [1990]). Here, we conclude that the City's identification of the tax parcel numbers and street addresses of the property was sufficient to comply with the notice requirements of the EDPL (*see Court St. Dev. Project, LLC*, 188 AD3d at 1604), despite the fluctuating acreage stated in the public document (*see Greenwich Assoc. v Metropolitan Transp. Auth.*, 152 AD2d 216, 218, 220 [1st Dept 1989], *appeal dismissed sub nom. Matter of Regency-Lexington Partners v Metropolitan Transp. Auth.*, 75 NY2d 865 [1990]). Here, "there is no indication in the minutes of the public hearing[s] that petitioner[s] [were] somehow

uncertain about the scope of the proposed acquisition" (*Matter of Tadasky Corp. v Village of Ellenville*, 45 AD3d 1131, 1132 [3d Dept 2007]).

Finally, we reject petitioners' contention that the City's failure to publish a synopsis of its determination and findings within 90 days of the public hearing, in violation of EDPL 204 (A), requires this Court to annul the 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 petitioners that the City's publication of the synopsis here was untimely because it was not made within 90 days following the hearing (*cf. Wechsler*, 76 NY2d at 927; *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]). Specifically, the City's initial publication of the synopsis occurred one day after the expiration of EDPL 204 (A)'s 90-day deadline. Nonetheless, we agree with the City that petitioners were not prejudiced by the one-day delay—and petitioners do not contend otherwise—and therefore, under the circumstances, we conclude that the error does not require this Court to annul the determination (*see Matter of River St. Realty Corp. v City of New Rochelle*, 181 AD3d 676, 677-678 [2d Dept 2020]; *Tadasky Corp.*, 45 AD3d at 1132; *see also Green v Oneida-Madison Elec. Coop.*, 134 AD2d 897, 898 [4th Dept 1987]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

506

CA 22-00888

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

MILHERST CONSTRUCTION, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NATALE BUILDING CORP., NATALE DEVELOPMENT LLC,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

BOND SCHOENECK & KING, PLLC, BUFFALO (MITCHELL J. BANAS, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE KNOER GROUP, PLLC, BUFFALO (COLIN M. KNOER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered April 1, 2022. The order, insofar as appealed from, granted that part of the motion of defendants Natale Building Corp. and Natale Development LLC for summary judgment dismissing the third cause of action.

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

Memorandum: Plaintiff appeals from an order insofar as it granted the motion of Natale Building Corp. and Natale Development LLC (defendants) to the extent that the motion sought summary judgment dismissing plaintiff's third cause of action. Plaintiff and defendants entered into a contract for infrastructure construction, including sewer systems, on property owned by defendants. Plaintiff commenced this action seeking, inter alia, to foreclose on a mechanic's lien, and defendants moved for summary judgment dismissing the amended complaint. At issue on appeal are several change orders submitted by plaintiff and disputed by defendants. As relevant here, plaintiff alleges in its third cause of action that defendants were unjustly enriched in the sum of approximately $234,000 by reason of improvements to the property made by plaintiff for which they refused to pay. Supreme Court dismissed the third cause of action, holding that it was duplicative of plaintiff's cause of action for breach of contract.

Plaintiff contends that the court erred in granting the motion with respect to the third cause of action because there is a dispute

whether the contract covered the "extra" work for which plaintiff seeks to be paid and, in the event that the work is not covered by the contract, it is entitled to proceed under the alternative theory of unjust enrichment. We agree with plaintiff. It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks omitted]), "and every available inference must be drawn in the [non-moving party's] favor" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *see Palumbo v Bristol-Myers Squibb Co.*, 158 AD3d 1182, 1183-1184 [4th Dept 2018]).

Here, we conclude that defendants failed to meet their initial burden on their motion. A cause of action for unjust enrichment requires a showing that the defendant was enriched at the expense of the plaintiff and that it would be inequitable for the defendant to retain the benefit provided by the plaintiff (*see Omar v Moore*, 196 AD3d 1182, 1183-1184 [4th Dept 2021]; *Canandaigua Emergency Squad, Inc. v Rochester Area Health Maintenance Org., Inc.*, 108 AD3d 1181, 1183 [4th Dept 2013]). Although "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), "a bona fide dispute concerning whether additional work is covered by a contract is sufficient to permit an unjust enrichment cause of action to proceed" (*Hayward Baker, Inc. v C.O. Falter Constr. Corp.*, 104 AD3d 1253, 1255 [4th Dept 2013] [internal quotation marks omitted]). Defendants, in support of their motion, submitted an affidavit from their principal that raises questions of fact whether the "extra work" was covered by the contract and, thus, defendants are not entitled to summary judgment dismissing the cause of action for unjust enrichment (*see Omar*, 196 AD3d at 1183-1184; *Canandaigua Emergency Squad, Inc.*, 108 AD3d at 1183; *Hayward Baker, Inc.*, 104 AD3d at 1255). Defendants' "failure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324; *see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

511
KA 22-00970
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE L. LIVELY, DEFENDANT-APPELLANT.

KAREN G. LESLIE, RIVERHEAD, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered April 4, 2022. The judgment convicted defendant upon a nonjury verdict of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We reject defendant's contention that County Court erred in refusing to suppress physical evidence found during the search of defendant's person and residence by parole officers. "[A] parolee's constitutional right to be secure against unreasonable searches and seizures is not violated when a parole officer conducts a warrantless search that is rationally and reasonably related to the performance of the parole officer's duties" (*People v McMillan*, 29 NY3d 145, 148 [2017]; *see People v Huntley*, 43 NY2d 175, 181 [1977]). "A parole officer's search is unlawful, however, when the parole officer is merely a conduit for doing what the police could not do otherwise" (*People v Sapp*, 147 AD3d 1532, 1533 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017] [internal quotation marks omitted]). In other words, a parolee's status may not "be exploited to allow a search which is designed solely to collect contraband or evidence in aid of the prosecution of an independent criminal investigation" (*id.* [internal quotation marks omitted]). Here, no such improper exploitation occurred. At the suppression hearing, a parole officer testified that she was familiar with defendant through her prior home visits to defendant's residence with defendant's assigned parole officer; that the conditions of defendant's parole included a consent to searches of his person and residence; and that the unannounced home visit was prompted by a request from another parole officer to conduct the visit to look for a

parole absconder who might be in defendant's residence. That conduct is unquestionably "substantially related to the performance of [the parole officer's] duty in the particular circumstances" (*Huntley*, 43 NY2d at 181), and we afford deference to the court's determination that the parole officer's testimony was credible (*see People v Johnson*, 94 AD3d 1529, 1532 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]; *see generally People v Prochilo*, 41 NY2d 759, 761 [1977]). Further, there is no evidence from which to infer that the parole officers conducting the search were "not pursuing parole-related objectives but were instead facilitating [a] police investigator's contact with defendant as part of a separate criminal investigation" (*People v Smith*, 202 AD3d 1492, 1495-1496 [4th Dept 2022] [internal quotation marks omitted]; *cf. People v Mackie*, 77 AD2d 778, 778-779 [4th Dept 1980]).

Defendant's further contention that the conviction is not supported by legally sufficient evidence is not preserved for our review inasmuch as he failed to renew his motion to dismiss after presenting proof (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Nash*, 214 AD3d 1461, 1461 [4th Dept 2023], *lv denied* — NY3d — [2023]). We nonetheless "necessarily review the evidence adduced as to each . . . element[ ] of the crime[ ] in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012] [internal quotation marks omitted]; *see People v Danielson*, 9 NY3d 342, 349 [2007]). Here, viewing the evidence in light of the elements of the crime in this nonjury trial (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that it cannot be said that the court "failed to give the evidence the weight it should be accorded" (*People v Albert*, 129 AD3d 1652, 1653 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016]).

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

All concur except BANNISTER and MONTOUR, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent inasmuch as we conclude that County Court erred in refusing to suppress physical evidence found during the search of defendant's residence and person by parole officers. A parolee has a constitutional right to be free from unreasonable searches and seizures (*see People v Hale*, 93 NY2d 454, 459 [1999]; *People v Johnson*, 94 AD3d 1529, 1531 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]). Where "the search and seizure is undertaken by *the parolee's own parole officer*, . . . whether the action was unreasonable and thus prohibited by constitutional proscription must turn on whether the conduct of the parole officer was rationally and reasonably related to the performance of *the parole officer's duty*" (*People v Huntley*, 43 NY2d 175, 181 [1977] [emphasis added]).

Here, the evidence adduced at the suppression hearing failed to establish that the search of defendant's pocket was rationally and reasonably related to the duty of defendant's parole officer with respect to the parolee defendant. A parole officer who assisted with the search testified at the suppression hearing that she was asked to assist in searching defendant's home for an unidentified parolee who had apparently absconded from parole. The record is silent as to why the parole officers believed that the absconder may have been present in defendant's apartment. Further, there was no testimony at the hearing by defendant's parole officer. Importantly, there was no testimony by defendant's parole officer that the search was related to any determination that defendant violated or was violating any condition of his parole or that the parole officers were conducting an unannounced search related to defendant's status as a parolee (*see People v Smith*, 202 AD3d 1492, 1495 [4th Dept 2022]). Thus, there was no evidence that the decision to search defendant's residence "was motivated . . . by legitimate reasons related to *defendant's* status as a parolee" (*Johnson*, 94 AD3d at 1532 [emphasis added]).

Rather, to justify the initial entry into the apartment for the search, the People relied solely on the assisting parole officer's testimony that parolees consent to searches of their person and residence as a condition of parole. However, that "authorization is not an unrestricted consent to any and all searches and does not obviate a showing by the parole officer that the search was rationally related to [the officer's] duty to detect and prevent parole violations" (*People v Mackie*, 77 AD2d 778, 779 [4th Dept 1980]), and we are unaware of any case law that stands for the proposition that a showing that a parole officer's actions were rationally related to that officer's duty to detect and prevent the parole violations of one parolee was sufficient to render a search or seizure with respect to a separate parolee reasonable. Further, upon entering the apartment, the parole officers handcuffed defendant "for [officer] safety . . . because there [were] multiple people in the apartment." There is no evidence, however, that defendant was handcuffed because the parole officers had reason to believe that defendant was armed or presented a safety risk. Once defendant was handcuffed, the testifying parole officer conducted a pat down of defendant "because there was a bulge in his left pocket." That parole officer did not testify that she believed that the bulge may have been a weapon—unlikely in this case because the bulge, it transpired, was caused by an earbud container—or that she had reason to believe that the bulge contained contraband. The People "adduced no evidence showing that the parole officer had any reason to suspect that . . . defendant had violated any condition of his parole" (*id.*).

Inasmuch as the testimony presented at the hearing by the People established that the parole officers' sole purpose for entering defendant's residence was to determine whether a parole absconder was present, we conclude that the search of defendant's pocket "was not reasonably designed to lead to evidence of a parole violation" (*People v LaFontant*, 46 AD3d 840, 841 [2d Dept 2007], *lv denied* 10 NY3d 841 [2008]). We would therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to suppress the physical evidence,

and dismiss the indictment.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

512
KA 18-01885
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES R. WILSON, DEFENDANT-APPELLANT.

MICHAEL JOS. WITMER, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered April 30, 2018. The judgment convicted defendant upon a nonjury verdict of criminal possession of a weapon in the second degree (two counts) 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 him upon a nonjury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of endangering the welfare of a child (§ 260.10 [1]). Defendant contends that the verdict is against the weight of the evidence because the gun that was recovered was inoperable. To establish criminal possession of a handgun, the People must prove that the weapon was operable (*see People v Longshore*, 86 NY2d 851, 852 [1995]; *People v Magee*, 182 AD3d 996, 997 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]). Here, a firearms examiner testified that the revolver was inoperable at the time it was examined because the hammer was stuck in the cocked position. He further testified, however, that the unfired cartridges that were recovered during the investigation had impressions on them that suggested possible misfires. One of the victims testified that a man fired shots at him and the second victim, and the second victim testified that defendant fired three shots at them and then continued to pull the trigger, but “nothing was happening.” Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different finding would not have been unreasonable, it cannot be said that Supreme Court failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The eyewitness testimony and the surrounding circumstances established that defendant possessed a loaded and operable firearm at the time of the incident (*see Magee*, 182 AD3d at 997; *People v Redmond*, 182 AD3d

1020, 1022 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]; *see generally People v Nelson*, 177 AD3d 1258, 1260 [4th Dept 2019], *lv denied* 34 NY3d 1161 [2020]).

Defendant's remaining contentions are unpreserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

514
CA 21-00432
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

NEW YORK STATE WORKERS' COMPENSATION BOARD, IN ITS CAPACITY AS THE GOVERNMENTAL AGENCY CHARGED WITH THE ADMINISTRATION OF THE WORKERS' COMPENSATION LAW AND ATTENDANT REGULATIONS AND IN ITS CAPACITY AS SUCCESSOR IN INTEREST TO THE LONG TERM CARE RISK MANAGEMENT GROUP, PLAINTIFF-RESPONDENT,

V — MEMORANDUM AND ORDER

EPISCOPAL CHURCH HOME AND AFFILIATES, INC., ET AL., DEFENDANTS,
FAIRPORT BAPTIST HOME, INC., FAIRPORT BAPTIST HOMES, GENESEE VALLEY PRESBYTERIAN NURSING CENTER, DOING BUSINESS AS KIRKHAVEN NURSING HOME, GENESEE VALLEY PRESBYTERIAN NURSING CENTER, DOING BUSINESS AS KIRKHAVEN NURSING HOME, PRESBYTERIAN HOMES AND SERVICES OF GENESEE VALLEY, INC., SEASONS CHILD CARE CENTER, AND WESTGATE NURSING HOME, INC., DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

NEW YORK STATE WORKERS' COMPENSATION BOARD, SCHENECTADY (TODD C. ROBERTS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered March 10, 2021. The order and judgment, among other things, granted plaintiff's motion for, inter alia, partial summary judgment.

It is hereby ORDERED that said appeal insofar as taken by defendants Fairport Baptist Home, Inc. and Fairport Baptist Homes is unanimously dismissed and the order and judgment is modified on the law by granting the motion of the remaining defendants-appellants in part and dismissing the second cause of action against those defendants-appellants and as modified the order and judgment is affirmed without costs.

Memorandum: Defendants-appellants (defendants) were among the members of the Long Term Care Risk Management Group (Trust), a group self-insurance trust (GSIT) created in 1992 to provide its members with workers' compensation insurance coverage. The Trust stopped providing

such coverage in 2009, and plaintiff assumed administration of the Trust in 2011 after determining that the Trust could no longer administer its liabilities. In July 2011, plaintiff levied an initial estimated assessment against group members based on its calculation of the Trust's deficit. Following a lengthy forensic accounting, plaintiff levied a subsequent assessment in September 2013 and an updated assessment in July 2016.

Plaintiff commenced this action by summons with notice stating, in summary, that the action sought to recover the total accumulated deficit of the Trust based on each defendant's pro rata share and joint and several liability therefor. Plaintiff's second amended complaint asserts two causes of action. The first seeks to impose on defendants joint and several liability for their shares of the Trust's cumulative deficit, and the second seeks to recover a collection fee pursuant to State Finance Law § 18. Plaintiff moved for, inter alia, partial summary judgment on the issue of liability on its first cause of action, and defendants moved for, inter alia, summary judgment dismissing the second amended complaint against them. Defendants now appeal from an order and judgment that granted plaintiff's motion and denied defendants' motion.

Defendants contend that the summons with notice is jurisdictionally defective because it does not sufficiently state the nature of the action. Even assuming, arguendo, that defendants did not waive that jurisdictional defense by failing to raise it in their initial answer (*see Iacovangelo v Shepherd*, 5 NY3d 184, 186 n [2005]), we conclude that defendants' contention lacks merit. "If the complaint is not served with the summons, CPLR 305 (b) requires that it contain a notice stating the nature of the action. Failure to comply with this requirement is a jurisdictional defect mandating dismissal of the action" (*Drummer v Valeron Corp.*, 154 AD2d 897, 897 [4th Dept 1989], *lv denied* 75 NY2d 705 [1990]; *see Parker v Mack*, 61 NY2d 114, 117 [1984]). Here, the summons with notice stated that the nature of the action was "based on the statutory obligations placed upon employers pursuant to the New York State Workers' Compensation Law, sections 1 et seq., and related rules and regulations and obligations of a contractual nature." The summons with notice further explained that the action sought "to recover the total accumulated deficit" accrued by the Trust "based on each [d]efendant's pro rata and joint and several liability therefor." In addition, the summons with notice explained that those amounts were based on the Workers' Compensation Law, related rules and regulations, the governing Trust documents, each defendant's participation in the Trust, and each defendant's contractual obligations related to their participation in the Trust. Based on those statements, we conclude that the summons with notice is sufficient to comply with the requirements of CPLR 305 (b) (*see Andrulis v Fox* [appeal No. 1], 284 AD2d 1006, 1006 [4th Dept 2001]; *Bergman v Slater*, 202 AD2d 971, 971 [4th Dept 1994]; *cf. Drummer*, 154 AD2d at 897-898).

Defendants next contend that they have no liability for any remaining deficit claimed by plaintiff because plaintiff has already recovered the amount that it timely assessed in July 2011 pursuant to Workers' Compensation Law § 50 (3-a) (7) (former [b]) and because the

later assessments that were based on plaintiff's recalculation of the deficit were untimely and not authorized by the statutory language then in effect. We conclude that defendants' contention lacks merit. As a preliminary matter, we reject defendants' assertion that we already resolved that issue against plaintiff by upholding a preliminary injunction in *Matter of Riccelli Enters., Inc. v State of N.Y. Workers' Compensation Bd.* (117 AD3d 1438 [4th Dept 2014]). "The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits and the issues at hand are to be decided as though no such injunction had been sought" (*Papa Gino's of Am. v Plaza at Latham Assoc.*, 135 AD2d 74, 77 [3d Dept 1988]; *see J.A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 402 [1986]; *Meyer v Stout*, 45 AD3d 1445, 1447 [4th Dept 2007]). Our "affirmance of [the] order granting a preliminary injunction [in *Riccelli Enters., Inc.*] determine[d] no more than that the discretion exercised in favor of granting the order was not based upon a demonstration of th[e] probabilities [supporting injunctive relief] so insufficient as to constitute an abuse of discretion" (*J.A. Preston Corp.*, 68 NY2d at 406). Thus, the determinations of the trial court and this Court in *Riccelli Enters., Inc.* do not constitute adjudications on the merits of the issue, and we must decide the statutory interpretation question anew as though no preliminary injunction had issued in that case.

When presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the legislature (*see Matter of Estate of Youngjohn v Berry Plastics Corp.*, 36 NY3d 595, 603 [2021]; *Samiento v World Yacht Inc.*, 10 NY3d 70, 77-78 [2008]; *Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]). " 'As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof' " (*Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 56 [2011]; *see CIT Bank N.A. v Schiffman*, 36 NY3d 550, 559 [2021]; *Youngjohn*, 36 NY3d at 603). "Although the statutory language is generally the best indication of the legislature's intent, the legislative history of an enactment may also be relevant and is not to be ignored, even if words be clear" (*Altman v 285 W. Fourth LLC*, 31 NY3d 178, 185 [2018], *rearg denied* 31 NY3d 1136 [2018] [internal quotation marks omitted]; *see CIT Bank N.A.*, 36 NY3d at 559; *Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]). Thus, "inquiry should be made into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history" (*Nostrom*, 15 NY3d at 507 [internal quotation marks omitted]; *see CIT Bank N.A.*, 36 NY3d at 559). In all events, "[c]ourts are guided in [their] analysis by the familiar principle that a statute . . . must be construed as a whole and that its various sections must be considered together and with reference to each other" (*Youngjohn*, 36 NY3d at 603 [internal quotation marks omitted]). "Courts should 'give [a] statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions' " (*id.* at 603-604).

Here, giving the statute a sensible and practical overall

construction that is consistent with and furthers its scheme and purpose while also harmonizing its provisions, we conclude that the statute required that the Board "levy an assessment" (Workers' Compensation Law § 50 [3-a] [7] [former (b)]) but that the 120-day period in which to do so was directory, not mandatory, and therefore did not act as a bar to the imposition of subsequent assessments. Where, as here, a statute imposes "a time limit within which an administrative agency is to act, such a provision will be considered directory, rather than mandatory, 'unless the language used by the [l]egislature shows that the designation of time was intended as a limitation on the power of the body or officer' " (*Matter of Pena v New York State Gaming Commn.*, 127 AD3d 1287, 1289 [3d Dept 2015], *appeal dismissed* 25 NY3d 1059 [2015], *lv denied* 26 NY3d 903 [2015], quoting *Matter of Grossman v Rankin*, 43 NY2d 493, 501 [1977]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 171). "Such a determination requires consideration of the language of the statute and the legislative intent" (*Pena*, 127 AD3d at 1289; *see Matter of Syquia v Board of Educ. of Harpursville Cent. School Dist.*, 80 NY2d 531, 536 [1992]; *Matter of King v Carey*, 57 NY2d 505, 513 [1982]).

There is no indication that the legislature intended that the 120-day time period would limit plaintiff's power to subsequently make a more complete evaluation of a GSIT's deficit and thereafter levy another assessment against members of a defaulted GSIT to cover the full amount of the GSIT's liabilities. To the contrary, the 2008 amendment that added the statutory language at issue here was specifically intended to "*strengthen*[ ] regulation of group self-insurers" and also to "provide short term funding to pay the immediate costs resulting from . . . defaults" (Senate Introducer's Mem in Support, Bill Jacket, L 2008, ch 139 at 7 [emphasis added]). Moreover, the third sentence of Workers' Compensation Law § 50 (3-a) (7) (former [b]), when read in the context of the statute's purpose of strengthening regulation of GSITs while providing short-term funding following defaults, suggests that the 120-day period in which to levy an assessment in an amount necessary to discharge all liabilities was not intended to be mandatory. Inasmuch as that sentence provided that members of GSITs would "remain jointly and severally responsible for all liabilities" (§ 50 [3-a] [7] [former (b)]), we conclude that the legislature did not intend that GSIT members would be able to avoid responsibility for the liability of the defaulted GSIT if plaintiff failed to levy a sufficient assessment against them within 120 days of default. Indeed, adopting the reading urged by defendants—that the statute permanently absolved GSIT members of any liability not reconciled within the 120-day period—would violate "the spirit and purpose of the legislation" (*Nostrom*, 15 NY3d at 507 [internal quotation marks omitted]; *see New York State Workers' Compensation Bd. v 21st Century Constr. Corp.*, 58 Misc 3d 1211[A], *7 [Sup Ct, Albany County 2018]).

We agree with defendants that Supreme Court erred in denying their motion insofar as it sought summary judgment dismissing the second cause of action against them. We therefore modify the order and judgment accordingly.

The State Finance Law authorizes a collection fee, not to exceed 22% of the outstanding debt to the state, "to cover the cost of

processing, handling and collecting" the debt where the debtor has failed to remit payment within 90 days of receiving the first billing invoice or notice (§ 18 [5]; *see Lawyers' Fund for Client Protection of State of N.Y. v Bank Leumi Trust Co. of N.Y.*, 94 NY2d 398, 408 [2000]; *New York State Thruway Auth. v Allied Waste Servs. of N. Am., LLC*, 143 AD3d 1145, 1146-1147 [3d Dept 2016]). "The statute defines a 'debt' as a 'liquidated sum due and owing any state agency,' with the term 'liquidated' being defined as 'an amount which is fixed or certain or capable of being readily calculated, whether or not the underlying liability or amount of the debt is disputed' " (*Allied Waste Servs.*, 143 AD3d at 1147, quoting § 18 [1] [b], [d]).

Here, as defendants contend and as plaintiff correctly acknowledges, the calculation of the Trust's deficit has fluctuated considerably over time. Given the continually changing assessments, the Trust's deficit cannot be considered a "liquidated sum due and owing" to plaintiff because the amount is not "fixed or certain or capable of being readily calculated" (State Finance Law § 18 [1] [b], [d]; *see Lawyers' Fund for Client Protection of State of N.Y.*, 94 NY2d at 408; *Allied Waste Servs.*, 143 AD3d at 1147).

We have considered defendants' remaining contentions and conclude that none warrants further modification or reversal of the order and judgment.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

517

CA 22-01705

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

NAKEISHA SMITH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARSHALL FARMS GROUP, LTD, INDIVIDUALLY AND
DOING BUSINESS AS MARSHALL INGREDIENTS,
MARSHALL PET PRODUCTS, LLC,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

ROSENBERG LAW FIRM, BROOKLYN, NICHOLAS, PEROT, SMITH, WELCH & SMITH, LIVERPOOL (ERIC P. SMITH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered April 29, 2022. The order granted those parts of the motion of defendants seeking summary judgment dismissing the complaint against defendants Marshall Farms Group, Ltd, individually and doing business as Marshall Ingredients, and Marshall Pet Products, LLC, and dismissed the complaint against those defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendant Marshall Pet Products, LLC, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this common-law negligence action seeking damages for injuries she sustained when her right hand was amputated while she was cleaning a machine. Plaintiff appeals from an order granting those parts of defendants’ motion seeking summary judgment dismissing the complaint against defendants Marshall Farms Group, Ltd, individually and doing business as Marshall Ingredients (Marshall Farms), and Marshall Pet Products, LLC (MPP). In a prior order, Supreme Court found that plaintiff was a special employee of defendant Marshall Ingredients, LLC (Marshall Ingredients) at the time of the accident and therefore granted that part of defendants’ motion for summary judgment dismissing the complaint against Marshall Ingredients.

We agree with plaintiff that the court erred in granting that part of defendants’ motion with respect to MPP, and we therefore

modify the order by denying the motion in part and reinstating the complaint against MPP. Marshall Ingredients operates its business manufacturing ingredients for food products at a facility (Facility) that has certain equipment, including a large metal cylinder dryer (Dryer) that had spinning blades at the top of it. The accident occurred while plaintiff was attempting to clean the Dryer. MPP, the parent company of Marshall Ingredients, owns the Facility and purchased the Dryer for Marshall Ingredients. In her complaint, plaintiff alleged that MPP was negligent in, inter alia, failing to include safety devices on the Dryer.

In granting defendants' motion with respect to MPP, the court concluded that MPP was an out-of-possession landlord who did not exercise any control of the Facility. That was error. "[A] landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]). "In determining whether a landowner has relinquished control, we consider 'the parties' course of conduct—including, but not limited to, the landowner's ability to access the premises—to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law' " (*Cummins v Middaugh*, 207 AD3d 1133, 1134 [4th Dept 2022]). "Control is both a question of law and of fact" (*Gronski*, 18 NY3d at 379).

In support of their motion, defendants submitted evidence that MPP entered into lease and leaseback agreements with the Wayne County Industrial Development Agency (IDA) when the Facility was built. The lease agreement gave the IDA a leasehold interest in the land and the Facility. Under the leaseback agreement, the IDA leased the land and Facility back to MPP and approved the contemplated sublease to Marshall Ingredients to operate its business. Although defendants submitted the affidavit of the Chief Executive Officer of MPP, who averred that the course of conduct between MPP and Marshall Ingredients was consistent with the provisions of the leaseback agreement, there was no written sublease between MPP and Marshall Ingredients. The leaseback agreement, which included all equipment in the Facility, provided that MPP was responsible to maintain the facility. While the leaseback agreement further provided that Marshall Ingredients, as sublessee, "shall assume the obligations of [MPP] to the extent of the interest assigned or subleased," it also stated that MPP was not relieved of primary liability for its obligations notwithstanding the sublease. We conclude that the leaseback agreement does not establish as a matter of law that MPP relinquished its contractual obligation to maintain the Facility and repair unsafe conditions, and thus defendants failed to establish as a matter of law that MPP was an out-of-possession landlord with no duty to maintain the Facility (*see Cummins*, 207 AD3d at 1134; *Washington-Fraser v Industrial Home for the Blind*, 164 AD3d 543, 545 [2d Dept 2018]; *see generally Gronski*, 18 NY3d at 379; *Wagner v Waterman Estates, LLC*, 128 AD3d 1504, 1506 [4th Dept 2015]).

The court further agreed with defendants that MPP was not liable

for plaintiff's injuries because it did not have control over the manner in which plaintiff performed her work. "It is settled law that where the alleged defect or dangerous condition arises from [the employer's] methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law" (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *see Poulin v Ultimate Homes, Inc.*, 166 AD3d 667, 670 [2d Dept 2018]; *Anderson v National Grid USA Serv. Co.*, 166 AD3d 1513, 1513-1514 [4th Dept 2018]). Where, however, the accident is a result of a dangerous condition of the premises or allegedly defective equipment, the owner must show that it did not create or have actual or constructive notice of the dangerous condition (*see Breau v Burdick*, 166 AD3d 1545, 1547 [4th Dept 2018]; *Sochan v Mueller*, 162 AD3d 1621, 1625 [4th Dept 2018]; *Ferguson v Hanson Aggregates N.Y., Inc.*, 103 AD3d 1174, 1175 [4th Dept 2013]). Contrary to defendants' contention, this is not a case involving only the employer's methods; both standards are implicated here. Plaintiff alleged that the Dryer constituted a dangerous condition because it lacked adequate safeguards, and MPP failed to establish as a matter of law that it did not have actual or constructive notice of the allegedly defective Dryer (*see Breau*, 166 AD3d at 1548; *see also Washington-Fraser*, 164 AD3d at 545).

Plaintiff next contends that the court erred in granting the motion insofar as it sought summary judgment with respect to Marshall Farms because the motion was premature. We reject that contention. When defendants moved for summary judgment, plaintiff objected in part on the ground that the motion was premature. The court deferred decision on the motion with respect to MPP and Marshall Farms and allowed plaintiff to conduct further discovery, which she did. Plaintiff fails to identify what else she would seek in discovery to oppose the motion with respect to Marshall Farms. "Mere hope that somehow the [nonmovant] will uncover evidence that will [help its] case provides no basis . . . for postponing a determination of a summary judgment motion" (*Nationwide Affinity Ins. Co. of Am. v Beacon Acupuncture, P.C.*, 175 AD3d 1836, 1837 [4th Dept 2019] [internal quotation marks omitted]; *see Weydman Elec., Inc. v Joint Schs. Constr. Bd.*, 140 AD3d 1605, 1607 [4th Dept 2016]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

518
CA 23-00097
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

AVION SYLVESTER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KIMANI S. SANDERS, FAITH E. HARRIS, DEFENDANTS,
AND CITY OF NIAGARA FALLS, DEFENDANT-RESPONDENT.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE LLP, BUFFALO (JOSEPH H. EMMINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 21, 2022. The order, insofar as appealed from, granted the motion of defendant City of Niagara Falls insofar as it sought an order of protection striking items numbered 1, 2, 3, 4 and 6 of plaintiff's second notice to produce.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion insofar as it sought to strike items numbered 1, 2, 3, 4, and 6 of plaintiff's second notice to produce is denied.

Memorandum: Plaintiff commenced this personal injury action against defendant City of Niagara Falls (City), among others, following a motor vehicle accident on a City road. We agree with plaintiff that Supreme Court abused its discretion by granting that part of the City's motion seeking an order of protection striking certain discovery demands in plaintiff's second notice to produce. Those demands included requests for records related to City road maintenance and re-paving, work assignments, and associated budgets. CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." "The words, 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see Garcia v Town of Tonawanda*, 210 AD3d 1483, 1485 [4th Dept 2022]). "The issues framed by the pleadings determine the scope of discovery in a particular action" (*Kern v City of Rochester*, 261 AD2d 904, 905 [4th Dept 1999] [internal quotation marks omitted]).

We agree with plaintiff that the requested records are material and necessary to the issues raised in plaintiff's pleadings (*see Garcia*, 210 AD3d at 1485). The City contends that the demands struck by the court were palpably improper because they sought information related to claims precluded by the City's written notice statute (*see Szuba v City of Buffalo*, 193 AD3d 1386, 1387 [4th Dept 2021]). Inasmuch as there has been no determination as a matter of law regarding either the absence of the requisite written notice or the unavailability of a recognized exception to the written notice requirement (*see id.*), the court erred to the extent that it granted the motion.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

523
CA 22-01047

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

RICHARD M. TALBOT AND KATIE JO TALBOT,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS MILLARD
FILLMORE HOSPITALS, MILLARD FILLMORE SUBURBAN
HOSPITAL AND DONALD HICKEY, M.D.,
DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT D. BARONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRADY & SWENSON, P.C., SALAMANCA (ERIN M. BRADY SWENSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered July 1, 2022. The order and judgment granted the motion of defendants for leave to reargue and, upon reargument, clarified a prior determination.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting that part of defendants' motion seeking a protective order striking document request No. 16 and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by Richard M. Talbot (plaintiff) while he was a patient at defendant Millard Fillmore Suburban Hospital. Plaintiffs alleged that defendants' care and treatment caused plaintiff to develop pressure sores that resulted in serious and permanent injuries to plaintiff. Defendants moved pursuant to CPLR 3103 for a protective order striking or limiting plaintiffs' document requests and striking plaintiffs' notice of deposition for a corporate representative of defendant Kaleida Health, doing business as Millard Fillmore Hospitals (Kaleida). Supreme Court denied the motion in part and required defendants to respond to certain requests, including document request No. 16, which sought "[d]ocuments reflecting all claims made and lawsuits filed against Kaleida related to the prevention and/or treatment of pressure sores in the [intensive care unit] from January 1, 2010" through the present, and to permit the deposition of a corporate representative.

Thereafter, defendants moved for leave to reargue their prior motion for a protective order and, upon reargument, to strike document request No. 16 and the notice of deposition. The court granted leave to reargue and, upon reargument, adhered to its prior determination with respect to the notice of deposition but clarified the scope of disclosure pursuant to document request No. 16. Defendants now appeal.

We agree with defendants that the court abused its discretion in denying that part of defendants' motion seeking a protective order striking document request No. 16, and we therefore modify the order and judgment accordingly. Generally, "it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion" (*Matter of Brandon*, 55 NY2d 206, 210-211 [1982]; *see Mazella v Beals*, 27 NY3d 694, 710 [2016]). As an exception to that general rule, where guilty knowledge or an unlawful intent is at issue, evidence of similar acts may be admitted "to negate the existence of an innocent state of mind" (*Brandon*, 55 NY2d at 211). Contrary to plaintiffs' contention, we conclude that the exception does not apply in this case inasmuch as the state of mind of defendants' employees is not relevant to the determination of whether defendants were negligent (*cf. Davis v Solondz*, 122 AD2d 401, 401-402 [3d Dept 1986]). Thus, inasmuch as the evidence sought in document request No. 16 is propensity evidence that lacks probative value concerning any material factual issue in this case, the court should have granted defendants' motion with respect to that request (*see generally Mazella*, 27 NY3d at 710; *Crawford v R. Jewula Holdings LLC*, 170 AD3d 1644, 1644-1645 [4th Dept 2019]). In light of our determination, we do not address defendants' remaining contention with respect to document request No. 16.

Contrary to defendants' further contention, however, the court did not abuse its discretion in denying defendants' motion to the extent that it sought a protective order striking plaintiffs' notice of deposition of a corporate representative of Kaleida. Here, the record establishes that none of the witnesses that had already been deposed could conclusively testify as to the policies and procedures that Kaleida had in place in 2015, and there is a substantial likelihood that a corporate representative of Kaleida would possess that information, which is material and necessary to the prosecution of the case (*see Black v Athale*, 129 AD3d 1661, 1662-1663 [4th Dept 2015]; *cf. Matter of Pignato v City of Rochester*, 288 AD2d 825, 825 [4th Dept 2001], *appeal dismissed* 97 NY2d 725 [2002], *lv denied* 98 NY2d 604 [2002]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

524
CA 22-00986
PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

GERALD TRUAX, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

M.D. MEYER'S PROPERTIES, LLC,
DEFENDANT-APPELLANT.

LAW OFFICES OF JORDAN DIPALMA, PALMYRA (RICHARD C. BRISTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

STANLEY LAW OFFICES, SYRACUSE (STEPHANIE VISCELLI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered May 31, 2022. The order denied 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.

Memorandum: Plaintiff commenced this negligence action seeking damages for personal injuries he sustained when an icicle fell from the roof of a building and struck his head. The building from which the icicle fell was owned by defendant and leased to plaintiff's employer (lessee). Defendant moved for summary judgment dismissing the complaint on the ground that it is an out-of-possession landlord. Supreme Court denied the motion, and defendant appeals. We affirm.

"[A]n out-of-possession landlord generally will not be responsible for dangerous conditions existing on leased premises" once the premises have been relinquished to a lessee (*Starr v Holes*, 87 AD3d 1395, 1396 [4th Dept 2011]; *see Ferro v Burton*, 45 AD3d 1454, 1454-1455 [4th Dept 2007]). However, there are certain exceptions to this rule, including where the landlord " 'has specifically contracted to repair or maintain the property . . . or has affirmatively created a dangerous condition' " (*Harkins v Tuma*, 182 AD3d 678, 679 [3d Dept 2020]; *see Ferro*, 45 AD3d at 1454-1455; *Davison v Wiggand*, 247 AD2d 700, 701 [3d Dept 1998]). "To be awarded summary judgment, [a defendant is] required to establish that none of the above exceptions applied or, if one or more of the exceptions did apply, that [it] had no actual or constructive knowledge of the hazardous condition" (*Harkins*, 182 AD3d at 679; *see generally Jones v Bartlett*, 275 AD2d 956, 956 [4th Dept 2000], *lv denied* 96 NY2d 705 [2001]). Although defendant met its initial burden on the motion by submitting evidence

establishing as a matter of law that it was not liable for plaintiff's injuries, we conclude, contrary to defendant's contention, that plaintiff raised triable issues of fact in opposition with respect to defendant's contractual obligation to maintain the premises, whether defendant created the alleged dangerous condition that caused the injury, and whether defendant had notice of that condition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In support of its motion, defendant submitted a lease agreement signed in 2004, approximately two years after defendant oversaw construction of the premises. The lease, together with depositions and affidavits in defendant's submission, established that defendant relinquished control of the premises in 2004, and plaintiff failed to raise a question of fact as to that issue. The fact that, under the lease, defendant reserved the right to enter the premises "at all reasonable times for the purpose of inspecting same; for purposes of ascertaining [the l]essee's compliance with the terms and conditions [of the lease] . . . ; [and] for the purpose of posting notices of non-responsibility for alterations, additions, or repairs," standing alone, is "insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord" (*Ferro*, 45 AD3d at 1455 [internal quotation marks omitted]; *see Addeo v Clarit Realty*, *Ltd.*, 176 AD3d 1581, 1582 [4th Dept 2019]). "[A]n out-of-possession landlord who reserves that right may be held liable for injuries to a third party only where a specific statutory violation exists" (*Regensdorfer v Central Buffalo Project Corp.*, 247 AD2d 931, 932 [4th Dept 1998] [internal quotation marks omitted]), and plaintiff failed to allege a specific statutory violation pertaining to snow and ice removal or the roof generally (*see Boice v PCK Dev. Co.*, *LLC*, 121 AD3d 1246, 1248 [3d Dept 2014]; *Velazquez v Tyler Graphics*, 214 AD2d 489, 490 [1st Dept 1995]; *see generally Weaver v DeRonde Tire Supply*, *Inc.*, 211 AD3d 1503, 1504-1505 [4th Dept 2022], *appeal dismissed* 39 NY3d 1149 [2023]).

The lease further provides that the lessee is responsible for all maintenance and repair of the premises except for "the repair and replacement of structural elements and roof and repair and replacement work that would be treated as a capital expense." Based on that language, we agree with defendant that it met its burden of showing that it was not contractually responsible for snow and ice removal on the premises (*see Addeo*, 176 AD3d at 1582; *see generally Regensdorfer*, 247 AD2d at 932). However, plaintiff does not argue that defendant was negligent in failing to remove the ice accumulation, but rather that the injury was caused either by a dereliction of defendant's contractual obligation to properly maintain the roof or through faulty construction and design. In support of that contention, plaintiff submitted, inter alia, an expert affidavit averring that the ice accumulation was due to faulty roof design and inadequate maintenance, specifically the failure to include or add "ice mitigation features." Viewing the evidence most favorably to plaintiff, we conclude that his submissions raise factual issues whether the roof was negligently maintained or constructed (*see Stickles v Fuller*, 9 AD3d 599, 600-601 [3d Dept 2004]; *Knight v Sawyer*, 306 AD2d 849, 849 [4th Dept 2003];

see also Jewett v M.D. Fritz, Inc., 83 AD3d 1572, 1573-1574 [4th Dept 2011]; *Meyers-Kraft v Keem*, 64 AD3d 1172, 1173 [4th Dept 2009]).

Defendant also submitted an affidavit from its president and sole member, who averred that he had no notice of ice accumulation on the premises and rarely visited the site in winter, thereby meeting its initial burden as to notice. In response, plaintiff submitted testimony that the lessee's employees were required to block the sidewalk around the premises and post warning signs "every winter" for the past 18 years "[b]ecause ice comes off the front of the building and goes right on the sidewalk." Inasmuch as that testimony indicates that the presence of the alleged dangerous condition dated back to 2002—i.e., two years prior to the time that defendant leased the premises to the lessee—it was sufficient to raise an issue of fact whether defendant had actual notice of the ice accumulation before entering into the lease (*see generally Wagner v Waterman Estates, LLC*, 128 AD3d 1504, 1506 [4th Dept 2015]). Further, "[c]onstructive notice will be found where a defective condition has existed for such a length of time that knowledge thereof should have been acquired in the exercise of reasonable care," including where the defendant is an out-of-possession landlord (*June v Bill Zikakis Chevrolet*, 199 AD2d 907, 909 [3d Dept 1993] [internal quotation marks omitted]; *see Balash v Melrod*, 167 AD3d 1442, 1443 [4th Dept 2018]). We therefore further conclude that plaintiff raised an issue of fact whether defendant had constructive notice of the dangerous condition (*see Wagner*, 128 AD3d at 1507).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

531

KA 21-01510

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN J. HEATH, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JEFFERY R. FRIESEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered October 12, 2021. The judgment convicted defendant, upon a plea of guilty, of driving while intoxicated (two counts), and aggravated unlicensed operation of a motor vehicle 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 of incarceration to three concurrent indeterminate terms of imprisonment of 1 to 3 years and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of driving while intoxicated (DWI) as a class E felony (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [i] [A]) and one count of aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). Defendant contends that County Court erred in refusing to suppress evidence obtained from him during an encounter with the police. We reject that contention.

According to the evidence presented at the suppression hearing, while on road patrol, an officer received a radio transmission from dispatch describing a “sick or intoxicated driver,” based on information provided by a 911 caller who reported having observed an individual in a vehicle located in the drive-through lane of a fast food restaurant pour an alcoholic beverage into a mug or cup. The officer testified that possessing an open alcoholic beverage in a vehicle constituted a violation of the Vehicle and Traffic Law. The dispatch also provided the make, model, and license plate number of

the suspect vehicle, and its location. The officer further testified that the "rest of the information" appeared on his computer-aided dispatch (CAD) system on the laptop in his patrol vehicle. The officer acknowledged, however, that the dispatch did not include any information regarding erratic or problematic driving, equipment issues with the vehicle, the name of the driver, or the status of the driver's license. The officer also did not ask dispatch for the name of the 911 caller.

As the officer responded to the reported location, the 911 caller reported that the suspect vehicle had left the fast food restaurant and was traveling south on a particular public highway. The officer was headed north on that road when he observed the suspect vehicle moving southbound, at which time the officer proceeded to pull off to the side of the road in order to turn around and begin to follow the vehicle. Although the officer's testimony is susceptible to more than one reasonable interpretation regarding whether the suspect vehicle voluntarily pulled over by the time the officer was pulling over to the side of the road to conduct a U-turn and activating his emergency lights and sirens, there is no dispute that the officer ultimately pulled behind the suspect vehicle and then approached the vehicle. Defendant, who was operating the suspect vehicle and whose breath smelled of alcohol, admitted that he consumed a couple of beers before driving to the fast food restaurant, refused to complete all of the field sobriety tests requested by the officer, and was then arrested.

The parties stipulated to the admission in evidence of the recordings of the 911 call and radio transmissions, as well as the event summary log of the incident, which indicated that the 911 caller had identified himself by name, address, and phone number. The dispatcher, who was called by defendant as a witness at the suppression hearing, confirmed that any information contained in the CAD report is also contained in the event summary log.

Here, even assuming, arguendo, that the officer did, in fact, initiate and conduct a traffic stop of a moving vehicle operated by defendant (*cf. e.g. People v Ocasio*, 85 NY2d 982, 984-985 [1995]; *People v Harrison*, 57 NY2d 470, 475 [1982]; *People v Morris*, 37 AD3d 1088, 1089 [4th Dept 2007], *lv denied* 8 NY3d 988 [2007]), we conclude that, contrary to defendant's contention, the seizure was lawful inasmuch as the officer had probable cause to believe that defendant had committed a traffic infraction. "[I]nterference with a moving vehicle is a seizure" (*Ocasio*, 85 NY2d at 984). As relevant here, such "[a]utomobile stops are lawful only when 'based on probable cause that a driver has committed a traffic violation' . . . [or] when based on a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Hinshaw*, 35 NY3d 427, 430 [2020]). With respect to the former, "[p]robable cause . . . 'does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a *reasonable belief* that an offense has been or is being committed or that evidence of a crime may be found in a certain place' " (*People v Guthrie*, 25 NY3d 130, 133 [2015], *rearg denied* 25 NY3d 1191 [2015]). "Thus, '[a] police officer who can

articulate credible facts establishing reasonable cause to believe that someone has violated a law has established a reasonable basis to effectuate a [traffic] stop' " (*id.*, quoting *People v Robinson*, 97 NY2d 341, 353-354 [2001]). "[P]robable cause may be supplied, in whole or in part, [by] hearsay information, provided [that] it satisfies the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted" (*People v Flowers*, 59 AD3d 1141, 1142 [4th Dept 2009] [internal quotation marks omitted]; *see People v Harlow*, 195 AD3d 1505, 1506 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]).

Initially, defendant's contention that the 911 caller was anonymous and unidentified is raised for the first time on appeal and therefore is not preserved for our review (*see* CPL 470.05 [2]; *cf. People v Williams*, 136 AD3d 1280, 1282 [4th Dept 2016], *lv denied* 27 NY3d 1141 [2016], *lv denied* 29 NY3d 954 [2017]). We decline to exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), particularly given that defendant expressly argued throughout the proceedings below that the 911 caller was an *identified* civilian informant.

On the merits, we conclude that the information from the identified 911 caller, who is presumed to be reliable (*see People v Parris*, 83 NY2d 342, 350 [1994]) and whose basis of knowledge was his personal observations (*see People v Hetrick*, 80 NY2d 344, 348 [1992]), provided the officer with the requisite probable cause that defendant committed a traffic infraction by violating Vehicle and Traffic Law § 1227 (1), which prohibits the possession of an open container containing an alcoholic beverage in a motor vehicle located upon a public highway. The 911 caller provided detailed information regarding his observations, i.e., that an individual in a particular vehicle located in the drive-through lane of a fast food restaurant had poured an alcoholic beverage in the form of beer into an open mug or cup. The 911 caller was also able to describe the make, model, and license plate number of the suspect vehicle, and provide its location and direction of travel. Immediately thereafter, the officer observed the vehicle matching the description provided by the 911 caller traveling, as reported, upon the public highway. In our view, that information provided the officer with " 'credible facts establishing reasonable cause to believe that [defendant] ha[d] violated a law,' " thereby " 'establish[ing] a reasonable basis to effectuate a [traffic] stop' " (*Guthrie*, 25 NY3d at 133). Finally on this point, while defendant further contends that the 911 caller, even as an identified citizen informant, could not, as a matter of law, provide the officer with probable cause to stop the vehicle for a traffic infraction, we conclude that defendant's contention lacks merit (*see People v King*, 137 AD3d 1424, 1424-1425 [3d Dept 2016], *lv denied* 27 NY3d 1070 [2016]).

We agree with defendant, however, that the sentence of incarceration is unduly harsh and severe under the circumstances of this case, and we therefore modify the judgment as a matter of

discretion in the interest of justice by reducing the sentence of incarceration to three concurrent indeterminate terms of imprisonment of 1 to 3 years (*see generally* CPL 470.15 [6] [b]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

537

CA 22-01224

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

MICHAEL S. REITZEL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STUART DERYCKE AND JACKLYN DERYCKE,
DEFENDANTS-RESPONDENTS.

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

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (MAUREEN G. FATCHERIC OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered July 20, 2022. The judgment dismissed the complaint.

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

Memorandum: Plaintiff commenced this premises liability action seeking damages for injuries he sustained when, while returning to his delivery truck after delivering a package at defendants' home, he allegedly slipped and fell on the snow- and ice-covered gravel driveway and sustained a broken ankle. Plaintiff alleged, inter alia, that defendants were negligent because they maintained their driveway in such a manner whereby the area became icy, frozen, slippery and deteriorated with areas of uneven gravel under the icy surface. Plaintiff now appeals from an order granting defendants' motion for dismissal of the complaint for failure to prosecute pursuant to CPLR 3216 and, in the alternative, for summary judgment dismissing the complaint pursuant to CPLR 3212. We deem the appeal to be taken from the judgment subsequently entered on that order inasmuch as plaintiff's 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]).

Initially, we agree with plaintiff that, under the circumstances here, dismissal of the complaint pursuant to CPLR 3216 is not warranted, and we therefore substitute our discretion for that of Supreme Court in that regard. 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 defendants'

90-day demand (*see* CPLR 3216 [e]), we note that "[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 Castiglione v Pisanczyn*, — AD3d —, —, 2023 NY Slip Op 03105, *1 [4th Dept 2023]; *Hawe v Delmar*, 148 AD3d 1788, 1789 [4th Dept 2017]; *see generally Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503-505 [1997]). Here, plaintiff's "participation in ongoing disclosure that occurred within the 90-day period . . . negated any inference that [plaintiff] intended to abandon [the] action" (*Hawe*, 148 AD3d at 1789 [internal quotation marks omitted]; *see Restaino v Capicotto*, 26 AD3d 771, 771-772 [4th Dept 2006]). In addition, "[a]lthough there were some delays attributable to plaintiff's attorney and [her] law office both before and after the 90-day demand," we conclude 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" (*Hawe*, 148 AD3d at 1789 [internal quotation marks omitted]).

We nonetheless affirm the judgment on the alternative ground that the court properly granted that part of defendants' motion for summary judgment dismissing the complaint. At the outset, we note that plaintiff *does not* contend on appeal that defendants created the particular icy condition at that location on the day of his fall, nor does plaintiff contend that defendants had actual or constructive notice of the specific slippery condition upon which plaintiff fell on the day of the incident. Instead, plaintiff contends on appeal only that the court erred in granting that part of defendants' motion seeking summary judgment insofar as the complaint, as amplified by the bill of particulars, alleges that defendants had actual knowledge of an ongoing, recurring dangerous condition in the area of his fall—i.e., that defendants allowed dips and grooves to exist on the gravel driveway on which accumulated snow would melt and freeze as ice in the depressions, and thus that defendants could be charged with constructive notice of the specific recurrence of that condition. Plaintiff has therefore abandoned any other theories of liability (*see Monnin v Clover Group, Inc.*, 187 AD3d 1512, 1513 [4th Dept 2020]).

Defendants nevertheless argue that plaintiff improperly sought to defeat that part of their motion for summary judgment by asserting the recurring dangerous condition theory as a new theory of liability for negligence for the first time in opposition to the motion. Contrary to defendants' argument, however, we agree with plaintiff that "the recurring dangerous condition theory was 'readily discernable' from the allegations set forth in [his complaint and] bill of particulars" (*id.* at 1514). Thus, with respect to the only theory of liability raised both in opposition to the motion and on appeal, it is well settled that "[a] defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition" (*id.* at 1513 [internal quotation marks omitted]; *see Wesolek v Jumping Cow Enters., Inc.*, 51 AD3d 1376, 1378 [4th Dept 2008]).

Here, we conclude that defendants met their initial burden of establishing that they did not have actual knowledge of any ongoing and recurring dangerous condition. Although defendant Stuart Derycke acknowledged during his deposition that snow removal efforts could displace gravel thereby requiring that he rake stone back into the driveway during the spring, defendants each averred in their affidavits submitted in support of the motion that there were no holes or depressions in the driveway and that, prior to plaintiff's fall, they had not received any complaints, violations or citations regarding the condition of the driveway or any complaints about snow or ice on the property (*see Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1468-1469 [4th Dept 2013]; *cf. Chrisler v Spencer*, 31 AD3d 1124, 1125 [4th Dept 2006]; *see also Evans v Old Forge Props., Inc.*, 213 AD3d 1361, 1362 [4th Dept 2023]; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]).

We further conclude that plaintiff, in opposition to the motion, failed to raise a triable issue of fact with respect to whether defendants had actual knowledge of an ongoing and recurring dangerous condition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In particular, plaintiff's assertion that the accident was caused by a recurrent dangerous condition of which defendants had actual knowledge, i.e., the existence of potholes, grooves and dips on which snow would accumulate, melt, and freeze into ice, "is unsupported by any competent evidence, and rests instead on the conclusory, unsubstantiated, and speculative affidavit of his expert, which was insufficient to raise a triable issue of fact" (*Coyne v Talleyrand Partners, L.P.*, 22 AD3d 627, 629 [2d Dept 2005], *lv denied* 6 NY3d 705 [2006]; *see Drissi v Kelly*, 30 AD3d 1009, 1010 [4th Dept 2006]; *see generally Groninger v Village of Mamaroneck*, 17 NY3d 125, 129-130 [2011]). Upon reciting the general characteristics of gravel and referring to unauthenticated photographs of the driveway taken at an unknown time, plaintiff's expert merely concluded to a reasonable degree of engineering certainty that defendants created a hazardous condition on their property by maintaining the gravel driveway with dips and grooves without appropriate repair and by allowing snow and ice to accumulate on the driveway without taking adequate measures to remove the snow and ice prior to the delivery. Plaintiff's expert did not, however, render an opinion on the specific recurrent dangerous condition theory that plaintiff now advances on appeal, i.e., the expert did not suggest that the purported dips and grooves constituted a repeated collection area for melted snow that would re-freeze into ice (*see Coyne*, 22 AD3d at 629). Moreover, the expert affidavit was otherwise conclusory and speculative. The expert did not inspect the driveway itself; instead, he based his conclusion that the driveway contained dips and grooves on a series of unauthenticated photographs without any indication as to when the photographs were taken relative to the incident or if the photographs substantially depicted the condition of the driveway on the date of the incident (*see generally Birmingham v Linden Plaza Hous. Co.*, 210 AD3d 853, 855 [2d Dept 2022]; *Anderson v Weinberg*, 70 AD3d 1438, 1439-1440 [4th Dept 2010]). We thus conclude that the expert's affidavit was insufficient to raise a triable issue of fact (*see Mitchell v 423 W. 55th St.*, 187 AD3d 661,

662 [1st Dept 2020]; *Menear v Kwik Fill*, 174 AD3d 1354, 1356 [4th Dept 2019]; *Landahl v Stein*, 162 AD3d 1563, 1563 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *Schneider v Corporate Place, LLC*, 149 AD3d 1503, 1504-1505 [4th Dept 2017]).

All concur except BANNISTER, J., who dissents in part and votes to modify in accordance with the following memorandum: I respectfully dissent in part because, in my view, plaintiff raised an issue of fact whether defendants had actual knowledge of an ongoing and recurring dangerous condition on the property sufficient to defeat defendants' motion for summary judgment (*see Monnin v Clover Group, Inc.*, 187 AD3d 1512, 1513 [4th Dept 2020]). Plaintiff submitted an expert affidavit from a professional engineer who reviewed, inter alia, photographs of the driveway and the depositions of the parties when forming his opinion that dips and grooves existed in the driveway that should have been filled with additional gravel. Specifically, plaintiff's expert explained gravel drives and their inherent need for upkeep and repair and that, despite such a need, defendant Stuart Derycke admitted in his deposition testimony that in 30 years of owning the driveway he did not make any repairs to the driveway, nor did he perform maintenance by adding stone to fill any dips or grooves. I therefore would modify the judgment by denying the motion in part and reinstating the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that defendants had constructive notice of a recurring dangerous condition (*see id.* at 1513-1514).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

538
CA 22-01276
PRESENT: SMITH, J.P., LINDLEY, CURRAN, BANNISTER, AND OGDEN, JJ.

PAUL SCIME, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

HALE NORTHEASTERN INC. AND DANIEL BOYD,
DEFENDANTS-RESPONDENTS.

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

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

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered July 19, 2022. The order denied in part the motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when he was struck by a vehicle operated by defendant Daniel Boyd, which was owned by defendant Hale Northeastern Inc. Boyd was backing the vehicle out of a loading dock and struck plaintiff, who was either standing or walking in the area behind the vehicle while talking on his cell phone and smoking a cigarette. Although plaintiff continued talking on the phone and smoking the cigarette following the collision, he later commenced this action alleging that he sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident. Following discovery, plaintiff moved for partial summary judgment on issues of "liability and sole proximate cause and . . . serious injury," and for dismissal of seven affirmative defenses. Supreme Court granted the motion in part and dismissed five affirmative defenses but otherwise denied plaintiff's motion. Plaintiff appeals and we affirm.

We initially conclude that the court properly denied that part of plaintiff's motion seeking summary judgment on the issue of negligence inasmuch as there are triable issues of fact whether Boyd was negligent in his operation of the vehicle. Even where there is evidence that a person exercised reasonable care in the operation of a vehicle and still struck a car or person, issues of fact may exist precluding an award of summary judgment (*cf. Ortiz v Lynch*, 105 AD3d 584, 585 [1st Dept 2013]; *Gill v Braasch*, 100 AD3d 1415, 1415-1416

[4th Dept 2012]; *Pries-Jones v Time Warner Cable, Inc.*, 93 AD3d 1299, 1301 [4th Dept 2012]; *see generally Smith v Niagara Frontier Tr. Metro Sys., Inc.*, 75 AD3d 1084, 1085 [4th Dept 2010], *lv dismissed* 16 NY3d 740 [2011]; *Hargis v Sayers* [appeal No. 2], 38 AD3d 1228, 1229-1230 [4th Dept 2007]).

Here, in support of his motion plaintiff submitted the deposition of Boyd, who testified that, before moving the vehicle in reverse, he looked in his rear-view mirror and his driver's side mirror and did not see anyone behind the vehicle. After driving the vehicle in reverse for approximately five to ten feet, Boyd heard a thud and then stopped the vehicle and learned that he had struck plaintiff. Plaintiff also submitted his own deposition, wherein he testified that, although he "believed" that he was stationary at the time of impact, he could not recall whether he was stationary or pacing as he smoked his cigarette and talked on the phone. Plaintiff further testified that he did not see the vehicle driven by Boyd until it struck him. Boyd's testimony, if believed by the trier of fact, would support a finding that plaintiff was not stationary behind the vehicle and instead walked into the vehicle's path unexpectedly, and that Boyd was therefore not negligent. Under the circumstances, plaintiff's own submissions raised an issue of fact on the issue of negligence (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Contrary to plaintiff's further contention, we conclude that the court properly denied his motion with respect to the issues of proximate cause and serious injury. With respect to proximate cause, inasmuch as plaintiff could not recall whether he was stationary or pacing, his own submissions raise triable issues of fact whether he was comparatively negligent in potentially walking directly into the path of a reversing vehicle (*see Tiwari v Tyo*, 106 AD3d 1462, 1463 [4th Dept 2013]).

With respect to serious injury, we note that, although plaintiff, in his motion, alleged injuries to his left shoulder and cervical spine, he limits his contentions on appeal to the injuries to his left shoulder, thus abandoning any appellate contention that the accident caused any serious injury to his cervical spine (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). As for the left shoulder, plaintiff submitted medical records and expert testimony demonstrating that the accident caused the injuries to his shoulder and that those injuries constituted serious injuries under the permanent consequential limitation of use and significant limitation of use categories of serious injury (*see* Insurance Law § 5102 [d]). Plaintiff also submitted, however, the opinion of a treating physician that, in the months immediately following the accident, plaintiff had full range of motion in his left shoulder but with "pain on extremes." Additionally, plaintiff submitted the report of an orthopedist who opined that any injury plaintiff may have sustained to his left shoulder as a result of the accident did not constitute a serious injury.

"[W]hether a limitation of use . . . is significant or consequential . . . relates to medical significance and involves a

comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002] [internal quotation marks omitted]; *see Wright v Wilson*, 211 AD3d 1621, 1623 [4th Dept 2022]). Moreover, "[a] significant limitation of use of a body function or member does not require a showing of permanency, and 'any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well' " (*Gates v Longden*, 120 AD3d 980, 981 [4th Dept 2014]; *see generally Campo v Neary*, 52 AD3d 1194, 1197 [4th Dept 2008]).

Here, inasmuch as courts "may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]), we conclude that the conflicting medical opinions submitted by plaintiff mandated denial of plaintiff's motion because they raised a question of fact whether he sustained a serious injury that was caused by the accident (*see generally Hollenbeck v Barry*, 199 AD3d 1329, 1329 [4th Dept 2021]; *Linnane v Szabo*, 111 AD3d 1304, 1305 [4th Dept 2013]).

All concur except BANNISTER and OGDEN, JJ., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent inasmuch as we conclude that Supreme Court erred in denying that part of plaintiff's motion seeking summary judgment on the issue of negligence, and we would therefore modify the order accordingly. Plaintiff met his initial burden on the motion by establishing as a matter of law that defendant Daniel Boyd was negligent in, inter alia, backing the vehicle into plaintiff without properly looking behind him (*see Gill v Braasch*, 100 AD3d 1415, 1415 [4th Dept 2012]). Plaintiff submitted Boyd's deposition testimony that, when Boyd was getting into his vehicle, he observed people smoking in the area behind his vehicle. He testified that, prior to backing up the vehicle, he turned his head to look out of the left side mirror of the vehicle and that, although he "peeked" or took a "very quick glance" in his rear-view mirror, he focused his attention on the left side mirror. As he began backing up, he heard a thud, stopped the vehicle and learned that the vehicle had hit plaintiff. Based on that deposition testimony, we conclude that plaintiff established as a matter of law that Boyd was negligent in failing to see that which, under the circumstances, he should have seen and in backing the vehicle up before ascertaining that it was safe to do so (*see generally Waltz v Vink*, 78 AD3d 1621, 1621-1622 [4th Dept 2010]). Further, in our view, defendants failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We disagree with the majority that there is an issue of fact concerning plaintiff's comparative fault that precludes summary judgment on the issue of negligence. Plaintiff was not required to anticipate that Boyd would back his vehicle toward him, as it was Boyd's obligation in the first place to ensure it was safe to back up his vehicle. We otherwise agree with the majority's determination that questions of fact exist with respect to causation and whether plaintiff sustained a serious

injury within the meaning of Insurance Law § 5102 (d).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

539

CA 22-01744

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

IN THE MATTER OF PENNY MORAN-RUIZ,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ONTARIO COUNTY AND ONTARIO COUNTY SHERIFF
PHILIP POVERO, RESPONDENTS-DEFENDANTS-RESPONDENTS.

TREVETT CRISTO P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (JOSEPH S. NACCA OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (Vincent M. Dinolfo, J.), entered October 13, 2022, in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents-defendants to dismiss in part the petition-complaint.

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

Memorandum: Petitioner-plaintiff (petitioner) has been employed by respondents-defendants (respondents) since 2001 as a correction officer. Unbeknownst to respondents, in 2018, petitioner's doctor prescribed her medical marijuana. In late 2021, petitioner went on disability leave from work, during which time respondents received petitioner's medical records and learned about her marijuana use. Although petitioner had been cleared to return to work from her disability leave, respondents did not allow her to return based solely on her use of medical marijuana and directed that she either use annual leave or take unpaid time until she had a verified negative drug test and had been evaluated by a substance abuse professional. Respondents supported that decision by invoking a provision of the applicable collective bargaining agreement (CBA) between respondents and petitioner's union, which strictly prohibited the use of, inter alia, marijuana—even when medically prescribed. That provision of the CBA was derived from the drug policy promulgated by the federal Department of Transportation (*see generally* 49 CFR 40.151). Ultimately, petitioner ceased using medical marijuana and was permitted by respondents to return to work.

Petitioner thereafter commenced this hybrid proceeding-action

seeking money damages based on having been placed in a no pay status, and a judgment, inter alia, annulling respondents' determination to place petitioner on unpaid leave due to her prescribed use of medical marijuana. Petitioner seeks relief under CPLR article 78 upon allegations that respondents violated Civil Service Law §§ 72 and 75, and her right to due process when they placed her on unpaid leave. In addition to her requests for relief under CPLR article 78, petitioner asserted several causes of action, including two causes of action based on allegations that respondents unlawfully discriminated against her pursuant to Executive Law § 296 and Civil Rights Law § 40-c on the basis of a disability—i.e., her lawful use of medical marijuana (*see* Cannabis Law § 42 [2]). She now appeals from a judgment granting respondents' motion to dismiss the petition-complaint with respect to the requests for relief under CPLR article 78 and the causes of action based on Executive Law § 296 and Civil Rights Law § 40-c (*see* CPLR 3211, 7804 [f]). We affirm.

Initially, we reject petitioner's contention that Supreme Court erred in granting the motion to dismiss with respect to the requests for relief based on allegations that respondents violated the Civil Service Law and petitioner's right to due process (*see generally* CPLR 7804 [f]). It is well settled that "terms of employment, so long as statutes or public policy do not forbid their negotiations, can be negotiated in collective bargaining" (*Police Benevolent Assn. of N.Y. State Troopers, Inc. v Division of N.Y. State Police*, 11 NY3d 96, 102 [2008]). Indeed, even "statutory and due process rights may . . . be surrendered during collective bargaining" (*id.* at 103; *see Matter of Raymond v Walsh*, 63 AD3d 1715, 1715 [4th Dept 2009], *appeal dismissed & lv denied* 14 NY3d 790; *Matter of Fortune v State of N.Y., Div. of State Police*, 293 AD2d 154, 158 [3d Dept 2002]). Here, we conclude that, under the CBA, petitioner surrendered the due process rights on which she relies in support of the petition-complaint—including the protections of Civil Service Law §§ 72 and 75. The CBA here expressly states that the drug policy was a condition of employment, and petitioner fails to identify any statutes that forbid collective bargaining with respect to a workplace drug and alcohol policy. Also supporting this conclusion, we note that the CBA expressly states that the grievance procedure contained therein shall apply to all "alleged violation[s] of the expressed terms of [the CBA]." It is undisputed that petitioner did not avail herself of the CBA's grievance procedure concerning respondents' initial determination. In short, by entering into the CBA through her union, petitioner agreed to follow the grievance procedure contained in that agreement, and to forego the protections of the Civil Service Law on which she now relies (*see generally Police Benevolent Assn. of N.Y. State Troopers, Inc.*, 11 NY3d at 102-103; *Raymond*, 63 AD3d at 1715). Thus, the court properly granted respondents' motion to dismiss the petition-complaint to the extent that it sought relief under CPLR article 78.

We further conclude that the court properly granted the motion to dismiss with respect to petitioner's discrimination causes of action—i.e., the causes of action asserted pursuant to Executive Law § 296 and Civil Rights Law § 40-c. Cannabis Law § 42 (2) states, in relevant part, that "[b]eing a certified patient [for medical

marijuana purposes] shall be deemed to be having a ‘disability’ under[, inter alia, Executive Law § 296 and Civil Rights Law § 40-c].” Cannabis Law § 127 (4) provides that “[a]n employer shall adhere to policies regarding cannabis use in accordance with” Labor Law § 201-d. In turn, that section provides, in relevant part that “[u]nless otherwise provided by law, it shall be unlawful for any employer . . . to discharge from employment or otherwise discriminate against an individual . . . because of . . . an individual’s legal use of . . . cannabis in accordance with state law, prior to the beginning or after the conclusion of the employee’s work hours, and off of the employer’s premises and without use of the employer’s equipment or other property” (§ 201-d [2] [b]).

Nonetheless, as an exemption, the Labor Law provides that “an employer shall not be in violation of this section where the employer takes action based on the belief either that . . . the employer’s actions were required by statute, regulation, ordinance or other governmental mandate, . . . [or] the employer’s actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or *collective bargaining agreement*” (Labor Law § 201-d [4] [emphasis added]). Here, we conclude that petitioner has failed to state a disability discrimination cause of action under Executive Law § 296 or Civil Rights Law § 40-c arising from her lawful use of medical marijuana, inasmuch as respondents placed her on leave pursuant to the CBA’s drug policy, which expressly precluded petitioner’s use of marijuana for any reason (*see* Labor Law § 201-d [4]). Respondents’ challenged actions in applying the terms of the CBA and placing petitioner on leave due to her use of medical marijuana were not discriminatory under Executive Law § 296 and Civil Rights Law § 40 because actions in accordance with a CBA are specifically exempted by statute. We reject petitioner’s contention that the exemption for drug policies contained in CBAs—i.e., Labor Law § 201-d (4)—does not apply here because it was effectively superseded by the exemption contained in Labor Law § 201-d (4-a), which contains language more specifically tailored to cannabis use. We conclude that the exemption contained in Labor Law § 201-d (4-a) does not conflict with the exemption contained in Labor Law § 201-d (4) and merely provides an *additional* basis for an employer to justify actions that would otherwise be discriminatory.

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

543

CA 22-00821

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

AMBER R., AS ADMINISTRATOR OF THE
ESTATE OF B. M.-R., DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PEDIATRIC & ADOLESCENT URGENT CARE OF
WESTERN NEW YORK, PLLC, KATELYN
JOHNSON-CLARK, D.O., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

GIBSON MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

PENBERTHY LAW GROUP LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 25, 2022. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: In this medical malpractice action, plaintiff, as the administrator of the estate of her deceased son, seeks damages arising from the death of her 27-day-old child, which occurred while he was being treated for flu-like symptoms at defendant Pediatric & Adolescent Urgent Care of Western New York, PLLC (the clinic). Following discovery, defendants moved for summary judgment dismissing the amended complaint. Supreme Court granted defendants' motion in part, dismissing almost all of the causes of action and claims against the clinic and defendant Katelyn Johnson-Clark, D.O. (collectively, clinic defendants), and dismissing all causes of action against defendant Kathleen Lillis, M.D., now known as Kathleen Grisanti, M.D. The court denied defendants' motion with respect to the claim that Johnson-Clark negligently placed an endotracheal tube (ET) in the infant. The clinic defendants appeal from the order insofar as it denied in part defendants' motion.

We agree with the clinic defendants that the court erred in failing to grant the motion in its entirety. "In moving 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" (*Ziemendorf v Chi*, 207 AD3d 1157, 1157 [4th Dept 2022] [internal quotation marks omitted]; *see Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]).

Here, contrary to the court's determination, defendants met their initial burden of establishing entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendants submitted deposition testimony, medical records and expert affidavits that were "detailed, specific and factual in nature" and addressed "each of the specific factual claims of negligence raised in . . . plaintiff's bill of particulars" (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015] [internal quotation marks omitted]; *see Nevarez v University of Rochester*, 173 AD3d 1640, 1641 [4th Dept 2019]). Defendants' submissions established that the ET was properly placed and that proper placement was verified by multiple people through several different methods. Although Johnson-Clark and her staff did not verify proper placement with a CO_2 monitor, that was due to the fact that the clinic did not have the correct size CO_2 monitor for an infant. It is undisputed that a specialized transport team (STAT team) was called to transport the infant to a hospital, but they were delayed in transit. That STAT team thus asked Johnson-Clark to intubate the infant. When the STAT team eventually arrived to transport the infant to the hospital, those specialized medical professionals verified that the ET was properly placed using the same methods used by Johnson-Clark.

Defendants' submissions established that the ET became dislodged following commencement of cardiopulmonary resuscitation (CPR) and, at that point, the STAT team used their available and correctly-sized CO_2 monitor to verify that the ET had become dislodged. Defendants also submitted an affidavit and an affirmation from experts, which established that CPR compressions can dislodge an ET through no fault of medical professionals. We note that the expert affirmation submitted by defendants established that nothing defendants did or did not do "contributed to the [death]" of the infant (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1257 [4th Dept 2019]).

In opposition to the motion, plaintiff failed to raise a triable issue of fact regarding the placement of the ET. The clinic defendants correctly contend that the expert affirmation submitted by plaintiff in opposition to defendants' motion lacked the requisite foundation. Even if we were to assume, arguendo, that plaintiff's expert established a familiarity with the applicable standard of care by explaining his training in pediatrics (*see generally Romano v Stanley*, 90 NY2d 444, 452 [1997]), we agree with the court and the clinic defendants that the affirmation should not be considered inasmuch as the expert failed to identify all of the documents that he reviewed (*see Dziwulski v Tollini-Reichert*, 181 AD3d 1165, 1166 [4th Dept 2020], *lv denied* 37 NY3d 901 [2021]; *Luu v Paskowski*, 57 AD3d 856, 858 [2d Dept 2008]; *cf. Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1471 [4th Dept 2020]), and he failed to state that his

opinions were based on a reasonable degree of medical certainty (*see generally Matott v Ward*, 48 NY2d 455, 459-460 [1979]).

We therefore reverse the order insofar as appealed from, grant defendants' motion in its entirety, and dismiss the amended complaint.

All concur except BANNISTER and OGDEN, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. In our view, defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as it asserted a claim for medical malpractice with respect to the placement of the endotracheal tube (ET) in the infant (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The medical records proferred by defendants established that, after a failed first intubation attempt with a 3.5 mm ET by defendant Katelyn Johnson-Clark, D.O., a physician with little training in the intubation process, Johnson-Clark attempted intubation using a smaller 3.0 mm ET. It is undisputed that there was no verification of the proper placement of that ET by way of an end-tidal CO_2 detector. The medical records further establish that one minute after the placement of the ET, the infant's heart rate quickly dropped and one minute thereafter, the infant's belly was distended. Another physician testified at her deposition that both of those signs indicate that there was a potential issue with the intubation. When the specialized transport team arrived, it was determined by way of a CO_2 detector that the ET was not in the proper place. Thus, we conclude that defendants' own submissions raise questions of fact whether Johnson-Clark acted negligently in the intubation of the infant and the motion was properly denied in part without regard to the sufficiency of plaintiff's opposition papers (*see Winegrad*, 64 NY2d at 853). We would therefore affirm that part of the order denying defendants' motion insofar as it seeks summary judgment dismissing the claim of malpractice related to the intubation of the infant.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

551

KA 22-00334

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK JOHNSON, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, 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 (John James Ottaviano, J.), rendered January 21, 2022. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child, rape in the second degree, criminal sexual act in the second 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 him upon a jury verdict of, inter alia, predatory sexual assault against a child (Penal Law § 130.96), rape in the second degree (§ 130.30 [1]), and criminal sexual act in the second degree (§ 130.45 [1]) stemming from his conduct toward a child living in his home. We reject defendant's contention that County Court improperly applied the Rape Shield Law to preclude him from cross-examining the victim regarding her association with boys outside the home. Defendant's offer of proof pursuant to CPL 60.42 (5) showed that the proposed cross-examination stemmed from a statement made by a sister of the victim regarding the victim's sexual history, which evidence would be prohibited by the Rape Shield Law (*see People v Halter*, 19 NY3d 1046, 1049 [2012]). The court did not abuse its discretion in refusing to apply the exception set forth in subdivision (5) of CPL 60.42 (*see Halter*, 19 NY3d at 1049; *People v Hill*, 184 AD3d 1086, 1087 [4th Dept 2020], *lv denied* 35 NY3d 1094 [2020]). Defendant contends that the court's ruling prohibited him from exploring the victim's motive to lie based on her reaction to defendant's house rules about not dating boys. We reject that contention inasmuch as defendant elicited on cross-examination that the victim was not allowed to have *any* friends come to her house and was not allowed to go to *any* friends' houses or parties, which rules she did not like, and defense counsel argued in summation that the victim fabricated the charges against defendant because of his strict house rules. We therefore conclude that

defendant had "sufficient latitude to develop the theory that [the victim] had substantial reasons to fabricate" (*Halter*, 19 NY3d at 1051; *see generally People v Vo*, 166 AD3d 1587, 1588 [4th Dept 2018]).

We reject defendant's contention that the court abused its discretion in admitting in evidence the testimony of the People's expert on child sexual abuse accommodation syndrome (CSAAS). It is well settled that expert testimony concerning CSAAS "is admissible to explain the behavior of child sex abuse victims as long as it is general in nature and does not constitute an opinion that a particular alleged victim is credible or that the charged crimes in fact occurred" (*People v Drake*, 138 AD3d 1396, 1398 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *see People v Diaz*, 20 NY3d 569, 575-576 [2013]; *People v Williams*, 20 NY3d 579, 583-584 [2013]). Here, the People's expert, who had never interviewed anyone involved in the case and was not aware of the facts of the case, gave testimony in general terms and did not exceed permissible bounds (*see Diaz*, 20 NY3d at 575-576; *People v Spicola*, 16 NY3d 441, 458, 466 [2011], *cert denied* 565 US 942 [2011]; *People v Young*, 206 AD3d 1631, 1632 [4th Dept 2022]).

Defendant next contends that the court erred in admitting in evidence three photographs showing parts of his residence that were dirty and in need of repair, contending that the condition of his residence was a collateral issue intended only to impeach his credibility. We reject that contention inasmuch as the conditions depicted in the photographs were relevant "to some issue in the case *other than* credibility" (*People v Schwartzman*, 24 NY2d 241, 245 [1969], *cert denied* 396 US 846 [1969]). The victim and one of her sisters testified that defendant and his wife kept the refrigerator locked and secured other food and snacks in their bedroom and that sometimes there was not enough heat or hot water in the home. Two photographs that depicted defendant's bedroom in disarray showed two refrigerators, a microwave, bottled water, and snacks, and another photograph showed the basement with a heater in apparent disrepair. The photographs were relevant to establish defendant's control over the victim by controlling her food intake and comforts and to help explain her delayed disclosure (*see generally People v Ortiz*, 135 AD3d 649, 650 [1st Dept 2016], *lv denied* 27 NY3d 1004 [2016]). We perceive no abuse of discretion by the court in admitting the photographs in evidence (*see People v Carrino*, 164 AD3d 695, 696 [2d Dept 2018], *lv denied* 32 NY3d 1109 [2018]; *see also People v Wright*, 107 AD3d 1398, 1400 [4th Dept 2013], *lv denied* 23 NY3d 1026 [2014]).

Defendant's contention that the conviction of predatory sexual assault against a child is not based on legally sufficient evidence is preserved only in part because, in moving for a trial order of dismissal, defendant raised only some of the specific grounds raised on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Parilla*, 214 AD3d 1399, 1402 [4th Dept 2023]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence provides a "valid line of reasoning and permissible inferences" that could lead a rational person to conclude, beyond a reasonable doubt

(*People v Delamota*, 18 NY3d 107, 113 [2011]), that defendant committed the offense of predatory sexual assault against a child. Any inconsistencies presented by the victim's testimony regarding the dates when the abuse occurred merely presented credibility issues for the jury (*see People v Furlong*, 4 AD3d 839, 841 [4th Dept 2004], *lv denied* 2 NY3d 739 [2004]). We further conclude that, viewing the evidence in light of the elements of all the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends that the People's statement of readiness was illusory, because the People had not disclosed the contents of the personnel record for each law enforcement official that the People intended to call as a trial witness, and the court should have granted his motion seeking to vacate the statement of readiness. We reject that contention. CPL article 245 requires the People to automatically disclose to the defendant "all items and information that relate to the subject matter of the case" that are in the People's "possession, custody or control" (CPL 245.20 [1]; *see People v Bonifacio*, 179 AD3d 977, 977-978 [2d Dept 2020]). That includes evidence that tends to "impeach the credibility of a testifying prosecution witness" (CPL 245.20 [1] [k] [iv]). The court properly denied the motion inasmuch as defendant was not automatically entitled to the entirety of a police officer's personnel file as impeaching material under CPL 245.20 (1) (k) (iv), but rather only to the extent that the information "relate[d] to the subject matter of the case" (CPL 245.20 [1]). We conclude that there were no such personnel records here that were subject to automatic discovery (*see People v Lewis*, 78 Misc 3d 877, 879-880 [Sup Ct, Kings County 2023]).

Contrary to defendant's contention, the court did not abuse its discretion in denying his CPL 330.30 (3) motion to set aside the verdict based on newly discovered evidence (*see generally People v Pugh*, 236 AD2d 810, 810-811 [4th Dept 1997], *lv denied* 89 NY2d 1099 [1997]). The evidence consisted of the posttrial statements of one of the victim's sisters recanting part of her trial testimony regarding seeing the victim and defendant standing close together in the kitchen on one occasion and stating that she had been pressured by the prosecutor to say that. " 'There is no form of proof so unreliable as recanting testimony' . . . , and such testimony is 'insufficient alone to warrant vacating a judgment of conviction' " (*People v Pringle*, 155 AD3d 1660, 1660 [4th Dept 2017], *lv denied* 31 NY3d 986 [2018]). Here, the court conducted a hearing during which the witness testified that her posttrial statements were voluntarily made, but admitted that she had first made the statement about witnessing defendant and the victim standing close to one another in the kitchen to an interviewer at a child advocacy center four months before meeting the prosecutor. We agree with the court that the recantation evidence was not credible, and in any event it was not "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to defendant" (CPL 330.30 [3]; *see People v Colbert*, 289 AD2d 976, 976 [4th Dept 2001], *lv denied* 97

NY2d 752 [2002]; *People v Dukes*, 106 AD2d 906, 906-907 [4th Dept 1984]; *see generally People v McCullough*, 275 AD2d 1018, 1019 [4th Dept 2000], *lv denied* 95 NY2d 936 [2000]).

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

554
CA 22-00551
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, AND GREENWOOD, JJ.

CAROLETTE MEADOWS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RACHEL ECKERT, DEFENDANT-APPELLANT.

DIPASQUALE & CARNEY, LLP, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an amended order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 11, 2022. The amended order, inter alia, granted plaintiff a permanent easement.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by vacating the first ordering paragraph and dismissing the first cause of action and as modified the amended order is affirmed without costs.

Memorandum: Defendant appeals from an amended order entered following a nonjury trial that, inter alia, granted plaintiff a permanent easement over that part of an 8-foot cement “driveway” that is situated on defendant’s side of the parties’ shared property line. The amended order also granted in part plaintiff’s fifth cause of action, based on Civil Rights Law § 52-a, by directing defendant to adjust the positioning of her security cameras so that they do not capture images of plaintiff’s property. We agree with defendant that Supreme Court erred in granting plaintiff a permanent easement, and we modify the amended order accordingly.

The parties are neighbors with a history of animosity (*Eckert v Meadows*, 216 AD3d 1397 [4th Dept 2023]). Filling the gap between the parties’ houses is an eight-foot wide concrete area, which plaintiff has used as a driveway to access a garage behind her home. Although most of that concrete area lies on plaintiff’s property, one side of it extends approximately 1 1/4 to 1 3/4 feet into defendant’s property. The prior owners of defendant’s home permitted plaintiff to use all of that section as a driveway to access the garage, but defendant did not. Plaintiff commenced this action seeking a permanent easement to allow her to continue to use the full width of the concrete section as a driveway.

We agree with defendant that plaintiff failed to establish the elements required for either an easement by necessity or an easement by implication. As a preliminary matter, we note that the court did

not address plaintiff's cause of action for an easement by prescription, and plaintiff has not submitted a brief asserting the existence of an easement by prescription as an alternative basis for affirming the amended order (*see generally Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488 [1978]). We therefore address only the issues related to an easement by necessity and an easement by implication.

"[A] party asserting an easement by necessity bears the burden of establishing by clear and convincing evidence . . . 'that there was a unity and subsequent separation of title, and . . . that at the time of severance an easement over [the servient estate's] property was *absolutely necessary*' " (*Simone v Heidelberg*, 9 NY3d 177, 182 [2007]; *see Mau v Schusler*, 124 AD3d 1292, 1295 [4th Dept 2015]; *Foti v Noftsier*, 72 AD3d 1605, 1607 [4th Dept 2010]).

"In order to establish an easement by implication from pre-existing use upon severance of title, three elements must be present: (1) unity and subsequent separation of title, (2) the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and (3) the use must be necessary to the beneficial enjoyment of the land retained" (*Abbott v Herring*, 97 AD2d 870, 870 [3d Dept 1983], *affd* 62 NY2d 1028 [1984]; *see Mau*, 124 AD3d at 1293-1294; *Sadowski v Taylor*, 56 AD3d 991, 993 [3d Dept 2008]). "Implied easements are not favored in the law and the burden of proof rests with the party asserting the existence of facts necessary to create an easement by implication to prove such entitlement by clear and convincing evidence" (*Abbott*, 97 AD2d at 870; *see Beretz v Diehl*, 302 AD2d 808, 810 [3d Dept 2003]).

Both easements by necessity and easements by implication require that the person claiming the easement establish a prior unity of title, severance of that title, and that continued use of the subservient property is "necessary" to the beneficial enjoyment of the claimant's property (*see Simone*, 9 NY3d at 182; *Abbott*, 97 AD2d at 870).

Here, plaintiff did not submit evidence of a prior unity of title. Moreover, she failed to establish that continued use of defendant's property was necessary to the beneficial enjoyment of her property. Although plaintiff formerly used the concrete area as a driveway, there is no dispute that plaintiff had a place to park her vehicle on the road. Further, although it might have been more convenient for plaintiff to park her vehicle in the garage behind her house, she did not establish that doing so was indispensable or necessary to the enjoyment of her property (*cf. Resk v City of New York*, 293 AD2d 661, 662 [2d Dept 2002], *lv denied* 99 NY2d 507 [2003]). Vehicular access to the garage may affect the value of plaintiff's home, but it is not " 'absolutely necessary' " to the reasonable use of plaintiff's residence (*Simone*, 9 NY3d at 182; *cf. Thomas Gang, Inc. v State of New York*, 19 AD3d 861, 862 [3d Dept 2005]; *Resk*, 293 AD2d at 662; *Stock v Ostrander*, 233 AD2d 816, 817-818 [3d Dept 1996]). As the Court of Appeals has stated, " 'the necessity must exist in fact and not as a mere convenience' . . . and must be indispensable to the

reasonable use for the adjacent property" (*Simone*, 9 NY3d at 182, quoting *Heyman v Biggs*, 223 NY 118, 126 [1918]).

We reject defendant's contention that the court erred in directing her to reposition cameras on her property so that they did not capture images from plaintiff's property. Civil Rights Law § 52-a (1) provides, in pertinent part that "[a]ny owner or tenant of residential real property shall have a private right of action for damages against any person who installs or affixes a video imaging device on property adjoining such residential real property for the purpose of video taping or taking moving digital images of the recreational activities which occur in the backyard of the residential real property without the written consent thereto of such owner and/or tenant with intent to harass, annoy or alarm another person, or with intent to threaten the person or property of another person."

Although plaintiff admitted that she had previously damaged defendant's property, we conclude that plaintiff established that defendant directed video imaging devices at plaintiff's property without plaintiff's consent and with the intent to harass, annoy, or threaten plaintiff. In addition, plaintiff established that defendant uploaded the video images of plaintiff captured by those cameras to social media networks with no purpose but to harass, annoy, or threaten plaintiff (*see Cangemi v Yeager*, 185 AD3d 1397, 1398-1399 [4th Dept 2020]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

559

CA 22-01101

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

MICHAEL BISCOTTO, PLAINTIFF-RESPONDENT,

V ORDER

WIECHEC'S LOUNGE, INCORPORATED, MICHAEL H.
WIECHEC AND WIECHEC'S SOCIAL & ATHLETIC CLUB,
DEFENDANTS-APPELLANTS.

NASH CONNORS, P.C., BUFFALO (BETHANY A. RUBIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (JACOB A. PIORKOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), entered July 1, 2022. The order denied in part the motion of defendants for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties, and filed in the Erie County Clerk's Office on June 22, 2023,

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

565
KA 20-00927
PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT HUMPHREY, 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 Erie County Court (Sheila A. DiTullio, J.), rendered March 10, 2020. The judgment convicted defendant upon his plea of guilty of attempted robbery in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of two counts of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]). We agree with defendant that the waiver of the right to appeal is not valid 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]; *see People v Williams*, 186 AD3d 1112, 1113 [4th Dept 2020]). Further, although defendant also signed a written waiver of the right to appeal at that time, we may not consider whether that document corrected any defects in the court's oral colloquy because "[t]he court did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

566
TP 22-01354
PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF AGA OPERATING LLC, AS OPERATOR OF THE BROOK AT HIGH FALLS NURSING HOME AND REHABILITATION CENTER, PETITIONER,

V MEMORANDUM AND ORDER

HOWARD A. ZUCKER, M.D., J.D., AND MARY T. BASSETT, M.D., M.P.H., RESPONDENTS.

THE LICHTMAN LAW FIRM, POUND RIDGE (AARON C. LICHTMAN OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order and judgment [one paper] of the Supreme Court, Monroe County [Gail Donofrio, J.], entered June 9, 2022) to review a determination of respondents. The determination found that petitioner was in violation of Executive Order No. 202.18 and imposed a penalty.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the petition is granted.

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks to annul a determination sustaining a charge that petitioner violated Executive Order (A. Cuomo) No. 202.18 (9 NYCRR 8.202.18) and imposing a $14,000 penalty pursuant to Executive Order (A. Cuomo) No. 202.19 (9 NYCRR 8.202.19). The Administrative Law Judge (ALJ) recommended that the charge be dismissed because the New York State Department of Health (Department) had failed to meet its burden of establishing that petitioner violated Executive Order No. 202.18. Respondent Howard A. Zucker, M.D., J.D. (Commissioner) rejected the report and recommendation of the ALJ "for the reasons stated in the Department's Exceptions," without issuing any new findings of fact. We agree with petitioner that the Commissioner's determination should be annulled.

"[W]hen [an] administrative official summarily rejects the [ALJ's] determinations of credibility, *but fails to make new findings sufficient for judicial review*, the determination is arbitrary and capricious" (*Matter of Stevens v Axelrod*, 162 AD2d 1025, 1026 [4th Dept 1990] [emphasis added]; *see Matter of Perfetto v Erie County*

Water Auth., 298 AD2d 932, 933-934 [4th Dept 2002]; *see generally Matter of Rochdale Mall Wines & Liqs. v State Liq. Auth.*, 29 AD2d 647, 648 [2d Dept 1968], *affd* 27 NY2d 995 [1970]). Indeed, "findings of fact in some form [are] essential so as to permit intelligent challenge by a party aggrieved and adequate judicial review following the determination" (*Matter of Simpson v Wolansky*, 38 NY2d 391, 396 [1975]).

Here, as petitioner correctly contends, the Commissioner's adoption of the reasons set forth in the Department's Exceptions does not constitute an adequate explanation for the departure from the ALJ's report and recommendation. In its Exceptions, the Department asserted that all of the alleged violations were established and that the evidence at the hearing supported the imposition of a $66,000 penalty. The Commissioner, however, imposed a penalty of only $14,000 without any explanation regarding how that figure was derived or which alleged violations were sustained. Because we do not know which alleged violations the Commissioner implicitly sustained and which ones he implicitly dismissed, we are unable to review intelligently the Commissioner's determination. We therefore annul the determination and grant the petition *(see Perfetto*, 298 AD2d at 933; *Stevens*, 162 AD2d at 1026; *Rochdale Mall Wines & Liqs.*, 29 AD2d at 648).

Based on our determination, we do not address petitioner's remaining contentions.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

567

KA 22-01653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID SNYDER, 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 an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), entered November 17, 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 pursuant to the Sex Offender Registration Act ([SORA] 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.

Initially, we agree with defendant that the court failed to set forth its findings of fact and conclusions of law in determining defendant's request for a downward departure (*see People v Antonetti*, 188 AD3d 1630, 1631 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]). Correction Law § 168-n (3) requires a court making a risk level determination pursuant to SORA to "render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based." Here, defendant requested a downward departure from his presumptive risk level based upon mitigating factors, including his response to a sex offender treatment program and his completion of substance abuse treatment. Although the court stated that it considered the mitigating factors, the court made no specific mention of them or how it reached its determinations with respect to those factors. Inasmuch as the record is sufficient for us to make our own findings of fact and conclusions of law, however, remittal is not required (*see Antonetti*, 188 AD3d at 1631; *People v Urbanski*, 74 AD3d 1882, 1883 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]).

Defendant contends that the court should have granted his request for a downward departure based on his record pertaining to the sex offender treatment. Although defendant is correct that “[a]n offender’s response to treatment, if exceptional, can be the basis for a downward departure” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]), we conclude that defendant failed to meet his burden of proving by a preponderance of the evidence that his response to sex offender treatment was exceptional (*see Antonetti*, 188 AD3d at 1631; *People v Rivera*, 144 AD3d 1595, 1596 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]).

Defendant further contends that he was entitled to a downward departure because, inter alia, he accepted responsibility for his crimes, completed substance abuse treatment and received mental health treatment while incarcerated, and had acceptable conduct in prison. Even assuming, arguendo, that defendant established mitigating factors not already contemplated by the risk assessment guidelines by a preponderance of the evidence, we nevertheless conclude, based upon the totality of the circumstances, including defendant’s history of sex abuse against children and adamant denial of his sex abuse against his daughter in his presentence investigation report interview, that a downward departure is not warranted (*see Antonetti*, 188 AD3d at 1632; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

568

KA 21-01534

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEWAYNE A. MCGUIRE, DEFENDANT-APPELLANT.

FELDMAN AND FELDMAN, MANHASSET (STEVEN A. FELDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered August 31, 2021. The judgment convicted defendant upon a jury verdict of assault in the first degree, assault in the second degree, criminal mischief in the third degree and tampering with physical evidence.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), assault in the second degree (§ 120.05 [2]), criminal mischief in the third degree (§ 145.05 [2]), and tampering with physical evidence (§ 215.40 [2]).

Defendant contends that prosecutorial misconduct on summation deprived him of a fair trial, and that County Court compounded this error in its response to the jury note requesting a readback of the mischaracterized testimony. We reject defendant's contention. Initially, as defendant correctly concedes, the contention is unpreserved inasmuch as defense counsel failed to object to the purportedly improper comment (*see People v Reynolds*, 211 AD3d 1493, 1494 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]). In any event, we conclude that any error was cured by the requested readback of the relevant testimony (*see People v Peters*, 277 AD2d 512, 514 [3d Dept 2000]; *see generally People v Proctor*, 104 AD3d 1290, 1291 [4th Dept 2013], *lv denied* 21 NY3d 1008 [2013]; *People v Phillips*, 237 AD2d 386, 386 [2d Dept 1997]) and by the court's instructions to the jury that its "recollection, understanding, and evaluation of the evidence . . . controls regardless of what the lawyers have said or will say about the evidence" (*see People v Morgan*, 148 AD3d 1590, 1591 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]; *People v Morrow*, 143 AD3d 919,

921 [2d Dept 2016], *lv denied* 28 NY3d 1148 [2017]; *People v Sylvain*, 33 AD3d 330, 331-332 [1st Dept 2006], *lv denied* 7 NY3d 904 [2006]). Inasmuch as defendant was not deprived of a fair trial by the error of the prosecutor, defense counsel's failure to preserve his contention did not deprive him of effective assistance of counsel (*see People v Palmer*, 204 AD3d 1512, 1514-1515 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]; *People v Bagley*, 194 AD3d 1475, 1477 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]).

We likewise reject defendant's related contention that the court erred in denying his motion to set aside the verdict under CPL 330.30 (1) based on the prosecutor's improper comment. "Pursuant to CPL 330.30 (1), following the issuance of a verdict and before sentencing a court may set aside a verdict on '[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would *require* a reversal or modification of the judgment *as a matter of law* by an appellate court' " (*People v Benton*, 78 AD3d 1545, 1546 [4th Dept 2010], *lv denied* 16 NY3d 828 [2011]). "The power granted a Trial Judge is, thus, far more limited than that of an intermediate appellate court, which is authorized to determine not only questions of law but issues of fact . . . , to reverse or modify a judgment when the verdict is against the weight of the evidence . . . , and to reverse as a matter of discretion in the interest of justice" (*People v Carter*, 63 NY2d 530, 536 [1984] [internal quotation marks omitted]). Here, inasmuch as defendant failed to preserve his contention for our review, reversal by an appellate court based on that contention was not required as a matter of law and the court lacked the authority to grant the motion.

Defendant further contends that the evidence is legally insufficient to support the conviction. At the close of the People's case, defendant moved for a trial order of dismissal on the basis that the People had failed to establish the element of intent. There is no indication in the record that the court ruled on defendant's motion. We lack the power to review defendant's contention that the evidence is legally insufficient with respect to intent because "we cannot deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Desmond*, 213 AD3d 1356, 1357 [4th Dept 2023] [internal quotation marks omitted]; *see People v Concepcion*, 17 NY3d 192, 197-198 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *People v Moore*, 147 AD3d 1548, 1548-1549 [4th Dept 2017]). We therefore hold the case, reserve decision, and remit the matter to County Court for a ruling on the motion (*see Desmond*, 213 AD3d at 1357; *Moore*, 147 AD3d at 1549). In light of our determination, we do not reach defendant's remaining contentions.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

570

KA 17-01724

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES GRAHAM, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered July 20, 2017. The appeal was held by this Court by order entered February 4, 2022, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (202 AD3d 1482 [4th Dept 2022]). The proceedings were held and completed (Karen Bailey Turner, J.).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We previously held the case, reserved decision, and remitted the matter for County Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*People v Graham*, 202 AD3d 1482, 1483 [4th Dept 2022]; *see generally People v Rudolph*, 21 NY3d 497, 499-501 [2013]). Upon remittal, the court determined that defendant should not be afforded youthful offender status. We conclude that the court did not thereby abuse its discretion, particularly in view of the serious nature of the crime, in which defendant fired a gun several times into a crowd of people attending a candlelight vigil, striking and killing an innocent bystander (*see generally People v McCall*, 187 AD3d 1682, 1683 [4th Dept 2020], *lv denied* 36 NY3d 930 [2020]; *People v Lester*, 167 AD3d 1559, 1560 [4th Dept 2018], *lv denied* 32 NY3d 1206 [2019]). In addition, upon our review of the record, we decline to exercise our discretion in the interest of justice to adjudicate defendant a youthful offender (*see People v Mohawk*, 142 AD3d 1370, 1371 [4th Dept 2016]; *cf. People v Thomas R.O.*, 136 AD3d 1400, 1402-1403 [4th Dept 2016]). We further conclude that the sentence imposed is not unduly harsh or severe.

Relying on a change in the law that occurred after the date of

his conviction but before he perfected his appeal (*see* CPL 420.35 [2-a], as added by L 2020, ch 144, § 1), defendant asks this Court to waive the mandatory surcharge, crime victim assistance fee, and DNA databank fee based on the fact that he was under the age of 21 at the time of the offense. Even assuming, arguendo, that defendant can raise that request for the first time on appeal (*see People v Johnson*, 195 AD3d 1510, 1513 [4th Dept 2021]; *cf. People v Rice*, 213 AD3d 1243, 1244 [4th Dept 2023], *lv denied* 39 NY3d 1143 [2023]; *see generally* CPL 470.05 [2]), we decline to waive those fees inasmuch as defendant has failed to establish any of the statutory grounds on which such fees could be waived (*see* CPL 420.35 [2-a] [a]-[c]; *People v Attah*, 203 AD3d 1063, 1064 [2d Dept 2022], *lv denied* 38 NY3d 1007 [2022]; *Johnson*, 195 AD3d at 1513).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

571

KA 19-01422

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN J. O'BRIEN, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS 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 (Stephen T. Miller, A.J.), rendered May 16, 2019. The judgment convicted defendant, upon his 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: Defendant appeals 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]). Preliminarily, as defendant contends and as the People correctly concede, the record does not establish that defendant validly waived his right to appeal. County 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 Stewart*, 210 AD3d 1445, 1446 [4th Dept 2022]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence, we nonetheless perceive no basis in the record for the exercise of our authority to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

573
KA 19-02181
PRESENT: SMITH, J.P., CURRAN, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT C. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered September 13, 2019. The judgment convicted defendant upon his plea of guilty of robbery in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the orders of protection and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of robbery in the third degree (Penal Law § 160.05), arising out of a bank robbery. In addition to imposing an indeterminate term of incarceration, County Court entered two orders of protection ordering defendant to stay away from two of the bank employees until June 20, 2034.

Initially, defendant contends that the orders of protection are invalid because they improperly contain the words “Family Offense” on their face, and erroneously list CPL 530.12 as the statutory basis for the orders of protection instead of CPL 530.13. We conclude that defendant failed to preserve this contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317 [2004]), 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]).

Defendant also contends that the court erred in setting expiration dates for the orders of protection by failing to take into account his jail time credit. Although defendant also failed to preserve that contention for our review (*see Nieves*, 2 NY3d at 315-317), we nonetheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v McBean*, 192 AD3d 1706, 1707 [4th Dept 2021], *lv denied* 37 NY3d 958

[2021]; *People v Riley*, 181 AD3d 1192, 1192 [4th Dept 2020]; *People v Merchant*, 170 AD3d 1651, 1652 [4th Dept 2019], *lv denied* 33 NY3d 1033 [2019]). Pursuant to CPL 530.13 (former [4] [A]), a court may enter an order of protection in addition to any other disposition imposed for a felony conviction, the duration which "shall not exceed the greater of: (i) eight years from the date of such sentencing . . . , or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate term of imprisonment actually imposed." Here, the orders of protection contain expiration dates that are more than eight years beyond the date that defendant's sentence was imposed and the date of expiration of the maximum term of the indeterminate term of imprisonment actually imposed (*see* CPL 530.13 [former (4) (A)]; *McBean*, 192 AD3d at 1707). We therefore modify the judgment by amending the orders of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled, and to specify for each order of protection an expiration date in accordance with the correct statutory provision—i.e., CPL 530.13 (former [4] [A]), the version of the statute in effect when the judgment was rendered on September 13, 2019 (*see People v Bradford*, 61 AD3d 1419, 1421 [4th Dept 2009], *affd* 15 NY3d 329 [2010]; *People v Boje*, 194 AD3d 1367, 1368-1369 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]).

We conclude that the sentence is not unduly harsh or severe.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

575
KA 21-01016
PRESENT: SMITH, J.P., CURRAN, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FUQUAN FIELDS, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (RICHARD S. PADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered April 27, 2021. The judgment convicted defendant, upon his plea of guilty, of attempted aggravated harassment of an employee by an inmate.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the mandatory surcharge to $175, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment, which convicted him, upon his plea of guilty, of attempted aggravated harassment of an employee by an inmate (Penal Law §§ 110.00, former 240.32). Defendant contends that his plea was not knowingly, voluntarily or intelligently entered because the colloquy did not include an adequate recitation of the facts. Initially, defendant failed to preserve his contention for our review inasmuch as “he did not move to withdraw the plea or to vacate the judgment of conviction” (*People v DeMarco*, 117 AD3d 1522, 1522 [4th Dept 2014], *lv denied* 23 NY3d 1061 [2014]; *see People v Trinidad*, 23 AD3d 1060, 1061 [4th Dept 2005]). In any event, defendant’s contention is without merit because “where, as here, [a] defendant pleads guilty ‘to a crime lesser than that charged in the indictment, a factual colloquy is not required’ ” (*People v Zimmerman*, 219 AD2d 848, 848 [4th Dept 1995], *lv denied* 88 NY2d 856 [1996]).

We agree with defendant, however, as the People correctly concede, that County Court erred in directing him to pay a mandatory surcharge that was greater than the amount set forth in Penal Law § 60.35 (1) (a) (ii). Although defendant failed to preserve for our review his challenge to the amount of the mandatory surcharge (*see People v Calkins*, 171 AD3d 1475, 1476-1477 [4th Dept 2019], *lv denied* 33 NY3d 1067 [2019]), we exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15

[3] [c]). We therefore modify the judgment by reducing the mandatory surcharge to $175 (*see* Penal Law § 60.35 [1] [a] [ii]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

577

KA 22-01547

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELVIN JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Thomas J. Miller, J.), entered July 11, 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 modified on the law and in the exercise of discretion by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining, inter alia, that he is a level three sex offender pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant contends that County Court erred in conducting its analysis on his request for a downward departure from his presumptive level three risk and that he should be granted such a departure under the circumstances of this case. We agree.

"Under SORA, a court must follow three analytical steps to determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score" (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see generally* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4-5 [2006] [Guidelines]). "At the first step, the court must decide whether the aggravating or mitigating circumstances alleged by a party seeking a departure are, as a matter of law, of a kind or to a degree not adequately taken into account by the [G]uidelines" (*Gillotti*, 23 NY3d at 861). "At the second step, the court must decide whether the party requesting the departure has adduced sufficient evidence to meet its burden of proof in establishing that the alleged aggravating or mitigating circumstances actually exist in

the case at hand" (*id.*). "If the party applying for a departure surmounts the first two steps, the law permits a departure, but the court still has discretion to refuse to depart or to grant a departure" (*id.*). "Thus, at the third step, the court must exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure to avoid an over- or under-assessment of the defendant's dangerousness and risk of sexual recidivism" (*id.*).

Here, we agree with defendant that the court erred as a matter of law in conducting the downward departure analysis when, despite determining that defendant met his initial burden by identifying his current physical and medical condition as a mitigating circumstance not adequately taken into account by the Guidelines and proving the existence thereof by a preponderance of the evidence, it failed to weigh the aggravating and mitigating factors to determine whether a departure from the presumptive risk level was warranted and instead concluded that, given the egregious nature of the underlying sex offense, there were no circumstances under which it could grant a downward departure, even if the mitigating factor outweighed any aggravating factors. Contrary to the court's reasoning, it is well established that "[w]here, as here, a defendant meets the initial burden, under step three of the analysis the court *must* exercise its discretion by weighing the mitigating factor [and any aggravating factors] to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of the defendant's dangerousness and risk of sexual recidivism" (*People v Wright*, 215 AD3d 1258, 1259 [4th Dept 2023] [internal quotation marks omitted]; *see Gillotti*, 23 NY3d at 861). Nonetheless, despite the court's error, inasmuch as "the record is sufficient for us to make our own findings of fact and conclusions of law, we may review . . . defendant's request for a downward departure instead of remitting" (*Wright*, 215 AD3d at 1259).

Contrary to defendant's contention with respect to the first step of that review, we conclude that his "performance in educational and vocational programs was adequately taken into account in assessing his presumptive risk level inasmuch as he was assessed zero points for conduct while confined despite having an extensive history of disciplinary infractions" (*People v Forshey*, 201 AD3d 1352, 1353 [4th Dept 2022], *lv denied* 38 NY3d 907 [2022]; *see People v Smith*, 108 AD3d 1215, 1216 [4th Dept 2013], *lv denied* 22 NY3d 856 [2013]).

With respect to the second step of the analysis, although an offender's response to sex offender treatment, if exceptional, may provide a basis for a downward departure (*see* Guidelines at 17; *People v Mann*, 177 AD3d 1319, 1320 [4th Dept 2019], *lv denied* 35 NY3d 902 [2020]), we conclude that defendant failed to meet his burden of proving by a preponderance of the evidence that his response to treatment was exceptional (*see Mann*, 177 AD3d at 1320; *People v June*, 150 AD3d 1701, 1702 [4th Dept 2017]; *People v Santiago*, 137 AD3d 762, 764 [2d Dept 2016], *lv denied* 27 NY3d 907 [2016]). Nonetheless, "if an offender's presumptive risk level is [two or three] but [the offender] suffers from a physical condition that minimizes [the] risk

of reoffense, such as advanced age or debilitating illness, a downward departure may be warranted" (Guidelines at 5; *see* Correction Law § 168-l [5] [d]). Here, the uncontroverted medical evidence submitted by defendant establishes that, nearly 30 years after the underlying sex offense, defendant is now a 62-year-old paraplegic who is confined to a wheelchair and has also suffered from several medical conditions including colon cancer and chronic obstructive pulmonary disease (*see People v Sanchez*, 186 AD3d 880, 882-883 [2d Dept 2020]; *see also People v Stevens*, 55 AD3d 892, 894 [2d Dept 2008]). Defendant thus met his initial burden by demonstrating, by a preponderance of the evidence, the existence of a mitigating circumstance that tends to establish a lower likelihood of reoffense or danger to the community, i.e., that he suffers from a combination of debilitating "physical condition[s] that minimize[] his risk of reoffense" (Guidelines at 5; *see Sanchez*, 186 AD3d at 882; *Stevens*, 55 AD3d at 894; *cf. People v Williams*, 172 AD3d 1923, 1924 [4th Dept 2019], *lv denied* 33 NY3d 913 [2019]; *see generally Wright*, 215 AD3d at 1259).

At the third step of the analysis, upon exercising our discretion by weighing the abovementioned mitigating circumstance, which minimizes defendant's current dangerousness and risk of reoffense, against the aggravating circumstances, including the egregious nature of the underlying sex offense committed nearly 30 years ago (*see Wright*, 215 AD3d at 1259-1260), we conclude that the totality of the circumstances warrants a downward departure to a level two risk because classifying defendant consistent with his presumptive level three risk would result in an overassessment of his dangerousness and risk of sexual recidivism when, instead, the record establishes that defendant represents a moderate risk to reoffend (*see* Correction Law § 168-l [6] [b]; *Sanchez*, 186 AD3d at 882-883; *see generally Gillotti*, 23 NY3d at 861). We therefore modify the order accordingly.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

578

KA 19-01461

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. ALBANESE, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Stephen T. Miller, A.J.), rendered May 7, 2019. 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 guilty plea 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 negotiated sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, as the People concede, we perceive "no basis in the record to exercise our power to modify the negotiated sentence[] as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b])" (*People v Baxter*, 204 AD3d 1440, 1441 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

579

KA 22-00444

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTHUR M. JANES, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 20, 2022. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree and criminal possession 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 sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [12]). We affirm.

Defendant contends that his guilty plea was not knowingly, intelligently, and voluntarily entered and that County Court abused its discretion in denying his motion to withdraw his plea without first conducting a hearing. We reject defendant's contention that the court should have conducted a hearing on his motion (*see People v Harris*, 206 AD3d 1711, 1711-1712 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]; *see generally People v Mitchell*, 21 NY3d 964, 967 [2013]). Contrary to defendant's further contention, the court properly denied his motion. Defendant's contention that his plea was not knowing, intelligent, or voluntary because of coercion and innocence is based on conclusory and unsubstantiated statements made by defendant and defense counsel at sentencing and is belied by the plea colloquy, wherein defendant admitted his guilt and stated, inter alia, that he was fully advised of the consequences of his plea, that he was confident in his attorney's abilities, and that he was not coerced into entering the plea (*see People v Fox*, 204 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]; *People v Alexander*, 203 AD3d 1569, 1570 [4th Dept 2022], *lv denied* 38 NY3d 1031 [2022]; *People v Garcia*, 203 AD3d 1585, 1586 [4th Dept 2022], *lv denied* 38 NY3d 1133

[2022]). We reject defendant's contention that the court's statements during the plea colloquy regarding the possible sentences that could be imposed if he were convicted after trial were coercive inasmuch as those statements were merely "a proper explanation of defendant's sentence exposure in the event that defendant chose not to plead guilty" (*People v Boyd*, 101 AD3d 1683, 1683 [4th Dept 2012] [internal quotation marks omitted]; *see People v Ross*, 117 AD3d 1342, 1343 [3d Dept 2014]).

Contrary to defendant's further contention, we conclude that the court did not abuse its discretion in denying his request for an adjournment of sentencing to give defense counsel the opportunity to file a written motion to withdraw the plea (*see People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *see generally People v Spears*, 24 NY3d 1057, 1059-1060 [2014]; *People v Howard*, 210 AD3d 1383, 1384-1385 [4th Dept 2022], *lv denied* 39 NY3d 1111 [2023]).

Finally, contrary to defendant's contention, we conclude that the bargained-for sentence is not unduly harsh or severe.

Entered: July 28, 2023 Ann Dillon Flynn
Clerk of the Court

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

580
KA 21-00607
PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM GAYTEN, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, 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 April 15, 2021. The judgment convicted defendant upon his plea of guilty of attempted arson in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted arson in the second degree (Penal Law §§ 110.00, 150.15), defendant contends that his plea was not knowingly, voluntarily or intelligently entered. Defendant, however, failed to preserve that contention for our review inasmuch as he "did not move to withdraw the plea or to vacate the judgment of conviction" (*People v DeMarco*, 117 AD3d 1522, 1522 [4th Dept 2014], *lv denied* 23 NY3d 1061 [2014]). In any event, we conclude that defendant's plea was knowingly, voluntarily, and intelligently entered despite defendant's family problems that existed at the time (*see People v Flakes*, 240 AD2d 428, 429 [2d Dept 1997], *lv denied* 90 NY2d 1011 [1997]; *People v Murray*, 207 AD2d 999, 1000 [4th Dept 1994], *lv denied* 84 NY2d 1014 [1994]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

581
KA 22-00361
PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLOYD I. CHAVIS, DEFENDANT-APPELLANT.

MICHELLE B. SCHNEIDER, MANLIUS, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered December 14, 2021. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree, criminal possession of a weapon in the third degree, criminal possession of stolen property in the fourth degree and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), criminal possession of a weapon in the third degree (§ 265.02 [7]), and criminal possession of stolen property in the fourth degree (§ 165.45 [4]). Defendant's conviction stems from the recovery of heroin and a stolen assault rifle from a residence upon the execution of a search warrant.

We reject defendant's contention that County Court erred in summarily denying his challenge to the search warrant and in refusing to suppress the items seized on the ground that he lacked standing. "There is no legal basis for suppression and, hence, no need for a hearing, unless the accused alleges facts that, if true, demonstrate standing to challenge the search or seizure" (*People v Burton*, 6 NY3d 584, 587 [2006]; *see* CPL 710.60 [3] [b]; *People v Wesley*, 73 NY2d 351, 357 [1989]). Defendant's motion papers did not contain sworn allegations that defendant had a legitimate expectation of privacy in the place searched, and thus he failed to demonstrate that he had standing to challenge the search warrant and the ensuing search of the residence (*see People v Jones*, 155 AD3d 1103, 1105 [3d Dept 2017], *lv denied* 30 NY3d 1106 [2018]; *People v Smith*, 155 AD3d 1674, 1675 [4th

Dept 2017], *lv denied* 30 NY3d 1120 [2018]; *People v Shire*, 77 AD3d 1358, 1359-1360 [4th Dept 2010], *lv denied* 15 NY3d 955 [2010]; *see generally People v Ramirez-Portoreal*, 88 NY2d 99, 108-109 [1996]).

We also reject defendant's contention that he was unduly prejudiced by the court's *Molineux* ruling. It is well settled that evidence of uncharged crimes may be admissible if it is relevant to demonstrate motive, intent, absence of mistake or accident, a common scheme or plan, or the identity of the defendant (*see People v Alvino*, 71 NY2d 233, 241-242 [1987]; *People v Ventimiglia*, 52 NY2d 350, 359 [1981]; *People v Molineux*, 168 NY 264, 293-294 [1901]). The testimony regarding defendant's prior uncharged drug transactions from the residence was properly admitted in evidence to demonstrate defendant's dominion and control and knowing possession of the heroin and firearm recovered from the residence and his intent to sell (*see People v Smith*, 129 AD3d 1549, 1549 [4th Dept 2015], *lv denied* 26 NY3d 971 [2015]; *People v Echavarria*, 53 AD3d 859, 863 [3d Dept 2008], *lv denied* 11 NY3d 832 [2008]; *see also People v Satiro*, 72 NY2d 821, 822 [1988]). The testimony was also admissible " 'to complete the narrative of events leading up to the crime for which defendant [was] on trial' " (*People v Ray*, 63 AD3d 1705, 1706 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]; *see People v Parilla*, 214 AD3d 1399, 1401-1402 [4th Dept 2023]). The court properly concluded that the probative value of the evidence outweighed its prejudicial effect (*see Parilla*, 214 AD3d at 1401-1402; *Smith*, 129 AD3d at 1549).

Defendant's contention that he was not given notice or an opportunity to be heard prior to the order compelling him to submit to a buccal swab is unpreserved for our review (*see* CPL 470.05 [2]; *see generally People v Small*, 79 AD3d 1807, 1809 [4th Dept 2010], *lv denied* 16 NY3d 837 [2011]). In any event, his contention is without merit inasmuch as the People's application for an order compelling defendant to submit to a buccal swab was made on notice to him, and he was afforded the opportunity to be heard (*see People v Goldman*, 35 NY3d 582, 594 [2020]; *see generally Matter of Abe A.*, 56 NY2d 288, 296 [1982]; *People v Smith*, 95 AD3d 21, 25 [4th Dept 2012]).

Defendant's contention that he was denied effective assistance of counsel because defense counsel did not advise him of the possibility of participation in the judicial diversion program or inform him of the maximum sentence he was facing relies on matters outside the record and must therefore be raised by motion pursuant to CPL 440.10 (*see People v Barber*, 192 AD3d 1679, 1680 [4th Dept 2021], *lv denied* 37 NY3d 953 [2021]; *People v Manning*, 151 AD3d 1936, 1938 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]). With respect to defendant's remaining claim of ineffective assistance of counsel, defendant has failed to establish "the absence of strategic or other legitimate explanations for counsel's allegedly deficient conduct" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]). The record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

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

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

584
CA 23-00535
PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

CHRISTOPHER HAMILL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PHYLLIS HAMILL, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

HAGERTY & BRADY, BUFFALO (DANIEL J. BRADY OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (JAMES GRABER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered March 27, 2023. The order, inter alia, appointed a guardian ad litem for defendant Phyllis Hamill.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the appointment of the guardian ad litem is vacated, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking, inter alia, specific performance of an oral agreement by defendant Phyllis Hamill (Phyllis), plaintiff's mother, whereby she allegedly promised to convey to him a one-eighth ownership interest in real property. Plaintiff alleged that Phyllis had breached the oral agreement at the behest of defendant Tracey Diehl, his sister and Phyllis's daughter. In appeal No. 1, Phyllis appeals from an order that, inter alia, appointed a guardian ad litem for her pursuant to CPLR article 12. In appeal No. 2, defendants appeal from an order that denied the motion to, inter alia, dismiss the complaint pursuant to CPLR 3211 (a) (7) and directed plaintiff to file an amended complaint.

Initially, with respect to appeal No. 1, we conclude that Supreme Court erred in sua sponte appointing a guardian ad litem for Phyllis under CPLR article 12 (*see* CPLR 1202 [a]). CPLR 1202 (a) provides, inter alia, that "[t]he court in which an action is triable may appoint a guardian ad litem at any stage in the action upon its own initiative." To appoint a guardian ad litem under that provision where the issue is the person's ability to protect their rights, "the court must find by a preponderance of the evidence that [a person's] condition impedes such ability" (Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, CPLR 1202; *see generally*

CPLR 1201; *Matter of Nancy C. v Alison C.*, 57 AD3d 986, 987 [2d Dept 2008]). It is well settled that a hearing must be conducted whenever issues of fact arise in connection with the appointment of a guardian ad litem (*see Matter of Jesten J.F. [Ruth P.S.]*, 167 AD3d 1527, 1528 [4th Dept 2018]; *Resmae Mtge. Corp. v Jenkins*, 115 AD3d 926, 927 [2d Dept 2014]; *Shad v Shad*, 167 AD2d 532, 533 [2d Dept 1990]).

Here, the court appointed a guardian ad litem for Phyllis, then 91 years old, almost entirely due to her age. We conclude, however, that a person's age, *standing alone*, cannot establish that a guardian ad litem is warranted under CPLR 1201 (*see Charter One Bank, FSB v Mills*, 112 AD3d 1338, 1340 [4th Dept 2013], *lv dismissed* 22 NY3d 1192 [2014]). Further, we note that, in reaching its determination, the court seemingly discounted the affidavit from Phyllis submitted in opposition to the appointment of a guardian ad litem wherein she refused to consent to the appointment and stated that she was capable of making her own decisions. To the extent that the court's decision to appoint a guardian ad litem was based on allegations that plaintiff and Diehl had, at various times, attempted to influence Phyllis's decision-making in connection with the relevant property, the record is unclear on that point. Thus, in light of the conflicting factual evidence in the record, the court should have conducted a hearing to consider whether Phyllis was capable of prosecuting or defending her rights before appointing a guardian ad litem (*see Jesten J.F.*, 167 AD3d at 1528-1529; *Piggott v Lifespire, Inc.*, 149 AD3d 785, 786 [2d Dept 2017]; *see also Vinokur v Balzaretti*, 62 AD2d 990, 990 [2d Dept 1978]). We therefore reverse the order in appeal No. 1, vacate the appointment of the guardian ad litem, and remit the matter to Supreme Court for a hearing on the issue of Phyllis's ability to prosecute and defend her rights in connection with this litigation.

Additionally, we dismiss as moot the appeal from the order in appeal No. 2 that, as relevant, denied defendants' motion insofar as it sought to dismiss the original complaint inasmuch as plaintiff filed an amended complaint that superseded the original complaint and became the only operative complaint in the action (*see Carcone v Noon* [appeal No. 1], 214 AD3d 1306, 1306 [4th Dept 2023]; *Morrow v MetLife Invs. Inc. Co.*, 177 AD3d 1288, 1288 [4th Dept 2019]; *see generally Penniman v Fuller & Warren Co.*, 133 NY 442, 444 [1892]). We note that the amended complaint contained substantive alterations (*cf. Paramax Corp. v VolP Supply, LLC*, 175 AD3d 939, 940 [4th Dept 2019]; *Aetna Life Ins. Co. v Appalachian Asset Mgt. Corp.*, 110 AD3d 32, 39 [1st Dept 2013]).

Entered: July 28, 2023 Ann Dillon Flynn
Clerk of the Court

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

585
CA 23-00576
PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

CHRISTOPHER HAMILL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PHYLLIS HAMILL AND TRACEY DIEHL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

HAGERTY & BRADY, BUFFALO (DANIEL JOSEPH BRADY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RUPP PFALZGRAF LLC, BUFFALO (JAMES GRABER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered November 29, 2022. The order, inter alia, denied a motion to dismiss the complaint and for sanctions.

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

Same memorandum as in *Hamill v Hamill* ([appeal No. 1] — AD3d — [July 28, 2023] [4th Dept 2023]).

Entered: July 28, 2023

Ann Dillon Flynn
Clerk of the Court