SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 22, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MARCH 22, 2024

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________	749	KA 22 00654	PEOPLE V JAYLIN WIGGINS
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

737
CA 22-01778
PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

JOHN CZECHOWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PAUL WISNIEWSKI, DEFENDANT-RESPONDENT.

COLUCCI & GALLAHER, P.C., BUFFALO (RYAN L. GELLMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Daniel Furlong, J.), entered October 26, 2022. The judgment, inter alia, awarded plaintiff $60,000 for past pain and suffering and $16,000 for future pain and suffering.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the posttrial motion of plaintiff in part and setting aside the verdict with respect to the award of damages and as modified the judgment is affirmed without costs and a new trial is granted on damages unless defendant, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to increase the award of damages for past pain and suffering to $150,000 and the award of damages for future pain and suffering to $125,000, plus interest from the date of the decision establishing liability to the date on which the judgment was entered, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he sustained when the ladder provided to him by defendant while plaintiff was installing gutters on defendant’s house broke, causing plaintiff to fall. Plaintiff sustained fractures of his left calcaneus. After a damages-only trial, the jury awarded plaintiff $60,000 for past pain and suffering and $16,000 for future pain and suffering. Plaintiff moved for an additur or, in the alternative, to set aside the verdict pursuant to CPLR 4404 (a). Supreme Court denied the motion. Defendant moved for, inter alia, an order striking accrued interest from the jury award. The court entered judgment awarding plaintiff a total of $99,564.14, allowing interest only through the date that plaintiff’s motion was decided, not the subsequent entry of the judgment. Plaintiff appeals from that judgment.

Initially, we note that plaintiff's appeal brings up for review the propriety of the order denying his posttrial motion (*see* CPLR 5501 [a] [1], [2]; *Shelp v Ratnik*, 218 AD3d 1209, 1209 [4th Dept 2023]; *Cooper v Nestoros*, 159 AD3d 1365, 1366 [4th Dept 2018]).

We agree with plaintiff that the court erred in denying his motion for an additur. "In evaluating whether the jury award is [inadequate], we consider whether the verdict deviates materially from what is considered reasonable compensation" (*Grasha v Town of Amherst*, 191 AD3d 1286, 1287 [4th Dept 2021], *lv denied* 37 NY3d 906 [2021]; *see* CPLR 5501 [c]; *Nayberg v Nassau County*, 149 AD3d 761, 762 [2d Dept 2017]; *Hotaling v Carter*, 137 AD3d 1661, 1662-1663 [4th Dept 2016]). "Because monetary awards for pain and suffering are not subject to precise quantification . . . , we look to comparable cases to determine at which point an award deviates materially from what is considered reasonable compensation" (*Grasha*, 191 AD3d at 1287 [internal quotation marks omitted]; *see Huff v Rodriguez*, 45 AD3d 1430, 1433 [4th Dept 2007]). Here, we conclude that the evidence at trial established that plaintiff suffered a fracture of his left calcaneus that required an open reduction internal fixation surgery to repair. The undisputed evidence established that plaintiff's calcaneus was in so many pieces that the surgeon had to remove the pieces and fit them back together like a puzzle before placing the bones back into plaintiff's foot and securing them with a plate and screws. In addition, plaintiff's cartilage had shifted when the talus "shoved" his bones out of alignment and had been scratched during the trauma. According to plaintiff's surgeon, this was "the one thing" that she could not fix and she would be unable to prevent arthritis from developing in that area. Plaintiff was prohibited from placing weight on his foot for approximately 10 weeks after the surgery. At his 11-month visit, plaintiff complained of "burning" along the incision and walked with a limp. He had 25% restricted motion because of the trauma-induced arthritis and the surgery itself. Almost seven years after the incident, plaintiff continued to have numbness and pain along the side of his foot. Plaintiff's imaging showed arthritis and he continued to have "restricted motion side to side." Based on the evidence presented at trial, we conclude that an award of $150,000 for past pain and suffering and an award of $125,000 for future pain and suffering are the minimum amounts the jury could have awarded as a matter of law based on the evidence at trial (*see Orlikowski v Cornerstone Community Fed. Credit Union*, 55 AD3d 1245, 1247 [4th Dept 2008], *lv dismissed* 11 NY3d 915 [2009]).

We therefore modify the judgment by granting the posttrial motion in part and setting aside the verdict with respect to the award of damages, and we grant a new trial on damages unless defendant, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to increase the award for past pain and suffering to $150,000 and the award for future pain and suffering to $125,000, in which event the judgment is modified accordingly.

We further agree with plaintiff that he is entitled to interest through the date that the judgment was entered. CPLR 5002 provides that interest shall accrue "from the date the verdict was rendered

. . . to the date of entry of the final judgment" The Court of Appeals has interpreted that statute to mean that prejudgment interest is properly awarded "from the date of the decision establishing liability, rather than the date of the decision fixing damages" (*Love v State of New York*, 78 NY2d 540, 541 [1991]; *see Gibbs v State Farm Fire & Cas. Co.*, 169 AD3d 1483, 1484-1485 [4th Dept 2019]). Here, the court properly awarded interest from the date that it decided the issue of liability, but erred in awarding interest only through the date that it denied plaintiff's motion. We conclude that prejudgment interest should be calculated in this case from the date that liability was established to the date of entry of the final judgment (*see* CPLR 5002). "The purpose of the statute is not to be punitive against defendants . . . Rather, the intent of the statute is merely to indemnify plaintiffs for the cost of the defendants having the use of another person's money between the time it is determined that compensation is due until judgment" (*Van Nostrand v Froehlich*, 44 AD3d 54, 57 [2d Dept 2007], *appeal dismissed* 10 NY3d 837 [2008]; *see Love*, 78 NY2d at 544).

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

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

749

KA 22-00654

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAYLIN WIGGINS, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered September 10, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). The conviction arises from two separate shootings, one in which a victim was fatally injured.

Initially, by failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Brooks*, 139 AD3d 1391, 1392-1393 [4th Dept 2016], *lv denied* 28 NY3d 1026 [2016]). Nonetheless, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Danielson*, 9 NY3d 342, 349-350 [2007]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*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]). A witness to the first

shooting identified defendant as the shooter to a police detective just days after the incident. In addition, evidence at trial established that defendant matched the descriptions of the physical appearance of the shooter given by the witness and by the victim of the first shooting; that defendant was subsequently observed wearing an uncommon shirt which matched descriptions of the shooter's clothing given by the witness and the first victim, and was similar to the shirt the shooter was wearing during the second shooting, which occurred approximately one hour after the first shooting; and that ballistics evidence established that the same gun was used in both shootings. Even assuming, arguendo, that an acquittal would not have been unreasonable, we do not conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*). To the extent that there were "inconsistencies in [a witness'] testimony, [the inconsistencies] were properly considered by the jury[,] and there is no basis for disturbing its determinations" (*People v Cirino*, 203 AD3d 1661, 1663 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022] [internal quotation marks omitted]; *see People v Jefferson*, 26 AD3d 798, 798-799 [4th Dept 2006], *lv denied* 6 NY3d 895 [2006]).

Defendant contends that County Court erred in denying his request to discharge juror No. 5 as "grossly unqualified" after she was observed allegedly sleeping during the court's jury charge (CPL 270.35 [1]; *see People v Robinson*, 121 AD3d 1179, 1180-1181 [3d Dept 2014]; *see generally People v Wright*, 16 AD3d 1113, 1113-1114 [4th Dept 2005], *lv denied* 4 NY3d 857 [2005]). The contention is not preserved for our review inasmuch as defendant failed to object to the court's inquiry of the juror and, additionally, failed to move to discharge that juror (*see Wright*, 16 AD3d at 1113). In any event, the court conducted an appropriate inquiry of the juror and accepted the assurances of the juror, after which defense counsel consented to the juror's continued service on the jury. Therefore, "defendant 'should not now be heard to complain' of the court's failure to discharge the juror" (*People v Phillips*, 34 AD3d 1231, 1231 [4th Dept 2006], *lv denied* 8 NY3d 848 [2007]).

Defendant further contends that the court abused its discretion in denying his motion for a mistrial on the ground that the jury was tainted by racial bias. The decision whether to grant or deny a motion for a mistrial is within the trial court's discretion (*see People v DeJesus*, 110 AD3d 1480, 1481-1482 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]). We respectfully disagree with our dissenting colleagues that the court abused its discretion in denying defendant's motion, which was premised on concerns raised by juror No. 5 subsequent to the court's determination not to discharge her. Initially, this is not a case where a court failed to make an "appropriate inquiry into this most serious charge" (*People v Rukaj*, 123 AD2d 277, 279 [1st Dept 1986]). Instead, the court, after consultation with the parties, questioned juror No. 5 on allegations she raised with the court that she "was told on Friday [by another juror] that all black people look the same in the dark." The juror's concern was initially raised in a note, wherein she explained the comment was made during a discussion of whether to view the video evidence again or whether, as her fellow jurors asserted, the "video

would not show anything better." The note explained that the comment was "insulting to [her]" and that she did "not want to be bullied into rushing [her] decision." Upon direct questioning, juror No. 5 identified juror No. 10 as the person who made the complained-of comment, but noted that "[w]e talked about it earlier," and moved on to raise a separate issue regarding the conduct of a man in the gallery during trial. She agreed that the concerns that she raised in the note, including the comment by juror No. 10, did not prevent her from continuing to be a fair and impartial juror.

Upon questioning by defense counsel, juror No. 5 agreed that there had been additional race-related comments in the jury room on Friday, but explained that she "confronted [her fellow jurors] today. We discussed it in deliberations." When asked by defense counsel how many jurors "expressed this type of bigotry," juror No. 5 answered, "approximately six," but when pressed to identify these additional jurors, she qualified her answer by explaining that "[t]hey changed their mind today. . . . [E]verybody went home and thought about the things they said and they brought it up" and "apologized for things that [were] said." Juror No. 5 asserted that this exchange led the jurors to take a second look at the evidence and also led to a similar frank discussion about age-related comments. As a result, although juror No. 5 could not "guarantee" that any racial animus had been extinguished, the juror expressed confidence that the jury was "aware of it, and are looking more deeper into the trial." The court nonetheless continued the inquiry by questioning juror No. 10, i.e., the juror identified as having made the complained-of comment, who agreed that she had made a statement on Friday to which juror No. 5 objected, but denied that it was phrased as reported. Juror No. 10 also confirmed juror No. 5's assertion that the initial deliberations on Friday, which had centered on the poor quality of the video evidence, had been rushed.

We conclude that, when considered in light of the full inquiry conducted by the court into the jury concerns, the record supports the conclusion that the procedure followed by the court appropriately ensured that "defendant's right to an impartial verdict [was] properly balanced with the jury's right to adjudicate 'free from outside interference' " (*People v Kuzdzal*, 31 NY3d 478, 486 [2018], quoting *People v Rivera*, 15 NY3d 207, 212 [2010]). Viewed as a whole, the record of the court's inquiry prior to denying defendant's motion does not evidence that juror No. 5's participation in deliberations was adversely affected or that she was even claiming as much (*cf. Rukaj*, 123 AD2d at 280-281). Moreover, on the broader issue of whether jury deliberations were tainted by racial bias, "[i]n a probing and tactful inquiry, the court [did] evaluate the nature of what [juror No. 5] ha[d] seen, heard, or ha[d] acquired knowledge of, and assess[ed] its importance and its bearing on the case" (*People v Buford*, 69 NY2d 290, 299 [1987]). Following that inquiry, the court was effectively tasked with determining whether the answers elicited provided evidence of racial bias potentially affecting jury deliberations or instead supported the conclusion that, following an initial rushed deliberation session, there was a frank discussion among the jurors about racial bias (and the appearance thereof) that prompted a closer

look at the evidence. Juror No. 5's own expressed conclusion was the latter. Further, inasmuch as juror No. 5 declined to specifically identify any other juror as having made racially biased comments, any further investigation would have required an intrusive juror-by-juror inquiry, an approach that both parties agreed would be inappropriate. " '[W]hile a court looking into juror misconduct must investigate and, if necessary, correct a problem, it must also avoid tainting a jury unnecessarily. . . . In this endeavor, sometimes less is more' " (*Kuzdzal*, 31 NY3d at 486).

We further reject the contention of defendant that the court's handling of a jury note violated the requirements set forth in CPL 310.30 and *People v O'Rama* (78 NY2d 270 [1991]). The jury submitted a note saying that it had not been able to reach a unanimous verdict, and defendant contends that the court erred because it did not read aloud a portion of the note that provided vote numbers and thus denied defendant meaningful notice of the note. We note that, after advising the parties that the note contained numbers and declining to read the numbers aloud, the court offered to let defense counsel and the prosecutor read the note themselves. We conclude that defendant failed to preserve his contention for our review inasmuch as defense counsel was made aware that the note contained the vote and defense counsel failed to object to the court's failure to read it aloud (*see People v Kalb*, 91 AD3d 1359, 1369 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012]; *see generally People v Kadarko*, 14 NY3d 426, 429 [2010]).

All concur except OGDEN and DELCONTE, JJ., who dissent and vote to reverse in accordance with the following memorandum: We must respectfully dissent because we are unable to conclude on the record before us that the jury was not tainted by racial bias in their deliberations. "The scourge of racial prejudice, toward any group, which impugns a jury's ability to impartially assess the evidence, constitutes a corrupt outside influence which cannot be sustained" (*People v Rukaj*, 123 AD2d 277, 281 [1st Dept 1986]). It is fundamental that "[a]n accused is entitled to a fair trial" (*People v Robinson*, 273 NY 438, 444 [1937]). Although a trial judge is accorded significant latitude in making the findings necessary to determine whether a juror is grossly unqualified, we believe it was an abuse of discretion for County Court to deny defense counsel's motion for a mistrial under the circumstances (*see People v Ortiz*, 54 NY2d 288, 292 [1981]; *see generally People v Thomas*, 196 AD2d 462, 464 [1st Dept 1993], *lv denied* 82 NY2d 904 [1993]; *People v Andrew*, 156 AD2d 978, 979 [4th Dept 1989]).

After the commencement of deliberations, on a Monday, juror No. 5 told the court, in a note, that she had been "told on [that preceding] Friday that all black people look the same in the dark." Defendant is a Black man. Juror No. 5 identified juror No. 10 as the juror who made the statement. In the course of the discussions with the court and counsel, juror No. 5 indicated there were additional incidents of racial bias, including an allegedly racist joke, in the jury room and that she confronted the other jurors about them. She further indicated that she spoke to her fellow jurors about "the joke" and explained that "it wasn't a joke." Juror No. 5 continued, stating,

"[s]o I don't know how far you want to go into an individual person because I don't know their names, but I let them know I didn't appreciate it, and I spoke on it." Juror No. 5 was asked how many jurors expressed bigotry, and she responded, "approximately six." She further explained that some of her fellow jurors made "statements as though blacks are different than – we live a whole different culture, whole different life, all of us, than white people . . . That's an insult to categorize everybody into this gang crime-related thing."

When juror No. 5 was again asked whether she could identify the approximately six jurors who she believed had expressed racial bigotry during deliberations, she responded that "[t]hey changed their mind today" and "[t]hey started apologizing for things that [were] said." When asked for assurances that the jury was free of racial animosity, juror No. 5 responded that she was unable to conclude that racial animus had been extinguished, and she stated, "I cannot guarantee it, but they're aware of it, and are looking more deeper into the trial than which they would have on Friday."

After that discussion, defense counsel moved for a mistrial. Defense counsel stated that a one-on-one voir dire of the entire jury was "impossible" but argued instead that sufficient evidence, including the allegations of racial bias by additional jurors, supported the motion for a mistrial without individual questioning of each juror. Defense counsel further argued that the reference to gang violence was "extremely troublesome" and also grounds for a mistrial.

The court opted to voir dire only juror No. 10 concerning juror No. 5's allegations. Juror No. 10 admitted that she made a statement and in response to the court's inquiry about her alleged assertion that all Black people look the same in the dark, invoked the fact that she has an Asian daughter. Despite juror No. 5's concerns of racial bias, juror No. 10 denied that other jurors had made similar statements and explained that "it was a . . . discussion on . . . clothing." When asked directly whether other jurors expressed similar statements, juror No. 10 was unable to give an unequivocal response and instead said, "I don't think. I think it was just a matter of where they were trying to – I feel that things were trying to be rushed on Friday, and think we should have taken more time." Upon further questioning whether "those sentiments" were expressed in the jury deliberations, juror No. 10 answered, "No. Not in that manner." Juror No. 10 returned to the jury room, and the court denied defendant's motion for a mistrial.

The question before us is whether the deliberations and jury verdict were influenced by prejudice or tainted by racial bias (*see Rukaj*, 123 AD2d at 281).

We recognize that "a trial court's investigation of juror misconduct or bias is a delicate and complex task" (*People v Kuzdzal*, 31 NY3d 478, 485 [2018] [internal quotation marks omitted]). On this record, however, the disclosure of alleged racial bias harbored by approximately half of the members of the jury warranted, at the very least, a question posed to each of the members of the panel of whether

they could perform their duties as jurors without bias or prejudice. We also conclude that, in its voir dire of juror No. 10, the court did not explore whether juror No. 10 harbored any racial prejudice *toward Black people*, a prerequisite to determining whether she, in fact, could be unequivocally fair and impartial in deliberations. Under these circumstances, the court should also have determined on the record "whether the juror's statements created a substantial risk of prejudice to the rights of the defendant by coloring the views of the other jurors as well as her own" (*People v Chodakowski*, 200 AD3d 437, 437 [1st Dept 2021] [internal quotation marks omitted]). On this record, without that guarantee, we conclude that the court abused its discretion in denying defendant's motion for a mistrial. Therefore, we would reverse the judgment and grant a new trial on counts one, five and six of the indictment.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

894
CA 23-00113
PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

LISA O'GEEN, INDIVIDUALLY, AND AS SPOUSE AND ADMINISTRATOR OF THE ESTATE OF ROBERT M. O'GEEN, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES P. MCCAUSLAND, DEFENDANT-APPELLANT.

BURGIO, CURVIN & BANKER, BUFFALO, LEWIS BRISBOIS BISGAARD & SMITH, LLP, NEW YORK CITY (NICHOLAS P. HURZELER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN WRIGHT LAW FIRM, PLLC, ROCHESTER (JOHN K. WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered January 10, 2023. The order granted 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 the motion in part, striking from the first ordering paragraph the phrase "the sole proximate cause" and substituting therefor the phrase "a proximate cause," and reinstating the affirmative defense of comparative negligence, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, individually and as the administrator of the estate of Robert M. O'Geen (decedent), commenced this wrongful death action arising from a motor vehicle accident in which a motorcycle operated by decedent was struck by a vehicle owned and operated by defendant. Plaintiff moved for partial summary judgment on the issues of liability and whether defendant's negligence was the sole proximate cause of the accident, as well as summary judgment dismissing, inter alia, defendant's affirmative defense of comparative negligence. Supreme Court granted the motion, determining that defendant's negligent operation of his vehicle was the sole proximate cause of the collision and decedent's serious injuries and resulting death. Defendant appeals.

Contrary to defendant's contention, the court properly granted that part of the motion with respect to the issue of defendant's liability. In seeking partial summary judgment on the issue of liability, plaintiff was required to establish that defendant "was negligent and that [his] negligence was a proximate cause of the

accident" (*Edwards v Gorman*, 162 AD3d 1480, 1481 [4th Dept 2018]; *see Lowes v Anas*, 195 AD3d 1579, 1582 [4th Dept 2021]). A driver has a common-law duty to see that which the driver should have seen through the proper use of their senses (*see Strassburg v Merchants Auto. Group, Inc.*, 203 AD3d 1735, 1736 [4th Dept 2022]). Additionally, Vehicle and Traffic Law § 1141 provides that "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is . . . so close as to constitute an immediate hazard." Here, plaintiff established her prima facie entitlement to judgment as matter of law on the issue of defendant's liability by establishing that decedent had the right-of-way and was struck by defendant's vehicle while defendant was making a left-hand turn. Plaintiff submitted defendant's deposition testimony in which he testified that, despite having seen decedent's motorcycle approximately a "football field" away prior to making the turn, he either did not look to determine where the motorcycle was after waiting for an unrelated vehicle in the southbound lane to pass or, at best, simply failed to see the motorcycle prior to making the turn. In response, defendant failed to raise a triable issue of fact (*see Webb v Scharf*, 191 AD3d 1353, 1354 [4th Dept 2021]).

However, we agree with defendant that the court erred in determining that plaintiff met her initial burden on that part of the motion with respect to defendant's affirmative defense of comparative fault. Although "a driver who has the right-of-way is entitled to anticipate that drivers of other vehicles will obey the traffic laws requiring them to yield" (*Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]; *see* Vehicle and Traffic Law § 1142 [a]), a driver is nevertheless "bound to see what is there to be seen with the proper use of his or her senses" (*Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788, 790 [2d Dept 2019]) and remains "bound to use such care to avoid [a] collision as an ordinarily prudent [driver] would have used under the circumstances" (*Heltz*, 115 AD3d at 1299 [internal quotation marks omitted]). Here, inasmuch as plaintiff failed to set forth any evidence that decedent was not negligent in the operation of his motorcycle, we conclude that she failed to meet her initial burden of "establishing a total absence of comparative negligence as a matter of law" (*Brioso v City of Buffalo*, 210 AD3d 1440, 1441 [4th Dept 2022] [internal quotation marks omitted]; *see Strassburg*, 203 AD3d at 1736; *Reichmuth v Family Video Movie Club, Inc.*, 201 AD3d 1348, 1349 [4th Dept 2022]). In light of our determination, we necessarily conclude that the court erred in granting plaintiff's motion insofar as it sought summary judgment determining that defendant's negligence was the sole proximate cause of the accident. We therefore modify the order accordingly.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

1043
CA 23-00370
PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, OGDEN, AND DELCONTE, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
LEWIS B. ROSBAUGH AND LYNNE T. ROSBAUGH,
PETITIONERS-RESPONDENTS-PLAINTIFFS-RESPONDENTS,

AND MEMORANDUM AND ORDER

TOWN OF LODI, RESPONDENT-PETITIONER-
DEFENDANT-APPELLANT,
ET AL., RESPONDENT-DEFENDANT-RESPONDENT.

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

DAVID LEE FOSTER, GENEVA, FOR PETITIONERS-RESPONDENTS-PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered January 9, 2023, in a proceeding pursuant to CPLR article 75 and action for money damages. The order and judgment confirmed an arbitrator's award and awarded petitioners-respondents-plaintiffs money damages against respondent-petitioner-defendant Town of Lodi.

It is hereby ORDERED that the order and judgment so appealed from is modified on the law by striking from the second decretal paragraph the language "the date of the commencement of the within action, to wit: November 23, 2011 under index #45715, as computed by the Clerk in the amount of $13,443.48 per year," and substituting therefor the language "the date of the arbitrator's award" and as modified the order and judgment is affirmed without costs.

Memorandum: Petitioners-respondents-plaintiffs (petitioners) commenced an action seeking damages after respondent-petitioner-defendant Town of Lodi (Town) hired respondent-defendant Cranebrook Tree Service & Tree Farm of Auburn, Inc. (Cranebrook) to cut and remove trees on petitioners' property (original action). After years of litigation, the parties agreed to submit the matter to arbitration. At the conclusion of that proceeding, the arbitrator awarded petitioners damages against the Town in the amount of $149,372, consisting of $2,625 for pre-cut wood that was removed by the Town and Cranebrook, $1,700 for property restoration, and $145,047 for treble the stumpage value of petitioners' standing trees ($48,349) pursuant to RPAPL 861 (1), plus interest from the date of the award, i.e., May 3, 2021. Petitioners thereafter filed a petition pursuant to CPLR

article 75 to confirm the arbitrator's award indexed to the original action, and the Town filed a separate petition seeking to modify the award by vacating the component of petitioners' award for treble the stumpage value of the trees. The petitions and original action were consolidated into the instant proceeding, and Cranebrook thereafter resolved petitioners' claim. Supreme Court then confirmed the arbitration award against the Town. In the subsequent order and judgment, the court diverted from the arbitration award by awarding petitioners interest "from the date of commencement of the within action, to wit: November 23, 2011," notwithstanding that neither party had challenged the amount of interest or its accrual date in the underlying arbitration award. The Town now appeals.

The Town first contends that the court's confirmation of the component of petitioners' damages award for treble the stumpage value of the trees violates public policy. We reject that contention. While the Town is correct that, under well settled law, " 'the State and its political subdivisions are not subject to punitive damages' " (*Cornell v County of Monroe*, 187 AD3d 1566, 1567 [4th Dept 2020]) and "[t]reble damages are generally viewed as punitive" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 385 [2020], *rearg denied* 35 NY3d 1079, 1081 [2020]), as we explained in *Matter of Svenson (Swegan)* (133 AD3d 1279, 1280-1281 [4th Dept 2015]), damages awards that include a component of "[t]reble damages pursuant to RPAPL 861 (1) are not equivalent to punitive damages" (*id.* at 1280; *see also Backus v Lyme Adirondack Timberlands II*, *LLC*, 144 AD3d 1454, 1458 [3d Dept 2016]; *Western N.Y. Land Conservancy*, *Inc. v Cullen*, 66 AD3d 1461, 1463-1464 [4th Dept 2009], *appeal dismissed* 13 NY3d 904 [2009], *lv denied* 14 NY3d 705 [2010], *reconsideration denied* 15 NY3d 746 [2010]).

Rather, RPAPL 861 (1) authorizes a court—or, in this case, an arbitrator—to determine the total amount of compensatory damages to award on a claim for the wrongful cutting and removal of trees by calculating "treble the stumpage value of the tree or timber or two hundred fifty dollars per tree, or both," in addition to "any permanent and substantial damage caused to the land or the improvements thereon" (RPAPL 861 [1]). As relevant here, "stumpage value" is limited to only "the current fair market value" of the merchantable lumber within a standing tree (RPAPL 861 [3]); it does not include the intrinsic value of a tree in its natural state—such as its environmental, historical and aesthetic qualities—which can be substantially greater to a landowner than the mere marketable lumber value. Thus, it is not the landowner's total compensatory damages, which are measured by what the landowner actually lost, that are trebled under RPAPL 861 (1). Rather, it is merely the fair market value of the merchantable lumber that is trebled, which is only a component of the total compensatory damages to be awarded under the statute when the cutting and removal is without "cause to believe the land was his or her own" (RPAPL 861 [2]; *see generally* Letter from NY State Dept. of Envtl. Conservation, Sept. 24, 2003, Bill Jacket, L 2003, ch 602; *Halstead v Fournia*, 160 AD3d 1178, 1181 [3d Dept 2018]).

The Town further contends that the court, in its order and

judgment, erred in awarding petitioners interest "from the date of the commencement" of the underlying action, i.e., November 23, 2011. We agree. The arbitration award provided for interest to be paid "from the date of th[e] award," i.e., May 3, 2021, and the court, in its decision and order, merely confirmed the award of the arbitrator, never mentioning interest. Inasmuch as "the arbitration award, upon which the [order and] judgment was based, did not include a provision awarding [petitioners] pre-arbitration award interest," we conclude that the court was "without power to award pre-arbitration award interest" (*Dermigny v Harper*, 127 AD3d 685, 686 [2d Dept 2015]; *see Schiferle v Capital Fence Co., Inc.*, 155 AD3d 122, 128 n 3 [4th Dept 2017]; *Matter of Gruberg [Cortell Group]*, 143 AD2d 39, 40 [1st Dept 1988]). We therefore modify the order and judgment to award interest only from the date of the arbitrator's award.

All concur except WHALEN, P.J., and LINDLEY, J., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part. We agree with the majority that Supreme Court erred in awarding interest from the date of commencement of this action. The arbitrator awarded interest from the date of his award, and petitioners-respondents-plaintiffs (petitioners) moved to confirm the award in its entirety, taking no issue with the accrual date of interest as set by the arbitrator. Similarly, respondent-petitioner-defendant Town of Lodi (Town), in its petition to modify the award, did not seek to vacate the interest portion of the award. In its decision and order, the court confirmed the award in its entirety, including the interest provision. In its subsequent order and judgment, however, the court, after stating that it was confirming the award, inexplicably ordered that interest on the award of damages shall run from the "date of commencement," relief that petitioners did not even request. As the majority concludes, the order and judgment must be modified to provide that interest shall run from the date of the arbitration award.

Unlike the majority, however, we conclude that the arbitrator lacked authority to award treble damages against the Town under RPAPL 861 (1). It is well settled that " '[d]amages awarded for *punitive* purposes . . . are not sensibly assessed against [a] governmental entity' " (*Sharapata v Town of Islip*, 56 NY2d 332, 339 [1982], quoting *City of Newport v Fact Concerts*, 453 US 247, 267 [1981]; *see Martinetti v Town of New Hartford Police Dept.*, 307 AD2d 735, 737 [4th Dept 2003]). "[T]he twin justifications for punitive damages—punishment and deterrence—are hardly advanced when applied to a governmental unit" inasmuch as the persons who would bear the burden of punishment are taxpayers who have done nothing wrong (*Sharapata*, 56 NY2d at 338). Additionally, "a statute in derogation of the sovereignty of a State must be strictly construed, waiver of immunity by inference being disfavored" (*id.* at 336; *see Cornell v County of Monroe*, 187 AD3d 1566, 1567 [4th Dept 2020]).

Here, there is no indication in RPAPL 861 or its legislative history that the legislature "discussed, debated, or even contemplated exposing" municipalities to treble damages (*Krohn v New York City Police Dept.*, 2 NY3d 329, 336 [2004]), and the majority does not

suggest otherwise. Instead, the majority concludes that the treble damages provision of RPAPL 861 is not punitive in nature because it is intended merely to compensate the property owner for the total value of their loss arising from the wrongful cutting or removal of trees and timber. We cannot agree.

RPAPL 861 (1) provides that an owner of property on which trees are cut or taken by another person may maintain an action against such person "for treble the stumpage value of the tree or timber or two hundred fifty dollars per tree, or both and for any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation." If, however, the trespasser "had cause to believe the land was [their] own," they do not have to pay treble the stumpage value of the trees or timber wrongfully taken (RPAPL 861 [2]). In other words, "a trespasser's good faith belief in a legal right to harvest timber does not insulate that person from the imposition of statutory damages, 'but merely saves [them] from having to pay the plaintiff treble damages' " (*Halstead v Fournia*, 160 AD3d 1178, 1182 [3d Dept 2018]; *see Fernandes v Morgan*, 95 AD3d 1626, 1628 [3d Dept 2012]).

Under the statute, "stumpage value" is defined as "the current fair market value of a tree as it stands prior to the time of sale, cutting, or removal" (RPAPL 861 [3]). If, as the majority concludes, the treble damages provision of RPAPL 861 is intended merely to compensate owners of trees or timber wrongfully cut or taken by trespassers, then it follows that the legislature intended that owners of trees cut down by trespassers who harvest trees in *good faith* should not be made whole and instead receive only one-third of the market value of their trees. In our view, such an interpretation of the statute would be unreasonable and is not supported by the legislative history, which evinces an intent to "provide for greater deterrence for the knowing offender while at the same time promote more diligence and care on the part of legitimate timber harvesters to prevent inadvertent trespass and timber theft" (Letter from NY State Dept. of Envtl. Conservation, Sept. 24, 2003, Bill Jacket, L 2003, ch 602 at 24; *see also* Letter from Adirondack Mountain Club, June 30, 2003, Bill Jacket, L 2003, ch 602 at 31).

Although we held in *Matter of Svenson (Swegan)* (133 AD3d 1279, 1280-1281 [4th Dept 2015]) that "[t]reble damages pursuant to RPAPL 861 (1) are not equivalent to punitive damages" and are not "punitive in nature," the latter statement was dicta in a matter involving two private homeowners. Moreover, the issue in *Svenson* juxtaposed punitive damages under a trespass cause of action and treble damages under RPAPL 861. This proceeding, in contrast, does not include a trespass cause of action, does not involve an award of punitive damages and, more importantly, involves a municipality against whom neither an arbitrator nor a court may assess damages that are punitive in nature. We are thus faced with an issue not addressed in *Svenson*, i.e., whether the award of treble damages assessed against a municipality has a punitive purpose, and for the reasons set forth above we answer that question in the affirmative. We therefore conclude that the court erred in granting that part of the petition of

petitioners seeking to confirm the arbitration award insofar as it awarded them treble damages against the Town and denying the Town's petition seeking to vacate the award to that extent. We would therefore further modify the order and judgment accordingly.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-01250

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN G.G., DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Jefferson County Court (Donald E. Todd, A.J.), entered August 19, 2020. The order denied defendant's request to apply for resentencing pursuant to CPL 440.47.

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

Memorandum: Defendant appeals from an order denying without a hearing his pro se request to apply for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (*see* CPL 440.47; Penal Law § 60.12, as amended by L 2019, ch 31, § 1; L 2019, ch 55, part WW, § 1). County Court determined that defendant was ineligible for resentencing under the DVSJA because he was not "serving a sentence with a minimum or determinate term of eight years or more" on the offense for which he sought resentencing, as required by CPL 440.47 (1) (a). We affirm.

Defendant pleaded guilty in January 2018 to criminal possession of a controlled substance in the third degree (CPCS 3rd) and reckless endangerment in the second degree. In March 2018, the court imposed concurrent sentences, the longest of which, for CPCS 3rd, is a determinate term of seven years in prison plus a term of postrelease supervision (PRS). When defendant committed those crimes, however, he was on PRS arising from an aggregate eight-year determinate sentence of imprisonment imposed upon him in 2010. Upon defendant's return to prison, the Department of Corrections and Community Supervision treated his 2018 sentence as being consecutive to the undischarged portion of his 2010 sentence, which was one year, one month and 23 days, making for an aggregate term of imprisonment that slightly exceeded eight years.

Defendant contends that, because his 2018 sentence of imprisonment for CPCS 3rd was added to the time he owed on the prior

sentence, resulting in an aggregate term of more than eight years in prison, he is eligible for resentencing under the DVSJA. We reject that contention. CPL 440.47 (1) (a) provides that a confined person may request to apply for resentencing where that person is serving at least eight years "for *an offense* committed prior to the effective date of this section" (emphasis added). Here, although defendant's pro se application referenced prior sentences, he sought resentencing on the 2018 conviction for CPCS 3rd. Because the sentence of imprisonment imposed for the offense of CPCS 3rd was a determinate term of only seven years, defendant does not meet the eight-year threshold set forth in CPL 440.47 (1) (a). The fact that the sentence of imprisonment imposed for CPCS 3rd may have been combined with the undischarged portion of a prior sentence does not, in our view, transform the CPCS 3rd sentence of imprisonment into a "term of eight years or more" (CPL 440.47 [1] [a]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01964

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

IN THE MATTER OF ADIRONDACK WHITE LAKE
ASSOCIATION, AND PROTECT THE ADIRONDACKS!,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ADIRONDACK PARK AGENCY, RESPONDENT-RESPONDENT,
AND RED ROCK QUARRY ASSOCIATES, LLC, RESPONDENT.

CHRISTOPHER A. AMATO, JOHNSBURG, AND TODD D. OMMEN, WHITE PLAINS, FOR PETITIONERS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LUCAS C. MCNAMARA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered September 20, 2022, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, to annul the determination of respondent Adirondack Park Agency (APA) conditionally approving the application of respondent Red Rock Quarry Associates, LLC (Red Rock) for a major project permit in connection with a granite mining project located within the Adirondack Park. In their petition, petitioners asserted a single cause of action in which they alleged, inter alia, that it was arbitrary and capricious for the APA to conditionally approve the application and issue the permit without first holding a public hearing. Supreme Court dismissed the petition, and petitioners now appeal. We affirm.

Petitioners contend that they submitted evidence to the APA warranting a public hearing on Red Rock's application pursuant to Executive Law § 809 (3) (d) and 9 NYCRR 580.2 and that, in light of such evidence, the APA acted arbitrarily and capriciously in declining to hold a public hearing. We reject that contention. Our review of the APA's determination is "limited to whether the . . . determination was irrational, arbitrary and capricious or contrary to law" (*Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 34 NY3d 184, 191 [2019]; *see Matter of Town of*

Marilla v Travis, 151 AD3d 1588, 1589 [4th Dept 2017]). Although "[a]n agency acts arbitrarily and capriciously when it fails to conform to its own regulations" (*St. Joseph's Hosp. Health Ctr. v Department of Health of State of N.Y.*, 247 AD2d 136, 155 [4th Dept 1998], *lv denied* 93 NY2d 803 [1999]), "[a]n agency's interpretation of its own regulations is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 10 NY3d 474, 481 [2008] [internal quotation marks omitted]).

Contrary to petitioners' contention, the record supports the APA's determination that there were no "substantive and significant" issues with respect to whether the project would have an "undue adverse impact on the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources" of the Adirondack Park (Executive Law § 809 [3] [d]; [10] [e]). We thus conclude that the APA did not act in an arbitrary or capricious manner in declining to conduct a public hearing before issuing the permit (*see generally* Executive Law § 809 [3] [d]; 9 NYCRR 580.2). Where, as here, an "agency's determination has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 161 AD3d 169, 176 [3d Dept 2018], *affd* 34 NY3d 184 [2019] [internal quotation marks omitted]).

Petitioners further contend that the actions of the APA were arbitrary, capricious, and contrary to law because the APA staff presentation with respect to the determination whether to conduct a public hearing was biased. Contrary to petitioners' contention, however, there is no indication in the record that the APA "failed to make an informed decision based upon an independent appraisal of the evidence" (*Matter of Gurin v Utica Mun. Hous. Auth.*, 208 AD3d 1591, 1592 [4th Dept 2022]).

Finally, petitioners contend that the APA fabricated its own standard for determining whether to conduct a public hearing. Petitioners, however, did not raise that issue in the petition, and therefore it is not properly before us (*see Matter of Onondaga Ctr. for Rehabilitation & Healthcare v New York State Dept. of Health*, 211 AD3d 1514, 1516 [4th Dept 2022], *lv denied* 40 NY3d 902 [2023]; *Matter of Westside Grocery & Deli, LLC v City of Syracuse*, 211 AD3d 1551, 1552-1553 [4th Dept 2022]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01929
PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF DANIEL T. WARREN,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PLANNING BOARD OF THE TOWN OF WEST SENECA,
TOWN OF WEST SENECA, AND CANISIUS HIGH SCHOOL
OF BUFFALO, NEW YORK, BY AND THROUGH FR. DAVID
CIANCIMINO, S.J., AS ITS PRESIDENT,
RESPONDENTS-DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

DANIEL T. WARREN, PETITIONER-PLAINTIFF-APPELLANT PRO SE.

GRECO TRAPP, PLLC, BUFFALO (CHRIS G. TRAPP OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS PLANNING BOARD OF THE TOWN OF WEST SENECA, AND TOWN OF WEST SENECA.

COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT CANISIUS HIGH SCHOOL OF BUFFALO, NEW YORK, BY AND THROUGH FR. DAVID CIANCIMINO, S.J., AS ITS PRESIDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered December 8, 2022, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, inter alia, granted the cross-motion of respondent-defendant Planning Board of the Town of West Seneca to dismiss the proceeding-action.

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 action seeking, inter alia, to annul certain determinations of respondent-defendant Planning Board of the Town of West Seneca (Planning Board) concerning respondent-defendant Canisius High School's development of student athletic facilities. In appeal No. 1, petitioner appeals from a judgment that, inter alia, granted the Planning Board's cross-motion to dismiss the proceeding-action and dismissed the proceeding-action in its entirety. In appeal No. 2, petitioner appeals from an order that denied in part his motion to settle the record on appeal in appeal No. 1.

Preliminarily, petitioner contends in appeal No. 2 that Supreme

Court improperly excluded necessary and relevant documents from the record on appeal in appeal No. 1. We reject that contention. Where, as here, an appellant fails to establish a "manifest error or a clear abuse of discretion by the trial court so that the record as settled is inaccurate or untrue, an appellate court should not supersede the trial court's order" settling the record (*Matter of Wilhelm*, 63 AD2d 1120, 1121 [4th Dept 1978]; *see Matter of Nataylia C.B. [Christopher B.]*, 150 AD3d 1657, 1658 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]).

With respect to appeal No. 1, we note at the outset that this is properly only a CPLR article 78 proceeding inasmuch as the relief sought by petitioner is available under CPLR article 78 without the necessity of a declaration (*see generally* CPLR 7801).

Petitioner contends that the court erred in denying his motion for a preliminary injunction. We reject that contention. It is well settled that, "[u]pon a motion for a preliminary injunction, the party seeking the injunctive relief must demonstrate by clear and convincing evidence: (1) 'a probability of success on the merits;' (2) '[a] danger of irreparable injury in the absence of an injunction;' and (3) 'a balance of equities in its favor' " (*Cangemi v Yeager*, 185 AD3d 1397, 1398 [4th Dept 2020], quoting *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Here, petitioner's conclusory and speculative allegations of injury to his property or the community in general fail to demonstrate any actual appreciable danger of irreparable injury in the absence of the injunction (*see Fields Enters. Inc. v Bristol Harbour Vil. Assn., Inc.*, 200 AD3d 1710, 1711 [4th Dept 2021]; *A.N. Deringer, Inc. v Troia*, 178 AD2d 1023, 1023-1024 [4th Dept 1991]).

We also reject petitioner's contention that the Planning Board failed to comply with the requirements of the State Environmental Quality Review Act (SEQRA). A lead agency's SEQRA determination is "entitled to great deference" (*Matter of Brockport Student Govt. v State Univ. of N.Y. at Brockport*, 136 AD3d 1418, 1420 [4th Dept 2016] [internal quotation marks omitted]), and judicial review thereof is " 'limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion' " (*Matter of Huntley Power, LLC v Town of Tonawanda* [proceeding No. 2], 217 AD3d 1325, 1327-1328 [4th Dept 2023], quoting *Akpan v Koch*, 75 NY2d 561, 570 [1990]). As explained by the Court of Appeals, "review of a lead agency's negative declaration is restricted to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 348 [2003] [internal quotation marks omitted]).

With respect to the merits, 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 Hudson v Town of Orchard Park Zoning Bd. of Appeals*, 218 AD3d 1380, 1382 [4th Dept 2023]). "Consequently, even if a respondent in a CPLR article 78 proceeding d[oes] not file an answer, where[, as here,] 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 Guttman v Covert Town Bd.*, 222 AD3d 1357, 1358-1359 [4th Dept 2023] [internal quotation marks omitted]; *see Hudson*, 218 AD3d at 1382). Here, a review of, inter alia, the petition and exhibits submitted by petitioner establishes that the Planning Board "complied with SEQRA, i.e., it identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Grasso v Town of W. Seneca*, 63 AD3d 1629, 1630 [4th Dept 2009] [internal quotation marks omitted]; *see generally Matter of Evans v City of Saratoga Springs*, 202 AD3d 1318, 1320 [3d Dept 2022]).

We further reject petitioner's contention that the Planning Board acted in violation of General Construction Law § 41 inasmuch as petitioner fails to identify any final vote, resolution, determination or other official action that was taken by the Planning Board as a public body without a quorum (*see Matter of Save the Pine Bush, Inc. v Town of Guilderland*, 205 AD3d 1120, 1126-1127 [3d Dept 2022]; *Mobil Oil Corp. v City of Syracuse Indus. Dev. Agency*, 224 AD2d 15, 30 [4th Dept 1996], *appeal dismissed* 89 NY2d 860 [1996], *lv denied* 89 NY2d 811 [1997]).

Petitioner also contends that the judicial standard of review in a CPLR article 78 proceeding seeking to annul a SEQRA determination was substantively modified by the January 1, 2022 amendment to the State Constitution establishing that "[e]ach person shall have a right to clean air and water, and a healthful environment" (NY Const, art I, § 19). That contention, however, is raised for the first time on appeal and, thus, is not properly before us (*see Matter of Riedman Acquisitions, LLC v Town Bd. of Town of Mendon*, 194 AD3d 1444, 1449-1450 [4th Dept 2021]).

We reject petitioner's contention that the subject parcel must be rezoned, or that a use variance must be obtained, before the site plan can be approved inasmuch as we concluded in a prior appeal that the construction of athletic facilities on the property at issue is a "permissible educational use under the Town Code within the subject zoning district" (*Grasso*, 63 AD3d at 1630).

While we agree with petitioner that the Planning Board violated the Open Meetings Law when it failed to place the SEQRA negative declaration and parts 2 and 3 of the full environmental assessment form "on [its] website to the extent practicable at least [24] hours prior to the [public meeting adopting the negative declaration]" (Public Officers Law § 103 [e]), we conclude that petitioner has nonetheless failed to meet his "burden to show good cause warranting

judicial relief" (*Mobil Oil Corp.*, 224 AD2d at 30; *see Sindoni v Board of Educ. of Skaneateles Cent. Sch. Dist.*, 202 AD3d 1457, 1459 [4th Dept 2022]).

We have reviewed petitioner's remaining contentions and conclude that they are without merit.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00546
PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF DANIEL T. WARREN,
PETITIONER-PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

PLANNING BOARD OF THE TOWN OF WEST SENECA,
TOWN OF WEST SENECA, AND CANISIUS HIGH
SCHOOL OF BUFFALO, NEW YORK, BY AND THROUGH
FR. DAVID CIANCIMINO, S.J., AS ITS PRESIDENT,
RESPONDENTS-DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

DANIEL T. WARREN, PETITIONER-PLAINTIFF-APPELLANT PRO SE.

GRECO TRAPP, PLLC, BUFFALO (CHRIS G. TRAPP OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS PLANNING BOARD OF THE TOWN OF WEST SENECA, AND TOWN OF WEST SENECA.

COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT CANISIUS HIGH SCHOOL OF BUFFALO, NEW YORK, BY AND THROUGH FR. DAVID CIANCIMINO, S.J., AS ITS PRESIDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 28, 2023, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The order settled the record on appeal.

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

Same memorandum as in *Matter of Warren v Planning Bd. of Town of W. Seneca* ([appeal No. 1] — AD3d — [Mar. 22, 2024] [4th Dept 2024]).

Entered: March 22, 2024   Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00168

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

OCWEN LOAN SERVICING, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY D. MAFFETT, ET AL., DEFENDANTS,
MAGMA PROPERTIES, INC., AND LARRY NEWMAN,
DEFENDANTS-RESPONDENTS.

MCGLINCHEY STAFFORD, PLLC, NEW YORK CITY (MATTHEW J. GORDON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered December 21, 2022. The judgment and order, inter alia, dismissed the action.

It is hereby ORDERED that the judgment and order so appealed from is unanimously vacated on the law without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In this action to foreclose a residential mortgage, Magma Properties, Inc. and Larry Newman (collectively, defendants) moved by order to show cause for leave to reargue their opposition to a motion of plaintiff for summary judgment and an order of reference and for vacatur of an earlier order that, inter alia, granted plaintiff’s motion. Supreme Court effectively granted defendants’ motion by vacating the earlier order and granting leave to reargue plaintiff’s summary judgment motion. Upon reargument, the court effectively denied plaintiff’s motion, searched the record pursuant to CPLR 3212 (b), and granted summary judgment in favor of defendants dismissing the complaint without prejudice on the ground that plaintiff failed to establish standing. Plaintiff appeals.

We reject plaintiff’s initial contention that defendants did not have a legal basis for their motion. Plaintiff is correct that “CPLR 5015 (a) (1) relief is unavailable where, as here, there was no default” (*Marshall v Marshall*, 198 AD3d 1288, 1289 [4th Dept 2021]; *see Firemen’s Fund Ins. Co. v Dietz*, 110 AD2d 1083, 1084 [4th Dept 1985]). It is well settled, however, that “[i]n addition to the grounds set forth in section 5015 (a), a court may vacate its own judgment [or order] for sufficient reason and in the interests of substantial justice” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68

[2003]). Inasmuch as the order of reference was inadvertently granted upon a mistaken belief that plaintiff's motion for summary judgment was unopposed, defendants had an appropriate legal basis to seek relief pursuant to the court's "inherent discretionary power" to vacate its prior order (*id.* [internal quotation marks omitted]; *see Wells Fargo Bank v Hodge*, 92 AD3d 775, 775 [2d Dept 2012], *lv dismissed* 23 NY3d 1012 [2014]; *Red Creek Natl. Bank v Blue Star Ranch*, 58 AD2d 983, 983-984 [4th Dept 1977]). Furthermore, contrary to plaintiff's contention with respect to the timeliness of that part of defendants' motion seeking leave to reargue, we conclude that defendants may properly seek that relief, particularly with respect to plaintiff's standing, inasmuch as "the court ha[s] authority to reexamine its prior ruling on the issue of standing [given that] 'every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action' " (*Carrington Mtge. Servs., LLC v Sudano*, 173 AD3d 1814, 1815 [4th Dept 2019], quoting *Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see Profita v Diaz*, 100 AD3d 481, 481 [1st Dept 2012]; *Itzkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636, 638 [2d Dept 2005]).

We agree with plaintiff, however, that the court erred in proceeding to determine the merits of defendants' motion inasmuch as the parties submitted conflicting evidence as to whether defendants' motion papers were properly served as directed in the order to show cause. "The absence of proper service of an order to show cause deprives the court of jurisdiction to entertain the motion" (*Serrao v Slope Stor.*, 223 AD3d 927, 927 [2d Dept 2024]; *see Page v Niagara Falls Mem. Med. Ctr.*, 167 AD3d 1428, 1432 [4th Dept 2018]; *see also State Bank of Texas v Kaanam, LLC*, 120 AD3d 900, 901 [4th Dept 2014]). Thus, we vacate the judgment and order and remit the matter to Supreme Court for a hearing on the issue whether defendants properly served the order to show cause and supporting papers and, if so, to determine upon reargument whether the submissions establish as a matter of law that either party is entitled to summary judgment (*see State Bank of Texas*, 120 AD3d at 901; *Daulat v Helms Bros., Inc.*, 32 AD3d 410, 411 [2d Dept 2006]; *see also Carrington Mtge. Servs., LLC*, 173 AD3d at 1815).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

47
OP 23-01347
PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF HBC VICTOR LLC, PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF VICTOR, RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR PETITIONER.

HARRIS BEACH PLLC, PITTSFORD (KYLE D. GOOCH 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. The determination authorized condemnation of certain real property owned by petitioner.

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

Memorandum: Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent, Town of Victor (Town), authorizing the condemnation of certain real property owned by petitioner in Ontario County. We previously annulled the Town's prior determination authorizing condemnation of the same property (*Matter of HBC Victor LLC v Town of Victor*, 212 AD3d 121 [4th Dept 2022]). We now confirm the Town's current determination and dismiss the petition.

Contrary to petitioner's contentions, the Town's determination and findings comport with EDPL article 2 and do not violate petitioner's federal and state constitutional rights. As a preliminary matter, we note that this Court's review power is limited by statute (*see* EDPL 207 [C] [1]-[4]; *Matter of Niagara Falls Redevelopment, LLC v City of Niagara Falls*, 218 AD3d 1306, 1307-1308 [4th Dept 2023], *appeal dismissed* 40 NY3d 1059 [2023]; *Matter of Truett v Oneida County*, 200 AD3d 1721, 1721-1722 [4th Dept 2021], *lv denied* 38 NY3d 907 [2022]; *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]). Such limited judicial review does not contemplate a de novo consideration of the issues (*see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 418 [1986]). Rather, this Court must determine whether the condemnor's exercise of its power of eminent domain "is rationally related to a

conceivable public purpose" (*id.* at 425 [internal quotation marks omitted]; *see Matter of Penney Prop. Sub Holdings LLC v Town of Amherst*, 220 AD3d 1169, 1171 [4th Dept 2023]), whether the condemnor's determination and findings "were predicated upon a rational factual basis" (*Long Is. R.R. Co. v Long Is. Light. Co.*, 103 AD2d 156, 168 [2d Dept 1984], *affd* 64 NY2d 1088 [1985]), or whether the property owner has established, on the part of the condemnor, a " 'clear showing of bad faith or conduct which is irrational, baseless or palpably unreasonable' " (*Matter of Dowling Coll. v Flacke*, 78 AD2d 551, 552 [2d Dept 1980]; *see Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 254 [2010], *cert denied* 562 US 1108 [2010]).

In other words, the party challenging the condemnation has the burden of establishing "that the determination was without foundation and baseless . . . Thus, [i]f an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the [condemnor's] determination should be confirmed" (*Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency*, 112 AD3d 1351, 1352 [4th Dept 2013], *appeal dismissed* 22 NY3d 1165 [2014], *lv denied* 23 NY3d 905 [2014] [internal quotation marks omitted]; *see Matter of United Ref. Co. of Pa. v Town of Amherst*, 173 AD3d 1810, 1810-1811 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]).

Here, contrary to petitioner's contention, the Town established a qualifying public purpose or use for the property. This Court has previously defined "public use" as "any use which contributes to the health, safety, general welfare, convenience or prosperity of the community" (*Matter of Byrne v New York State Off. of Parks, Recreation & Historic Preserv.*, 101 AD2d 701, 702 [4th Dept 1984]; *see Matter of PSC, LLC v City of Albany Indus. Dev. Agency*, 200 AD3d 1282, 1285 [3d Dept 2021], *lv denied* 38 NY3d 909 [2022]; *see also Matter of Gabe Realty Corp. v City of White Plains Urban Renewal Agency*, 195 AD3d 1020, 1022 [2d Dept 2021]). A public use or purpose could therefore include stimulating the local economy, creating jobs, providing infrastructure (*see Matter of City of New York v Yonkers Indus. Dev. Agency*, 170 AD3d 1003, 1004 [2d Dept 2019]), avoiding the blight of economically underutilized properties (*see PSC, LLC*, 200 AD3d at 1284-1285; *see also Matter of Court St. Dev. Project, LLC v Utica Urban Renewal Agency*, 188 AD3d 1601, 1602 [4th Dept 2020]), or fostering redevelopment and urban renewal (*see Penney Prop. Sub Holdings LLC*, 220 AD3d at 1171; *United Ref. Co. of Pa.*, 173 AD3d at 1811).

Inasmuch as one of the Town's stated public purposes is to facilitate an economic redevelopment project that would permit the vacant and underutilized property to be turned into space appropriate for lease to an international department store and a grocer, both of which have expressed interest in becoming tenants, we conclude that the Town met its burden of establishing a legitimate public purpose for the condemnation (*see Penney Prop. Sub Holdings LLC*, 220 AD3d at 1171). We further conclude that the Town's proposed use of a portion of the building for an 11,000-square-foot community and recreation space is a viable public purpose under the EDPL (*see Niagara Falls Redevelopment, LLC*, 218 AD3d at 1308; *Matter of Woodfield Equities LLC*

v Incorporated Vil. of Patchogue, 28 AD3d 488, 489-490 [2d Dept 2006]; *Matter of Pfohl v Village of Sylvan Beach*, 26 AD3d 820, 821 [4th Dept 2006]).

With respect to petitioner's claim that the Town is improperly transferring title to another private developer with no support from an integrated development plan, it is well settled that "the '[t]aking of substandard real estate by a municipality for redevelopment by private corporations has long been recognized as a species of public use' " (*Matter of Huntley Power, LLC v Town of Tonawanda* [proceeding No. 1], 217 AD3d 1325, 1328 [4th Dept 2023], *appeal dismissed* 40 NY3d 1058 [2023], quoting *Cannata v City of New York*, 11 NY2d 210, 215 [1962], *appeal dismissed* 371 US 4 [1962]; *see Kelo v City of New London*, 545 US 469, 486 [2005]; *see also Penney Prop. Sub Holdings LLC*, 220 AD3d at 1172).

Contrary to petitioner's further contentions, we conclude that the Town's 2015 Comprehensive Plan is sufficient to support the Town's condemnation action (*see generally Kelo*, 545 US at 486) and that the public purposes articulated by the Town are not merely incidental to the private benefits arising from the condemnation (*see Penney Prop. Sub Holdings LLC*, 220 AD3d at 1172; *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]; *cf. Syracuse Univ.*, 71 AD3d at 1434-1435; *Matter of 49 WB, LLC v Village of Haverstraw*, 44 AD3d 226 [2d Dept 2007], *abrogated on other grounds by Hargett v Town of Ticonderoga*, 13 NY3d 325 [2009]). We reject petitioner's contention that the public use proposed for the part of the property to be leased by the Town is illusory. Although the Town initially stated at the public hearing that it had not yet determined what it would do with that portion of the property, the Town subsequently narrowed its public use in its determination and findings to a "community and recreation center space to provide for and enhance the Town's public services" as part of creating a "vibrant, sought-after retail, community and recreation destination" on the property. Moreover, petitioner's "assertion that alternate sites would better serve the [Town's] purposes is not a basis for relief under EDPL 207" (*Matter of Peekskill Hgts., Inc. v City of Peekskill Common Council*, 110 AD3d 1079, 1080 [2d Dept 2013]; *see Matter of One Point St., Inc. v City of Yonkers Indus. Dev. Agency*, 170 AD3d 851, 853 [2d Dept 2019]; *see also Village Auto Body Works v Incorporated Vil. of Westbury*, 90 AD2d 502, 502 [2d Dept 1982]).

Finally, inasmuch as petitioner did not raise any of its SEQRA concerns at the public hearing on April 24, 2023 (*see* EDPL 202 [C] [2]), we conclude that, if petitioner wanted to challenge the subsequent SEQRA determination, it should have done so by commencing a CPLR article 78 proceeding against the Town (*see Matter of County of*

Tompkins [Perkins], 237 AD2d 667, 668 [3d Dept 1997]). We therefore do not address the merits of those contentions.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

92
KA 22-01866
PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS ACOSTA, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), entered November 2, 2022. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that Supreme Court violated his right to due process by sua sponte assessing 25 points on the risk assessment instrument (RAI) under risk factor 2, rather than the five points recommended by the Board of Examiners of Sex Offenders (Board) and requested by the People under that risk factor. We agree with defendant.

The disputed points assessed by the court under risk factor 2 are for having sexual intercourse with the victim of defendant's qualifying offense. The Board had recommended that five points be assessed against defendant under risk factor 2, for sexual contact over the victim's clothing, and that defendant be assessed a total of 50 points, making him a presumptive level one risk. Prior to the SORA hearing, the People asked the court in writing to assess an additional 10 points under risk factor 12, for failing to accept responsibility, but which would give defendant a total of 60 points even with an additional 10 points, and with which defendant would have remained a presumptive level one risk. The People also therefore requested "an upward departure based on the defendant's prior [unspecified] conduct not being adequately taken into consideration by the risk assessment instrument."

At the SORA hearing, the People agreed with the Board's recommendation to assess five points under risk factor 2, and, notably, the court also agreed with the Board's recommendation and rejected defense counsel's contention that no points should be assessed under that risk factor. The court stated to defense counsel, "I disagree with you. The People have already consented to the five points. So, I will assess five points." The court further stated at the hearing that it was granting the People's written request to assess 10 points under risk factor 12, thus raising defendant's total score to 60 points, but leaving him as a presumptive level one risk. After the court determined on the record that 60 points should be assessed, the People renewed their request for an upward departure based on defendant's prior criminal history. The court, however, later issued a written decision and order that assessed 80 points against defendant, including 25 points under risk factor 2, thereby making him a presumptive level two risk. The court did not address the People's request for an upward departure.

"The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment" (*People v Wilke*, 181 AD3d 1324, 1325 [4th Dept 2020]; *see* Correction Law § 168-n [3]; *People v David W.*, 95 NY2d 130, 136-138 [2000]). "A defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be afforded a meaningful opportunity to respond to that assessment" (*People v Griest*, 143 AD3d 1058, 1059 [3d Dept 2016]; *see People v Hackett*, 89 AD3d 1479, 1480 [4th Dept 2011]). Thus, " 'a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond' " (*People v Chrisley*, 172 AD3d 1914, 1915 [4th Dept 2019]).

Here, as noted, the court assessed 25 points under risk factor 2 even though the Board had recommended that five points be assessed and the People requested five points. Although the court stated during an appearance prior to the SORA hearing that "it does appear that the upward modification [sic] that was requested [in writing] by the People may be warranted in regards to the sexual intercourse factor," the court misapprehended the nature of the People's request for an upward departure, which plainly was not based on a disagreement with the Board's recommendation under risk factor 2. In any event, the court did not grant an upward departure; instead, after determining at the hearing that only five points should be assessed under risk factor 2, the court later assessed 25 points based on an indication in the case summary that defendant stated at sentencing on the qualifying offense that he had consensual sexual intercourse with the victim.

Because defendant did not have notice that the court was considering a sua sponte assessment of additional points under risk factor 2, we "reverse the order, vacate defendant's risk level determination, and remit the matter to [Supreme] Court for a new risk level determination, and a new hearing if necessary, in compliance with Correction Law § 168-n (3) and defendant's due process rights"

(*Wilke*, 181 AD3d at 1325-1326; *see Chrisley*, 172 AD3d at 1916; *Hackett*, 89 AD3d at 1480).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 19-02252

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELVIN JENKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered October 24, 2019. The judgment convicted defendant upon a jury verdict of burglary in the second degree, criminal contempt in the first degree, aggravated family offense (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 following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), criminal contempt in the first degree (§ 215.51 [b] [v]), and two counts each of aggravated family offense (§ 240.75 [1]) and endangering the welfare of a child (§ 260.10 [1]). The evidence at trial established that, on two occasions, defendant went to the victim's apartment while there was an order of protection in effect against defendant prohibiting him from having any contact with the victim. On the second occasion, defendant forced his way inside the apartment, where the victim and her daughters were sleeping. Once inside the apartment, defendant punched the victim in the head and face. According to the victim, defendant also pointed a handgun at her and threatened to kill her. After leaving the apartment, defendant walked two blocks to a friend's house, where he was arrested by the police. Defendant told the police that he went to the victim's apartment but denied that he assaulted or threatened her with a gun.

On appeal, defendant contends that Supreme Court abused its discretion in allowing the People to present evidence in their direct case that defendant had previously committed the offense of criminal mischief in the fourth degree by breaking into the victim's prior apartment and stealing her keys. We reject that contention. The

Molineux evidence was relevant to defendant's intent and to "provide background information concerning the context and history of [the] defendant's relationship with the victim" (*People v Wolff*, 103 AD3d 1264, 1265 [4th Dept 2013], *lv denied* 21 NY3d 948 [2013]; *see People v Medley*, 165 AD3d 1585, 1585-1586 [4th Dept 2018]; *People v Wertman*, 114 AD3d 1279, 1280 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014]). We note that the introduction of evidence of prior uncharged domestic violence "is especially warranted . . . where[, as here,] the crime charged has occurred in the privacy of the home and the facts are not easily unraveled" (*People v Henson*, 33 NY2d 63, 72 [1973]; *see People v Anderson*, 220 AD3d 1223, 1225 [4th Dept 2023]; *People v Roman*, 43 AD3d 1282, 1282 [4th Dept 2007], *lv denied* 9 NY3d 1009 [2007]; *People v Riley*, 23 AD3d 1077, 1077 [4th Dept 2005], *lv denied* 6 NY3d 817 [2006]).

We further conclude that, inasmuch as the prior incident of criminal mischief did not involve any allegations of violence or use of a gun, the probative value of the *Molineux* evidence outweighed its "potential for prejudice" (*People v Ely*, 68 NY2d 520, 529 [1986] [internal quotation marks omitted]; *see People v Ventimiglia*, 52 NY2d 350, 359 [1981]). Moreover, any possible prejudice to defendant was "mitigated by the court's limiting instruction" (*People v Watts*, 218 AD3d 1171, 1173 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]).

We reject defendant's remaining contention that he was deprived of a fair trial by improper comments made by the prosecutor during summation. Defendant failed to object to several of the comments, rendering his contention partially unpreserved (*see* CPL 470.05 [2]; *People v Jones*, 213 AD3d 1279, 1280 [4th Dept 2023], *lv denied* 39 NY3d 1155 [2023]). In any event, we conclude that the allegedly improper comments were either " 'fair response to the comments made by the defense' " (*People v Cooley*, 220 AD3d 1189, 1191 [4th Dept 2023]), which alleged that various prosecution witnesses had lied at trial, or were otherwise not "so pervasive or egregious as to deprive defendant of a fair trial" (*People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020] [internal quotation marks omitted]; *see People v Holmes*, 210 AD3d 1510, 1512 [4th Dept 2022], *lv denied* 39 NY3d 1073 [2023]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

103
CA 23-00367
PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, OGDEN, AND GREENWOOD, JJ.

MICHAEL FREITAS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

IMRAN AHMED, DEFENDANT-RESPONDENT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ROBERT J. MARANTO, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HINSHAW & CULBERTSON LLP, NEW YORK CITY (BRENT M. REITTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 31, 2023. The order and judgment granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: In this negligence action arising from a motor vehicle accident, plaintiff seeks damages sufficient to compensate him for diminution in market value of his vehicle, which was struck from behind by a vehicle owned and operated by defendant. Although defendant's insurance company paid plaintiff for the reasonable costs of repairs to his vehicle, plaintiff contends that, contrary to the common-law rule set forth in *Johnson v Scholz* (276 App Div 163 [2d Dept 1949]) and followed by courts in New York for the past 70-plus years, he should be able to recover *both* the cost of repairs and the diminution in value of his vehicle as a result of the accident. According to plaintiff, his repaired vehicle is worth $3,000 less than it was prior to the accident. Supreme Court granted defendant's motion for summary judgment dismissing the complaint, and we now affirm.

"The measure of damages for injury to property resulting from negligence is the difference in the market value immediately before and immediately after the accident, or the reasonable cost of repairs necessary to restore it to its former condition, whichever is lesser" (*id.* at 164; *see Angielczyk v Lipka*, 132 AD3d 1380, 1381 [4th Dept 2015]). "Where the repairs do not restore the property to its condition before the accident, the difference in market value immediately before the accident and after the repairs have been made may be added to the cost of repairs" (*Johnson*, 276 App Div at 165).

However, where “there is no dispute that the repairs fully restored the vehicle to its condition before the accident, and the only basis of the claim made by the plaintiff for the difference in value immediately before and immediately after the accident is not that [the] automobile could not be fully repaired, but, rather, that after repair the resale value would be diminished because the car had been in an accident, ‘the diminution in resale value is not to be taken into account’ ” (*Parkoff v Stavsky*, 109 AD3d 646, 648 [2d Dept 2013], *lv denied* 22 NY3d 864 [2014], quoting *Johnson*, 176 App Div at 165).

In *Franklin Corp. v Prahler* (91 AD3d 49, 50 [4th Dept 2011]), we recognized an exception to the general rule that is applicable in situations where the damaged property allegedly *appreciated* in value after its purchase and repairs would not fully restore the property to its pre-accident market value. The property at issue in *Franklin* was “ ‘a rare collector’s sports car rapidly appreciating in value’ ” (*id.*), and we held that the plaintiff was not limited to recovering the cost of repairs and that the trial court erred in denying the plaintiff’s request for a charge permitting the jury to consider the alleged diminution in the value of the vehicle. As we recognized in *Franklin*, however, the law set forth in *Johnson* still applies to property that depreciates in value after its purchase (*see id.* at 57), as is the case with most automobiles.

Here, plaintiff does not allege that his vehicle, a 2014 GMC Sierra 1500, appreciated in value after its purchase, and therefore the exception described in *Franklin* does not apply. Nor does plaintiff allege that the repairs he made to the vehicle with the insurance money received from defendant’s carrier did “not restore the property to its condition before the accident” (*Johnson*, 276 App Div at 165). Instead, plaintiff merely alleges that the repairs did not fully restore the vehicle to its pre-accident *market value*. Inasmuch as plaintiff concedes that he received payment of $8,437.03 from defendant’s insurance company to repair his vehicle and offered no evidence that the repairs did not fully restore the vehicle to its pre-accident condition, we conclude that the court properly granted summary judgment to defendant on the ground that plaintiff has been fully compensated for his loss.

We decline plaintiff’s invitation to modify the common-law rule on damages as it relates to automobiles, which is consistent with case law from the Court of Appeals on property damages in general (*see Fisher v Qualico Contr. Corp.*, 98 NY2d 534, 539-540 [2002]; *Gass v Agate Ice Cream*, *Inc.*, 264 NY 141, 143-144 [1934]; *see also* 1B NY PJI3d 2:311 at 1081-1083 [2024]).

In light of out determination, we need not address plaintiff’s remaining contention.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

110

CA 23-00929

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

IN THE MATTER OF BRANDON EVANS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 10, 2023, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated incarcerated individual rule 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon]). Supreme Court dismissed the petition, and we affirm.

Petitioner failed to raise in his administrative appeal his contention that the Hearing Officer relied on evidence outside the record in rendering a decision. Petitioner thus failed to exhaust his administrative remedies with respect to that contention, and this Court lacks the discretionary authority to consider it (*see Matter of Pierre v Annucci*, 181 AD3d 1179, 1180 [4th Dept 2020]; *Matter of Plaza v Annucci*, 173 AD3d 1778, 1778-1779 [4th Dept 2019]). Contrary to petitioner's further contention, the record does not support his claim that the Hearing Officer failed to electronically record the entire hearing (*see Matter of Olukotun-Williams v Gardner*, 221 AD3d 1164, 1165 [3d Dept 2023]; *Matter of Barnes v Annucci*, 185 AD3d 1367, 1367 [3d Dept 2020]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

112
KA 23-00419
PRESENT: SMITH, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

SEAN DYER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Onondaga County (Rory A. McMahon, J.), entered November 30, 2022. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: In this proceeding pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant, who relocated to New York State having been previously convicted of related sex offenses for possessing child pornography in California and in his prior home state of Texas, appeals from an order determining that he is a level two risk. We affirm.

Initially, we agree with defendant that Supreme Court failed to set forth its findings of fact and conclusions of law as required by Correction Law § 168-n (3) in determining defendant's request for a downward departure (*see People v Webster*, — AD3d —, —, 2024 NY Slip Op 00577, *1 [4th Dept 2024]; *People v Snyder*, 218 AD3d 1356, 1356 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]; *People v Cornwell*, 213 AD3d 1239, 1240 [4th Dept 2023], *lv denied* 39 NY3d 916 [2023]). We nonetheless conclude that "[the] omission by the court does not require remittal because the record is sufficient for us to make our own findings of fact and conclusions of law with respect to defendant's request" (*People v Augsbury*, 156 AD3d 1487, 1487 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]; *see Snyder*, 218 AD3d at 1356-1357; *see generally People v Palmer*, 20 NY3d 373, 380 [2013]).

We reject defendant's contention that he is entitled to a downward departure from his presumptive level two risk. Contrary to defendant's assertion, his lack of a prior criminal history,

satisfactory conduct while confined, strong family support network, and engagement in sex offender treatment do not constitute proper mitigating factors inasmuch as those circumstances were adequately taken into account by the risk assessment guidelines (*see People v Swartz*, 216 AD3d 1426, 1427 [4th Dept 2023], *lv denied* 40 NY3d 906 [2023]; *People v Finster*, 214 AD3d 1336, 1337 [4th Dept 2023], *lv denied* 39 NY3d 916 [2023]; *People v Scott*, 186 AD3d 1052, 1054 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]; *see also* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 13, 16-18 [2006] [Guidelines]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Although an offender's response to sex offender treatment, if exceptional, may provide a basis for a downward departure (*see* Guidelines at 17; *Swartz*, 216 AD3d at 1427), 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 People v June*, 150 AD3d 1701, 1702 [4th Dept 2017]; *People v Martinez*, 104 AD3d 924, 924-925 [2d Dept 2013], *lv denied* 21 NY3d 857 [2013]).

With respect to defendant's assertion that his advanced college degree in computer science and purported past employment history are mitigating circumstances, we conclude that defendant " 'failed to demonstrate by a preponderance of the evidence how th[ose] alleged mitigating circumstance[s] would reduce his risk of sexual recidivism or danger to the community' " (*Swartz*, 216 AD3d at 1427; *see People v Davis*, 170 AD3d 1519, 1520 [4th Dept 2019], *lv denied* 33 NY3d 907 [2019]).

Defendant correctly asserts that "a prolonged period at liberty without any reoffending sexual conduct constitutes a mitigating circumstance that is, 'as a matter of law, of a kind or to a degree not adequately taken into account by the [G]uidelines' " (*People v Gatling*, 204 AD3d 1428, 1429 [4th Dept 2022], *lv denied* 38 NY3d 912 [2022], quoting *Gillotti*, 23 NY3d at 861; *see People v Edwards*, 200 AD3d 1594, 1595 [4th Dept 2021]; *People v Sotomayer*, 143 AD3d 686, 687 [2d Dept 2016]; *see also People v Burgess*, 191 AD3d 1256, 1256-1257 [4th Dept 2021]) and that he proved the existence of that mitigating circumstance by a preponderance of the evidence (*see People v Wright*, 215 AD3d 1258, 1259 [4th Dept 2023], *lv denied* 40 NY3d 904 [2023]; *Edwards*, 200 AD3d at 1595; *cf. Gatling*, 204 AD3d at 1429-1430).

Nevertheless, even upon considering that mitigating circumstance and assuming, arguendo, that defendant established the existence of certain additional mitigating circumstances—namely, "the statistically low likelihood that a child pornography offender will commit hands-on sex offenses in the future" (*Gillotti*, 23 NY3d at 864) and the fact that points were assessed under risk factors 3 and 7 for convictions based upon the collection of a small number of images depicting child sexual abuse over a relatively brief period of time (*see People v Fernandez*, 219 AD3d 760, 762-763 [2d Dept 2023], *lv denied* 41 NY3d 902 [2024]; *People v Sestito*, 195 AD3d 869, 870 [2d Dept 2021])—we conclude that the totality of the circumstances does not warrant a downward departure inasmuch as defendant's presumptive risk level does

not represent an over-assessment of his dangerousness and risk of sexual recidivism (*see People v Burgio*, 214 AD3d 1444, 1444-1445 [4th Dept 2023], *lv denied* 39 NY3d 916 [2023]; *People v Paine*, 207 AD3d 1202, 1203 [4th Dept 2022], *lv denied* 39 NY3d 902 [2022]; *cf. People v Morana*, 198 AD3d 1275, 1276-1277 [4th Dept 2021]; *see generally People v Sincerbeaux*, 27 NY3d 683, 689-691 [2016]; *Gillotti*, 23 NY3d at 861). Indeed, defendant acknowledges in his brief on appeal that the extent of monitoring and public notification to which he was subject in Texas was “sufficient and appropriate,” and he simply requests that his classification in New York not result in “unnecessarily increased” monitoring and public notification. Contrary to defendant’s assertion, however, the record and the law establish that the relevant consequences in each state are comparable inasmuch as defendant was subject, as a level one risk under Texas’s system, to lifetime registration due to his possession of child pornography conviction and to public listing on the registry website (*see* Tex Code Crim Pro Ann arts 62.005, 62.101 [a] [2]) and inasmuch as he will likewise be subject, as a level two risk in New York, to lifetime registration (Correction Law § 168-h [2]) unless he successfully petitions for relief after 30 years (§ 168-o [1]) and to public listing on the registry website (§ 168-q).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

116
KA 23-00856
PRESENT: SMITH, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN ROBINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered January 18, 2023. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [3]). The charges arose from an incident in which defendant, while incarcerated at the Groveland Correctional Facility, assaulted two correction officers.

Defendant first contends that County Court abused its discretion in failing, sua sponte, to order a competency examination pursuant to CPL 730.30 (1), inasmuch as, prior to the altercation with the correction officers, he expressed suicidal thoughts and a desire to fight the officers and wrongly asserted that he had a 99-year sentence, and, at sentencing, he acted obstinately and engaged in a diatribe. Preliminarily, we note "that the issue of competency to stand trial may be raised on appeal despite the absence of any objection to the . . . court's failure to cause the defendant to be examined" (*People v Winebrenner*, 96 AD3d 1615, 1615 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012] [internal quotation marks omitted]).

With respect to the merits of defendant's contention, " '[i]t is fundamental that the trial of a criminal defendant while he is mentally incompetent violates due process' " (*id.* at 1616). However, a defendant in a criminal proceeding "is presumed to be competent" (*People v Tortorici*, 92 NY2d 757, 765 [1999]), and, thus, it is only when " 'the court wherein the criminal action is pending . . . is of

the opinion that the defendant may be an incapacitated person' " that it must order a competency evaluation (*id.* at 765-766, quoting CPL 730.30 [1]). "The determination of whether to order a competency hearing lies within the sound discretion of the trial court," and "[t]he sole issue [on appeal] is whether the trial court abused that discretion, not whether it might have been reasonable to order a hearing" (*id.* at 766). In reviewing a trial court's determination for an abuse of discretion, "[t]he test to be applied has been formulated as follows: 'Did the . . . judge receive information which, objectively considered, should reasonably have raised a doubt about [the] defendant's competency and alerted [the judge] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid [the defendant's] attorney in [the] defense' " (*Winebrenner*, 96 AD3d at 1616). Here, we agree with the People that there is no indication in the record that defendant "was unable to understand the proceedings or that he was mentally incompetent at the time he entered his guilty plea" (*People v Williams*, 35 AD3d 1273, 1275 [4th Dept 2006], *lv denied* 8 NY3d 928 [2007]). Neither defendant's emotional outburst during sentencing nor the evidence that at the time of the assault he was suicidal, violent, or untruthful calls into question defendant's competence to proceed, particularly where, as here, defendant was able to appropriately answer the court's questions and neither defense counsel nor the People requested a competency evaluation (*see People v Chapman*, 179 AD3d 1526, 1527 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]).

Defendant next contends that the court did not make sufficient inquiry as to the People's actual readiness for trial under CPL 30.30 (5), inasmuch as, although the People indicated their readiness for trial, they had not turned over disciplinary records for the officers involved in the underlying incident and had therefore failed to comply with their disclosure obligations under CPL 245.20 (1) (k) (iv). Defendant's statutory speedy trial contention is not preserved for appellate review "because he never moved to dismiss the indictment on that ground" (*People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Moreover, we conclude that, "[b]y subsequently pleading guilty, . . . defendant forfeited [his] contention [relating to the People's disclosure obligations] because 'the forfeiture occasioned by a guilty plea extends to claims premised upon, inter alia, . . . motions relating to discovery' " (*People v Smith*, 217 AD3d 1578, 1578 [4th Dept 2023]).

Defendant also failed to preserve for our review his challenge to the voluntariness of his plea, because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). This case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). Indeed, nothing defendant said during the plea colloquy cast "significant doubt" on defendant's guilt or otherwise called into

question the voluntariness of the plea, and the court therefore had no duty to conduct further inquiry with respect to the plea (*id.*). Contrary to defendant's contention, "a trial court has no duty, in the absence of a motion to withdraw a guilty plea, to conduct a further inquiry concerning the plea's voluntariness 'based upon comments made by [the] defendant during . . . sentencing' " (*People v Brown*, 204 AD3d 1519, 1519 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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OP 23-01632
PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
GERALD T. WALSH, ESQ., ON BEHALF OF
PEREZ M. AUGHTRY, PETITIONER,

V MEMORANDUM AND ORDER

JOHN GARCIA, ERIE COUNTY SHERIFF, RESPONDENT.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PETITIONER.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 70 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 7002 [b] [2]) seeking a writ of habeas corpus.

It is hereby ORDERED that said petition is unanimously denied without costs.

Memorandum: Petitioner commenced this original proceeding pursuant to CPLR 7002 (b) (2) seeking a writ of habeas corpus for the immediate release of Perez M. Aughtry on his own recognizance or on reasonable bail pursuant to CPL 30.30 (2) (a). Aughtry was initially arrested on December 3, 2021, and committed into custody on various charges, including one felony charge (initial charges). While Aughtry was in custody on those charges, he was arrested and arraigned on December 9, 2021, on multiple counts of misdemeanor contempt relating to a series of jail telephone calls he made to the victim (misdemeanor charges). The charges were presented to the grand jury, and Aughtry was subsequently arraigned on a four-count indictment on May 10, 2022. Petitioner seeks to have Aughtry released from custody on the ground that the People did not declare readiness for trial within the requisite 90 days pursuant to CPL 30.30 (2) (a).

Where a defendant is being held in custody on a felony, the defendant is subject to release on their own recognizance or reasonable bail if the People are not ready for trial within “ninety days from the commencement of [defendant’s] commitment to custody . . . in a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a felony” (CPL 30.30 [2] [a]; *see People ex rel. Chakwin v Warden, N.Y. City Correctional Facility*,

Rikers Is., 63 NY2d 120, 125 [1984]). Here, the record establishes that Supreme Court released Aughtry on his own recognizance pursuant to CPL 180.80 on the initial charges. At that point, Aughtry was being held on the other pending misdemeanor charges and a parole detainer and thus he was no longer "in custody" on the initial charges. We therefore conclude that his contention regarding the initial charges is academic (*see generally People ex rel. Luck v Squires*, 173 AD3d 1767, 1767 [4th Dept 2019]; *People ex rel. Valentin v Annucci*, 159 AD3d 1391, 1392 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]).

We have considered petitioner's remaining contentions and conclude they are without merit.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

150
CA 23-01618
PRESENT: WHALEN, P.J., BANNISTER, OGDEN, AND DELCONTE, JJ.

VALERIE MELDRIM AND HARMON MELDRIM,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HOLIDAY MEADOWS, LLC, PILLAR REAL ESTATE
INVESTORS, LLC, AND PILLAR REAL ESTATE
ADVISORS, LLC, DEFENDANTS-APPELLANTS.

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

ANDREWS, BERNSTEIN & MARANTO, PLLC, BUFFALO (NORTON T. LOWE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Craig D. Hannah, J.), entered September 8, 2023. The order denied the motion of defendants for summary judgment.

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

Memorandum: Valerie Meldrim (plaintiff) was injured when she tripped over the elevated edge of a parking lot at her daughter's apartment complex, which was allegedly obscured by tall grass. Defendants—the owners, operators or maintenance providers at the complex—appeal from an order denying their motion for summary judgment dismissing the complaint. We affirm.

Whether a specific condition " 'constitutes a dangerous or defective condition depends on the peculiar facts and circumstances of each case, including the width, depth, elevation, irregularity, and appearance of the defect as well as the time, place, and circumstances of the injury' " (*Wilson v 100 Carlson Park, LLC*, 113 AD3d 1118, 1119 [4th Dept 2014]), and " 'is generally a question of fact for the jury' " (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). "[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*id.*), and " '[t]he fact that a dangerous condition is open and obvious does not negate the duty to maintain premises in a reasonably safe condition, but, rather, bears only on the injured person's comparative fault' " (*Jaques v Brez Props., LLC*, 162 AD3d 1665, 1667 [4th Dept 2018]).

Here, we conclude that defendants failed to meet their initial burden of establishing that the allegedly dangerous or defective condition was nonactionable or trivial as a matter of law (*see Lupa v City of Oswego*, 117 AD3d 1418, 1419 [4th Dept 2014]; *Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533 [4th Dept 2012]). The photographs and deposition testimony submitted in support of defendants' motion describe a measurable height differential, which plaintiff's daughter testified was approximately three to four inches in depth, between the ground and the pavement edge running along the side of the parking lot that was concealed by long grass. Thus, defendants' own submissions raise a triable issue of fact whether " 'a dangerous or defective condition exist[ed] on [defendants'] property' " (*Lupa*, 117 AD3d at 1419; *see also Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000]; *Slate v Fredonia Cent. School Dist.*, 256 AD2d 1210, 1210 [4th Dept 1998]).

In addition, we conclude that defendants failed to meet their initial burden of establishing that they lacked constructive notice of the allegedly dangerous or defective condition as a matter of law (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Deposition testimony submitted in support of defendants' motion suggests that the allegedly dangerous or defective condition was in existence for at least five years prior to plaintiff's accident, during which time the lawn in that area was regularly cut, which raises a triable issue of fact whether the condition was visible and apparent and " 'exist[ed] for a sufficient length of time prior to the accident to permit defendant[s'] employees to discover and remedy it' " (*Keene v Marketplace*, 114 AD3d 1313, 1314 [4th Dept 2014]).

Because defendants "failed to meet [their] initial burden on the motion, we need not consider the sufficiency of [plaintiffs'] opposing papers" (*Lupa*, 117 AD3d at 1419; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: March 22, 2024 — Ann Dillon Flynn, Clerk of the Court

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

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CA 23-00120

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

CAROL L. JONES, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF DONALD J. JONES, DECEASED,
JONES-CARROLL, INC., AND SEALAND WASTE LLC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF CARROLL AND TOWN BOARD OF
TOWN OF CARROLL, DEFENDANTS-RESPONDENTS.

BRAUTIGAM & BRAUTIGAM, LLP, FREDONIA (DARYL P. BRAUTIGAM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS CAROL L. JONES, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF DONALD J. JONES, DECEASED, AND JONES-CARROLL, INC.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFF-APPELLANT SEALAND WASTE LLC.

HODGSON RUSS LLP, BUFFALO (JEFFREY C. STRAVINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeals from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered December 9, 2022. The order dismissed three causes of action upon a nonjury verdict.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the ordering paragraphs dismissing the causes of action and granting judgment in favor of defendants as follows:

> "It is ADJUDGED and DECLARED that Local Law No. 1 of 2007 of the Town of Carroll is valid"

and as modified the order is affirmed without costs.

Memorandum: The facts and procedural history of this case are set forth in our decisions on the prior appeals (*Jones v Town of Carroll*, 32 AD3d 1216 [4th Dept 2006], *lv dismissed* 12 NY3d 880 [2009]; *Jones v Town of Carroll* [appeal No. 1], 57 AD3d 1376 [4th Dept 2008], *revd* 15 NY3d 139 [2010], *rearg denied* 15 NY3d 820 [2010] [*Jones I*]; *Jones v Town of Carroll* [appeal No. 2], 57 AD3d 1379 [4th Dept 2008] [*Jones II*]; *Jones v Town of Carroll*, 122 AD3d 1234 [4th Dept 2014], *lv denied* 25 NY3d 910 [2015] [*Jones III*]; *Jones v Town of Carroll*, 158 AD3d 1325 [4th Dept 2018], *lv dismissed* 31 NY3d 1064 [2018] [*Jones IV*]; *Jones v Town of Carroll*, 177 AD3d 1297 [4th Dept

2019] [*Jones V*]; *Jones v Town of Carroll*, 197 AD3d 1003 [4th Dept 2021] [*Jones VI*]).

As relevant to the present appeal, plaintiff Carol L. Jones and her husband, Donald J. Jones (decedent), owned property on a portion of which plaintiff Jones-Carroll, Inc. operated a construction and demolition landfill under permits obtained from the New York State Department of Environmental Conservation (DEC) (*see Jones III*, 122 AD3d at 1235). Plaintiff Sealand Waste LLC (Sealand) is a potential buyer of the property and had previously entered into an agreement with Jones, decedent, and Jones-Carroll, Inc. providing, among other things, that Sealand would test the suitability of the property for expansion of the landfill onto the entire parcel and then enter into contract negotiations to purchase the property. Sealand thereafter applied for a DEC permit for the proposed expansion and was denied a requested federal permit as a result of Local Law No. 1 of 2007 (2007 Law). The 2007 Law had been enacted by defendants and banned the operation of any solid waste management facility in defendant Town of Carroll (Town), but exempted, inter alia, such a facility then in operation pursuant to a permit issued by the DEC under the current terms and conditions of the existing operating permit (*see Jones III*, 122 AD3d at 1235-1236). Jones, decedent, and Jones-Carroll, Inc. commenced this action seeking, inter alia, a judgment declaring that the 2007 Law is invalid on the bases that it violates substantive due process and is arbitrary and capricious. Sealand was granted status as an intervenor (*see Jones IV*, 158 AD3d at 1328). In 2022, the case proceeded to a bench trial on the causes of action asserting that the 2007 Law violates substantive due process and is arbitrary and capricious. At the close of trial, Supreme Court determined that plaintiffs had failed to prove their causes of action and dismissed them with prejudice. Plaintiffs appeal.

Where, as here, the appeal follows a nonjury trial, "the Appellate Division has 'authority . . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts' " (*Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018], quoting *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *see Buchmann v State of New York*, 214 AD3d 1412, 1413 [4th Dept 2023]). "Nonetheless, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Unger v Ganci* [appeal No. 2], 200 AD3d 1604, 1605 [4th Dept 2021] [internal quotation marks omitted]; *see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]; *Davis v Hinds*, 215 AD3d 1242, 1243 [4th Dept 2023]). Moreover, when conducting such a review, we must view the record "in the light most favorable to sustain the judgment" (*Farace v State of New York*, 266 AD2d 870, 871 [4th Dept 1999]; *see A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1286 [4th Dept 2014]). Upon conducting that review, we conclude that there is a fair interpretation of the evidence supporting the court's well-reasoned determinations. We have considered plaintiffs' specific contentions,

and we conclude that they do not require a different result.

Although we do not disturb the court’s determination of the merits, we note that the court erred in dismissing the causes of action seeking declaratory judgment and should instead have made a declaration of the parties’ rights (*see Pless v Town of Royalton*, 185 AD2d 659, 660 [4th Dept 1992], *affd* 81 NY2d 1047 [1993]; *Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984]; *Schlossin v Town of Marilla*, 48 AD3d 1118, 1119 [4th Dept 2008]). We therefore modify the order accordingly.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01176

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

VIRGINIA WILTBERGER, AS TRUSTEE AND BENEFICIARY
OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY ALLEN, BEVERLY BRITZZALARO,
LOUISE MACVIE AND TERRENCE WELSCH, AS TRUSTEES
OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST,
AND CHARLES W. CHIAMPOU, AS TRUST PROTECTOR OF THE
WALTER N. WELSCH 2006 IRREVOCABLE TRUST,
DEFENDANTS-RESPONDENTS.

LIPPES MATHIAS LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JOSHUA GLASGOW OF COUNSEL), FOR DEFENDANTS-RESPONDENTS TIMOTHY ALLEN, BEVERLY BRITZZALARO, LOUISE MACVIE AND TERRENCE WELSCH, AS TRUSTEES OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), FOR DEFENDANT-RESPONDENT CHARLES W. CHIAMPOU, AS TRUST PROTECTOR OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 27, 2023. The order, insofar as appealed from, denied the motion of plaintiff to compel the production of documents.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the first ordering paragraph is vacated, the motion to the extent that it sought an in camera review is granted and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of fiduciary duty. During discovery, defendants withheld documents set forth in a “privilege log” (withheld documents) on the ground that the documents were protected from disclosure. Plaintiff moved for, inter alia, an order compelling defendants to produce those documents and a determination that the asserted protections do not apply to the documents. Supreme Court denied plaintiff’s motion without conducting an in camera review of the withheld documents on the ground that it had already determined one or

more of the asserted protections applied to the documents in a prior action involving the parties. Plaintiff appeals from the resulting order insofar as it denied the motion. We conclude that the court erred in denying the motion to the extent that it sought an in camera review of the withheld documents to determine if any of those documents are subject to disclosure.

We agree with plaintiff that the court abused its discretion in summarily denying the motion on the basis that it had previously ruled that the withheld documents were protected from disclosure in a prior action involving the parties. Collateral estoppel bars relitigation of an issue when "the identical issue necessarily [was] decided in the prior action and [is] decisive of the present action, and . . . the party to be precluded from relitigating the issue [had] a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Preclusion of an issue occurs only if that issue was " 'actually litigated, squarely addressed and *specifically decided*' " in the prior action (*Zayatz v Collins*, 48 AD3d 1287, 1290 [4th Dept 2008] [emphasis added]). While in the prior action the court denied a motion to compel the identical documents contained in the privilege log, the court did not specifically address whether the withheld documents were protected and which protection, such as attorney-client privilege, applied to each document. Thus, there is no evidence that the identical issue, decisive in this action, was necessarily decided in the prior action (*see generally id.*; *cf. generally Marullo v Amchem Prods., Inc.*, 200 AD3d 422, 422 [1st Dept 2021]). We therefore reverse the order insofar as appealed from, vacate the first ordering paragraph, and grant the motion insofar as it sought in camera review of the withheld documents, and we remit the matter to Supreme Court to determine the motion with respect to the withheld documents following an in camera review thereof.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 19-02138
PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL GILBERT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Suzanne Maxwell Barnes, J.), rendered October 9, 2019. The judgment convicted defendant upon his plea of guilty of attempted arson in the third degree and 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 arson in the third degree (Penal Law §§ 110.00, 150.10 [1]) and attempted burglary in the second degree (§§ 110.00, 140.25 [2]). We affirm.

We agree with defendant that his waiver of the right to appeal is invalid because County Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of the waiver and failed to sufficiently identify that certain rights would survive the waiver (*see People v Appiah*, — NY3d —, 2024 NY Slip Op 00158, *1 [2024]; *People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Beach*, 217 AD3d 1593, 1593 [4th Dept 2023]). We are therefore not precluded from reviewing defendant's challenge to the severity of the period of postrelease supervision imposed in connection with his conviction of attempted burglary in the second degree (*see People v Martin*, 213 AD3d 1299, 1299-1300 [4th Dept 2023]). Nevertheless, we reject defendant's contention that the period of postrelease supervision is unduly harsh or severe.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-01434

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

YANCEY J. FRUSTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 8, 2020. The judgment convicted defendant upon a guilty plea of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On an appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), 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* (597 US 1 [2022]). Defendant failed to raise a constitutional challenge to the statute during the proceedings in Supreme Court, and therefore any such contention is unpreserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]). Contrary to defendant's further contention, his "challenge to the constitutionality of [his conviction under the] statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, — NY3d —, —, 2023 NY Slip Op 05968, *2-7 [2023]). We decline to exercise our power to review defendant's constitutional challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Although defendant also contends that his waiver of the right to appeal is invalid, we note that resolution of that issue is of no moment inasmuch as his challenge to the constitutionality of Penal Law

§ 265.03 would survive even a valid waiver of the right to appeal (*see People v Benjamin*, 216 AD3d 1457, 1457 [4th Dept 2023]; *see generally People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

165

KA 22-01931

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. LACEY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM 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 (Brian D. Dennis, J.), rendered December 6, 2022. The judgment convicted defendant upon his plea of guilty of identity theft in the first degree (two counts), identity theft in the second degree and criminal possession of stolen property in the fourth degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of identity theft in the first degree (Penal Law § 190.80 [1]), one count of identity theft in the second degree (§ 190.79 [1]), and three counts of criminal possession of stolen property in the fourth degree (§ 165.45 [2]). By pleading guilty, defendant forfeited his challenge to County Court's *Molineux* ruling (*see People v Johnson*, 195 AD3d 1420, 1421 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]; *People v Pierce*, 142 AD3d 1341, 1341 [4th Dept 2016], *lv denied* 28 NY3d 1149 [2017]; *People v Johnson*, 104 AD3d 705, 706 [2d Dept 2013]). Defendant further contends that the guilty plea was improperly entered because he gave monosyllabic, perfunctory responses to the court's questions during the plea colloquy and because statements he made at sentencing negated his guilt and thus warranted further inquiry by the court. That contention is not preserved for our review inasmuch as defendant did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Brown*, 204 AD3d 1519, 1519 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *People v Brinson*, 192 AD3d 1559, 1559-1560 [4th Dept 2021]; *People v Rathburn*, 178 AD3d 1421, 1421 [4th Dept 2019], *lv denied* 35 NY3d 944 [2020]). In any event, a defendant's monosyllabic responses to a court's questions do not render a plea invalid (*see People v Adams*, 201 AD3d 1311, 1313 [4th Dept 2022], *lv denied* 38 NY3d 1007 [2022]; *Brinson*, 192 AD3d at 1560; *Rathburn*, 178 AD3d at 1421-1422).

With respect to the statements defendant made at sentencing, we note that "a trial court has no duty, in the absence of a motion to withdraw a guilty plea, to conduct a further inquiry concerning the plea's voluntariness 'based upon comments made by [the] defendant during . . . sentencing' " (*Brown*, 204 AD3d at 1519; *see People v Mobayed*, 158 AD3d 1221, 1223 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Moreover, defendant said nothing at sentencing that called into doubt the voluntariness of his plea (*see generally People v Lopez*, 71 NY2d 662, 666 [1988]).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

177

KA 23-00293

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY LOSTUMBO, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (KENNETH H. TYLER, JR., 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 December 29, 2022. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously 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: Defendant appeals from an order determining that he is a level two risk and a sexually violent offender pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Preliminarily, although defendant's notice of appeal is premature inasmuch as it predates the order from which he purports to appeal, we exercise our discretion in the interest of justice to treat the notice of appeal as valid and deem the appeal as properly taken from the order (*see* CPLR 5520 [c]; *People v Pichcuskie*, 111 AD3d 1344, 1344 [4th Dept 2013], *lv denied* 22 NY3d 861 [2014]; *People v Cantrell*, 37 AD3d 1183, 1184 [4th Dept 2007], *lv denied* 8 NY3d 812 [2007]). Defendant contends that Supreme Court violated his right to due process by assessing 10 points under risk factor 12 for failure to accept responsibility, which assessment was not recommended by the Board of Examiners of Sex Offenders (Board) and rendered defendant a presumptive level two risk, because he lacked the requisite notice and meaningful opportunity to contest that assessment. We agree.

" 'It is well established that sex offenders are entitled to certain due process protections at their risk level classification proceedings' . . . , and the basic hallmarks of due process are notice and an opportunity to be heard" (*People v Worley*, 40 NY3d 129, 134-135 [2023]; *see Doe v Pataki*, 3 F Supp 2d 456, 471-472 [SD NY 1998]; *People v Baxin*, 26 NY3d 6, 10 [2015]; *People v David W.*, 95 NY2d 130,

138 [2000]). The statute thus provides, as relevant here, that "[i]f the [D]istrict [A]ttorney seeks a determination that differs from the recommendation submitted by the [B]oard, at least ten days prior to the determination proceeding the [D]istrict [A]ttorney shall provide to the court and the sex offender a statement setting forth the determinations sought by the [D]istrict [A]ttorney together with the reasons for seeking such determinations" (Correction Law § 168-n [3]; *see Worley*, 40 NY3d at 134). "Proper notice is essential to achieve SORA's goal that an offender arrive at the hearing informed of the bases for the Board's and the District Attorney's recommendations and is also afforded an opportunity to challenge the grounds propounded by both" (*Worley*, 40 NY3d at 135). "Otherwise, an offender would prepare for the hearing solely relying on the Board's determinations, factor by factor and point assessment by point assessment, without advance knowledge of the reasoning upon which the District Attorney will rely in support of a different offender designation, risk classification or underlying grounds," which would not comport with due process under law (*id.*). Likewise, " 'a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the [offender] of a meaningful opportunity to respond' " (*People v Chrisley*, 172 AD3d 1914, 1915 [4th Dept 2019]; *see People v Montufar-Tez*, 195 AD3d 1052, 1053 [2d Dept 2021]; *People v Maus*, 162 AD3d 1415, 1417 [3d Dept 2018]; *People v Segura*, 136 AD3d 496, 497 [1st Dept 2016]).

Here, as the People correctly concede, they failed to provide defendant with the requisite 10-day notice that they intended to seek a determination different from that recommended by the Board inasmuch as they did not request an assessment of 10 points under risk factor 12 for failure to accept responsibility until the day of the hearing (*see* Correction Law § 168-n [3]; *People v Scott*, 96 AD3d 1430, 1430 [4th Dept 2012]; *see generally Worley*, 40 NY3d at 134-136). Contrary to the People's further assertion, however, we conclude that defendant was also deprived of a meaningful opportunity to respond to the theory on which the court assessed points on that risk factor (*see Chrisley*, 172 AD3d at 1914-1916). Neither the Board nor the People requested the assessment of points under risk factor 12 on the ground that defendant's statements during his presentence interview, as recounted in the case summary, alone established that he did not accept responsibility for his sexual misconduct. The Board recommended no point assessment under that category given that defendant, despite having minimized the underlying offenses in the past, had more recently participated and made acceptable progress in sex offender treatment (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15-16 [2006]), and the People recommended the assessment of points under risk factor 12 on different grounds, primarily that defendant denied in his affirmation submitted to the SORA court that he had threatened a prosecutor during his prosecution even though that alleged conduct was ostensibly "one of his underlying charges" (*see Chrisley*, 172 AD3d at 1915). The court correctly determined, as defendant's attorney argued at the hearing, that the aforementioned denial in defendant's affirmation was unrelated to his acceptance of responsibility for his sexual misconduct because the purported threat to the prosecutor was not, as the People had

erroneously represented, one of the underlying charges. The court nonetheless further determined in its bench decision that the assessment of 10 points under risk factor 12 was warranted on a ground advanced by neither the Board nor the People, namely, that defendant's statements in his presentence interview conducted approximately seven years before the SORA hearing, as recounted in the case summary, were alone sufficient to establish by clear and convincing evidence that defendant failed to accept responsibility for his sexual misconduct. We thus conclude that the proceeding failed to comport with due process because defendant was not provided with notice or a meaningful opportunity to respond to the basis for the court's assessment of points under risk factor 12 (*see id.* at 1916; *see generally Worley*, 40 NY3d at 134-136).

Based on the foregoing, we reverse the order, vacate the risk level determination, and remit the matter to Supreme Court for a new hearing and risk level determination in compliance with SORA's procedural requirements and defendant's due process rights, i.e., "a new judicial determination of defendant's SORA classification, made after timely notice of the Board and District Attorney's recommendations and reasons in support, and upon consideration of the parties' arguments and the evidence submitted at the [new] hearing" (*Worley*, 40 NY3d at 136; *see Chrisley*, 172 AD3d at 1916). We have considered defendant's remaining contentions and conclude that they do not require a different result.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-00985

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY SAPP, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 July 22, 2020. The judgment convicted defendant upon a guilty plea of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), 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* (597 US 1 [2022]). Defendant failed to raise a constitutional challenge before the trial court, however, and therefore any such contention is unpreserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]). Contrary to defendant's contention, his "challenge to the constitutionality of [the] statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, — NY3d —, —, 2023 NY Slip Op 05968, *2-7 [2023]). We decline to exercise our power to review defendant's constitutional challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

As defendant contends and the People correctly concede, we need not consider whether he validly waived his right to appeal inasmuch as his challenge with respect to the constitutionality of Penal Law § 265.03 would survive even a valid waiver (*see People v Benjamin*, 216

AD3d 1457, 1457 [4th Dept 2023]; *see generally People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-00346
PRESENT: SMITH, J.P., CURRAN, OGDEN, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OLLIE JACKSON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered February 22, 2022. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that the waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant’s waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Albanese*, 218 AD3d 1366, 1366-1367 [4th Dept 2023], *lv denied* 40 NY3d 995 [2023]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-01625
PRESENT: SMITH, J.P., CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY STEELE, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered November 19, 2020. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on count 1 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant was acquitted of the remaining count of the indictment. Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that a new trial is warranted with respect to the criminal possession of a weapon count because he was denied his right to be present at a material stage of the trial (*see People v Turaine*, 78 NY2d 871, 872 [1991]; *People v Phillips*, 203 AD3d 1636, 1637 [4th Dept 2022]; *People v McCune*, 98 AD3d 631, 632 [2d Dept 2012]; *see generally* CPL 260.20). During the suppression hearing, allegations were made that defendant, or people acting at his behest, had threatened two witnesses to the underlying incident about testifying against defendant. The People, therefore, requested a *Sirois* hearing and sought a determination that the witnesses had been made constructively unavailable to testify at trial by threats attributable to defendant, allowing them to introduce at trial

statements made by the witnesses that would otherwise constitute inadmissible hearsay (*see generally People v Geraci*, 85 NY2d 359, 365-366 [1995]; *Matter of Holtzman v Hellenbrand*, 92 AD2d 405, 415 [2d Dept 1983]).

County Court granted the People's request and precluded defendant and defense counsel from being present during the *Sirois* hearing, instead allowing them to participate only to the extent of submitting written questions for the court's consideration. Thus, the *Sirois* hearing was conducted with only the court, the People, and the witnesses present and was essentially an ex parte proceeding. The People presented testimony from both witnesses, and the court asked the witnesses some of the written questions submitted by defendant. After the hearing, the court determined that the People had met their burden of showing, by clear and convincing evidence, that the witnesses were constructively unavailable to testify at trial and that their unavailability had been procured by defendant. Thus, it permitted the People to introduce the witnesses's statements in evidence at trial.

The court erred in conducting the *Sirois* hearing without defendant or defense counsel present. "[A] defendant's absence at a *Sirois* hearing has a substantial effect on [their] ability to defend the charges against [them] and, thus, a *Sirois* hearing constitutes a material stage of the trial" (*McCune*, 98 AD3d at 632; *see Phillips*, 203 AD3d at 1637; *People v Williams*, 125 AD3d 697, 698 [2d Dept 2015]). A "[d]efendant [is] entitled to confront the witness[es] against [them] at [such a] hearing and also to be present so that [the defendant can] advise counsel of any errors or falsities in the witness[es]' testimony which could have an impact on guilt or innocence" (*Turaine*, 78 NY2d at 872; *see Williams*, 125 AD3d at 698; *McCune*, 98 AD3d at 632).

Here, as noted above, the court precluded defendant and defense counsel from being present at the *Sirois* hearing, and merely allowed defendant to submit written questions to the court that could be asked during the ex parte proceeding (*cf. People v Babb*, 226 AD2d 469, 470 [2d Dept 1996], *lv denied* 88 NY2d 876 [1996]). Courts have previously held that a defendant's right to be present during a material stage of trial was violated where they were not physically present during the *Sirois* hearing, even where the defendant was "permitted . . . to hear a live audio transmission of the proceeding" (*Williams*, 125 AD3d at 698). Under the circumstances here, it cannot be said that defendant's right to be present during the *Sirois* hearing was not violated. The ability to submit pre-written questions before the *Sirois* hearing commenced cannot be considered a valid substitute for a defendant's ability when present to confront the witnesses, and to provide assistance to defense counsel in real time and in response to the testimony elicited by the People during the proceeding.

To the extent that the People argue that defendant waived any challenge to his exclusion from the *Sirois* hearing (*see generally People v Johnson*, 93 NY2d 254, 259 [1999]; *People v Spotford*, 85 NY2d

593, 598-599 [1995]), we conclude that the record does not show, either expressly or implicitly, that defendant voluntarily and intentionally relinquished his known right to be present during the *Sirois* hearing (*see People v Maull*, 218 AD3d 1236, 1239 [4th Dept 2023]; *People v Suttell*, 109 AD2d 249, 252 [4th Dept 1985], *lv denied* 66 NY2d 767 [1985]; *see generally Johnson v Zerbst*, 304 US 458, 464 [1938]). The court never explained to defendant the nature of his right and, although defense counsel asked the court to make inquiries of the witnesses in camera, that request was made before the People formally requested a *Sirois* hearing and cannot be construed as an express or implicit waiver of defendant's right to be present during a proceeding that had yet to be either requested or granted. Moreover, defendant's submission of written questions for the court to consider at the *Sirois* hearing cannot be considered a waiver on this record inasmuch as the court expressly stated that it was noting defendant's objection to the procedure and would "preserve [defendant's] position."

Ultimately, by precluding defendant and defense counsel from being present at the *Sirois* hearing, the court improperly deprived defendant of any real ability to confront the adverse witnesses against him or to advise defense counsel of any inconsistencies, errors or falsities in their testimony (*see Turaine*, 78 NY2d at 872). Given the nature of the accusations against him, it cannot be said that defendant's presence at the hearing "would be useless, or the benefit but a shadow" (*McCune*, 98 AD3d at 632 [internal quotation marks omitted]; *see Kentucky v Stincer*, 482 US 730, 745 [1987]). Consequently, we reverse the judgment and grant a new trial on count 1 of the indictment (*see Phillips*, 203 AD3d at 1638).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-01426
PRESENT: WHALEN, P.J., LINDLEY, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS E. FRANCO, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered August 3, 2022. The judgment convicted defendant upon a jury verdict of assault in the second degree and assault 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 by reducing the determinate term of imprisonment imposed for assault in the second degree to a term of two years and by reducing the period of postrelease supervision to a period of 1½ years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [3]) and assault in the third degree (§ 120.00 [2]). The conviction arises out of an incident in which defendant, during a physical struggle with a school resource officer, fired the officer's weapon and shot the officer in the foot.

As defendant correctly concedes, defendant's contention that the verdict is repugnant is unpreserved for our review because defendant failed to raise it before the jury was discharged (*see People v Pearson*, 192 AD3d 1555, 1556 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]; *People v Baldwin*, 173 AD3d 1748, 1749 [4th Dept 2019], *lv denied* 34 NY3d 928 [2019]; *People v Spears*, 125 AD3d 1401, 1402 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]).

Defendant contends that the evidence against him is legally insufficient to establish the intent and causation elements of assault in the second degree (Penal Law § 120.05 [3]) and the causation element of assault in the third degree (§ 120.00 [2]). With respect to the element of intent, we reject defendant's contention that, in

light of the testimony regarding his alleged intoxication and mental health crisis at the time of the incident, the evidence is not legally sufficient to support the jury's conclusion that he had the requisite intent to prevent the victim from performing a lawful duty (*see People v Stillwagon*, 101 AD3d 1629, 1630 [4th Dept 2012], *lv denied* 21 NY3d 1020 [2013]).

With respect to causation, we conclude that the evidence is legally sufficient to establish that defendant caused physical injury to the victim under Penal Law §§ 120.05 (3) and 120.00 (2), inasmuch as defendant's scuffle with the officer was a "sufficiently direct cause of the ensuing [injury]" (*People v Cipollina*, 94 AD3d 1549, 1550 [4th Dept 2012], *lv denied* 19 NY3d 971 [2012]; *see People v Pierce*, 201 AD2d 677, 678 [2d Dept 1994], *lv denied* 83 NY2d 914 [1994]).

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

Defendant further contends that County Court erred in refusing to suppress statements that he made to the victim. We reject that contention. Although defendant was in custody when he made those statements, we conclude that 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 Rivers*, 56 NY2d 476, 479 [1982], *rearg denied* 57 NY2d 775 [1982]; *see People v Ibarrondo*, 150 AD3d 1644, 1645 [4th Dept 2017]).

Finally, we agree with defendant that, under the circumstances of this case, the sentence imposed for assault in the second degree is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the determinate term of imprisonment imposed for assault in the second degree to a determinate term of two years and by reducing the period of postrelease supervision to a period of 1½ years (*see generally* CPL 470.15 [6] [b]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

198

KA 21-01582

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN RIOS, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered September 22, 2021. The judgment convicted defendant upon his plea of guilty of robbery 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 robbery in the second degree (Penal Law § 160.10 [2] [b]), defendant contends that his post-plea statements cast doubt on his guilt and require vacatur of the plea. Inasmuch as defendant's challenge to the voluntariness of the plea would survive even a valid waiver of the right to appeal (*see People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *People v Sapp*, 210 AD3d 1431, 1432 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]), we need not address the validity of the waiver of the right to appeal, which defendant does not challenge on appeal (*see People v Morseman*, 199 AD3d 1475, 1475 [4th Dept 2021]). Defendant's challenge to the voluntariness of his guilty plea, however, is not preserved for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Jones*, 211 AD3d 1489, 1490 [4th Dept 2022], *lv denied* 40 NY3d 929 [2023]; *People v Garbarini*, 64 AD3d 1179, 1179 [4th Dept 2009], *lv denied* 13 NY3d 744 [2009]), and this case does not fall within the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

199

KA 21-01661

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA P. RIVERA, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 17, 2021. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of burglary in the third degree (Penal Law § 140.20). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Fernandez*, 218 AD3d 1257, 1257-1258 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to his enhanced sentence (*see People v Johnson*, 215 AD3d 1282, 1282 [4th Dept 2023], *lv denied* 40 NY3d 929 [2023]), we nevertheless conclude that the enhanced sentence is not unduly harsh or severe.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

200
KA 18-01100
PRESENT: WHALEN, P.J., LINDLEY, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

SHAWN G. GRANGER, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, 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 (Kim H. Martusewicz, J.), rendered March 7, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree and reckless endangerment 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, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, defendant forfeited the right to raise the suppression issues on appeal inasmuch as he pleaded guilty before County Court issued a ruling thereon (*see* CPL 710.70 [2]; *People v Fernandez*, 67 NY2d 686, 688 [1986]; *People v Dix*, 170 AD3d 1575, 1576 [4th Dept 2019], *lv denied* 33 NY3d 1030 [2019]; *see also People v Monk*, 189 AD3d 1970, 1971-1972 [3d Dept 2020], *lv denied* 37 NY3d 958 [2021]).

Entered: March 22, 2024   Ann Dillon Flynn
                                                                        Clerk of the Court

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

204

CA 23-00037

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

ELIZABETH L. RILEY, AS EXECUTOR OF THE
ESTATES OF JOHN LETO AND JEANNE LETO, DECEASED,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK AND NEW YORK STATE
THRUWAY AUTHORITY, DEFENDANTS-APPELLANTS.
(CLAIM NO. 122520.)

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

BARCLAY DAMON LLP, SYRACUSE (DEBRA C. SULLIVAN OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered November 28, 2022. The order granted claimant's motion for partial summary judgment on the issue of liability and ordered a trial on the issue of damages.

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

Memorandum: In this action sounding in de facto taking, defendants appeal from an order that granted claimant's motion for partial summary judgment on the issue of liability and ordered a trial on the issue of damages. We agree with defendants that the order must be reversed.

In August 2011, defendant State of New York closed and barricaded the Lock 7 Bridge in Oswego, which provided land access to claimant's real property—used for a family fishing business—on Leto Island. The bridge was closed due to structural safety concerns, and the Lock 7 operations were moved to the eastern side of the canal. After claimant filed an amended claim, defendants moved to dismiss it. In its order denying defendants' motion to dismiss, the Court of Claims expressly declined to treat the motion as one for summary judgment, but the court nevertheless wrote that "the closure of the Lock 7 Bridge . . . deprived claimant of her sole means of legal access to her property, thereby establishing her claim for a *de facto* appropriation."

After discovery, claimant moved for partial summary judgment on the issue of liability; defendants opposed the motion. The court refused to consider defendants' proof in opposition to the motion, reasoning that any question as to whether claimant had a right of access to the bridge or whether suitable alternate access to the island existed had already been adjudicated in claimant's favor when the court denied defendants' motion to dismiss.

It is well settled that the law of the case doctrine "applies only to legal determinations that were necessarily resolved on the merits in a prior decision" (*Pettit v County of Lewis*, 145 AD3d 1650, 1651 [4th Dept 2016] [internal quotation marks omitted]), and that a court's order denying a motion to dismiss is "addressed to the sufficiency of the pleadings" and does not "establish the law of the case for the purpose of" motions for summary judgment (*Dischiavi v Calli*, 111 AD3d 1258, 1261 [4th Dept 2013] [internal quotation marks omitted]). We thus agree with defendants that the court erred in refusing to consider defendants' proof in opposition to the motion. We further agree with defendants that in opposition to claimant's motion, defendants raised triable issues of fact whether claimant had a legal right of access to the bridge and whether the bridge was the only suitable means of access to claimant's property (*see generally Weaver v Town of Rush*, 1 AD3d 920, 923-924 [4th Dept 2003]; *Gengarelly v Glen Cove Urban Renewal Agency*, 69 AD2d 524, 526-527 [2d Dept 1979]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

208
CA 23-00598
PRESENT: WHALEN, P.J., LINDLEY, GREENWOOD, AND KEANE, JJ.

MATTHEW T. MARIACHER AND LOUISE MARIACHER,
PLAINTIFFS,

V MEMORANDUM AND ORDER

LPCIMINELLI, INC., LPCIMINELLI CONSTRUCTION
CORP., DEFENDANTS-RESPONDENTS,
I.C. CONSTRUCTION SERVICES, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

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

HODGSON RUSS LLP, BUFFALO (JULIA E. MIKOLAJCZAK OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered March 8, 2023. The order granted the motion of defendants LPCiminelli, Inc., and LPCiminelli Construction Corp. seeking contractual indemnification from defendant I.C. Construction Services, Inc.

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 sustained by Matthew T. Mariacher (plaintiff) in September 2017 while he was working as a teacher assigned to bus duty outside a school. Plaintiff was standing on a sidewalk when he fell due to a drop-off between the sidewalk and the abutting grass. Plaintiffs commenced this action against defendants, various contractors who were involved in a construction project (project) at the school that was completed in July 2013. As part of the project, certain sidewalks were removed and replaced, including the sidewalk at issue here. Plaintiffs allege that the accident was caused by defendants' failure during the project to fill in the area to raise the lawn to the same height as the adjacent sidewalk.

In appeal No. 1, defendant I.C. Construction Services, Inc. (ICC) appeals from an order granting the motion of defendants LPCiminelli, Inc. (Ciminelli) and LPCiminelli Construction Corp. (Ciminelli Construction) (collectively, Ciminelli defendants) for summary judgment seeking contractual indemnification from ICC. In appeal

No. 2, ICC, the Ciminelli defendants, and defendants Lisa Doucet, doing business as Shades of Color, and Shades of Color, Inc. (collectively, SOC) separately appeal from an order denying their motions for summary judgment dismissing plaintiffs' amended complaint and all cross-claims against them.

With respect to appeal No. 2, Ciminelli Construction contends that Supreme Court erred in denying that part of the motion of the Ciminelli defendants seeking summary judgment dismissing the amended complaint and all cross-claims against Ciminelli Construction because it is not a proper defendant to the action inasmuch as it had no involvement in the project. Plaintiffs do not oppose that relief, and we therefore modify the order accordingly (*see generally Sochan v Mueller*, 162 AD3d 1621, 1622-1623 [4th Dept 2018]).

We agree with SOC with respect to appeal No. 2 that the court erred in denying its motion for summary judgment seeking dismissal of the amended complaint and all cross-claims against it, and we therefore further modify the order accordingly. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *see Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). That is because "imposing liability under such circumstances could render the contracting parties liable in tort to 'an indefinite number of potential beneficiaries' " (*Espinal*, 98 NY2d at 139, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). In *Espinal*, the Court of Appeals identified "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" (*id.* at 140), only the first of which is at issue here. The first exception applies "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church*, 99 NY2d at 111; *see Espinal*, 98 NY2d at 140, 142-143). Stated another way, a contracting party may have assumed a duty of care where, in failing to exercise reasonable care in the performance of its duties, it " 'launche[s] a force or instrument of harm' " (*Espinal*, 98 NY2d at 140; *see Bregaudit v Loretto Health & Rehabilitation Ctr.*, 211 AD3d 1582, 1583 [4th Dept 2022]).

Here, Ciminelli was the construction manager for the project and subcontracted all the work to various prime contractors, including ICC, which acted as the general contractor. The contract between Ciminelli and the City of Buffalo City School District (BCSD) included "Contract 101 - General Construction," which required Ciminelli to perform "Specification Section 02920 - Lawns and Grasses." In particular, Ciminelli was required to "renovate all existing lawn and garden areas damaged during construction . . . that are located within the project limit lines." In its contract with ICC, Ciminelli assigned Contract 101 to ICC. ICC subcontracted the sidewalk work to SOC but, in the contract between those parties, Specification Section 02920 is not listed. SOC subcontracted the sidewalk work to defendant Mark Cerrone, Inc. and did no work on the project itself.

We agree with SOC that it established that it was not responsible for filling or fine grading the area at issue, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to plaintiffs' contention, SOC is not raising that issue for the first time on appeal (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). SOC was therefore entitled to summary judgment dismissing the amended complaint against it inasmuch as it did not create the allegedly dangerous condition in the area of plaintiff's accident (*see generally Barends v Louis P. Ciminelli Constr. Co., Inc.*, 46 AD3d 1412, 1413 [4th Dept 2007]).

We agree with Ciminelli with respect to appeal No. 2 that the court erred in denying the motion of the Ciminelli defendants for summary judgment dismissing the amended complaint and all cross-claims against Ciminelli, and we therefore further modify the order accordingly. "The general rule in New York is that a party who retains an independent contractor is not liable for the independent contractor's negligent acts" (*Tschetter v Sam Longs' Landscaping, Inc.*, 156 AD3d 1346, 1347 [4th Dept 2017], citing *Kleeman v Rheingold*, 81 NY2d 270, 273-274 [1993]), but there is an exception to that rule where there has been negligent supervision on the part of the hiring party (*see Wendt v Bent Pyramid Prods., LLC*, 108 AD3d 1032, 1033 [4th Dept 2013]). Here, however, as the construction manager, Ciminelli exercised only general supervisory powers over the contractors on the project. "Neither the retention of inspection privileges nor the general power to supervise and coordinate the work being done constitutes sufficient control to render [Ciminelli] liable" (*Farnsworth v Brookside Constr. Co., Inc.*, 31 AD3d 1149, 1150 [4th Dept 2006], *lv denied* 7 NY3d 713 [2006]; *see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; *Barends*, 46 AD3d at 1413).

Contrary to the contention of ICC with respect to appeal No. 2, the court properly denied its motion for summary judgment seeking dismissal of the amended complaint and all cross-claims against it. As explained above, the contract between Ciminelli and ICC required ICC to perform all work in Contract 101, including Specification Section 02920, and ICC failed to establish that it subcontracted that work to another contractor. We conclude that ICC remained responsible for that work.

ICC contends that it did not assume a duty of care to plaintiff under *Espinal* because of the lengthy passage of time between the completion of the project and the accident (four years), the fact that no complaints were made regarding the area during those years, and the fact that BCSD accepted the work. We agree with ICC that it met its initial summary judgment burden, but we conclude that plaintiffs raised a triable issue of fact in opposition. Plaintiffs submitted the affidavit and deposition of a person who worked across the street from the school. She testified and averred that there was a noticeable drop-off between the sidewalk in question and the adjoining ground and that condition had remained the same since the project was completed. There is therefore a triable issue of fact whether ICC

negligently created a dangerous condition by failing to fine grade the area in a proper manner after the sidewalk was installed (*see Bregaudit*, 211 AD3d at 1585; *cf. Green v Incorporated Vil. of Great Neck Plaza*, 190 AD3d 702, 705 [2d Dept 2021]; *Zorin v City of New York*, 137 AD3d 1116, 1117-1118 [2d Dept 2016]; *see generally Barends*, 46 AD3d at 1413).

We reject ICC's further contention that it cannot be held liable because it was at most passively negligent for failing to notice or remedy the allegedly dangerous condition. "[A] party's passive omissions might . . . . create or exacerbate a dangerous condition" provided there is evidence linking the failure to act to the creation or exacerbation of the condition (*Santos v Deanco Servs., Inc.*, 142 AD3d 137, 142 [2d Dept 2016]; *see Somekh v Valley Natl. Bank*, 151 AD3d 783, 786 [2d Dept 2017]). Stated another way, the first *Espinal* exception "does not apply when the breach of contract consists merely in withholding a benefit . . . . where inaction is at most a refusal to become an instrument for good" (*Bregaudit*, 211 AD3d at 1583-1584 [internal quotation marks omitted]). Thus, " 'a claim that a contractor [created or] exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than [the contractor] found them' " (*id.* at 1584).

Here, viewing the evidence in the light most favorable to plaintiffs, the nonmoving parties (*see Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 496 [2019]; *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that ICC left the area in question in a more dangerous condition than when the project started (*see generally Bregaudit*, 211 AD3d at 1585). The existing sidewalks were removed and new ones installed, but the surrounding ground was not made level with the new sidewalk. Thus, ICC was not entitled to summary judgment dismissing the amended complaint against it pursuant to *Espinal* (*see generally Kappes v Cohoes Bowling Arena*, 2 AD3d 1034, 1035 [3d Dept 2003]).

We reject ICC's contention with respect to appeal No. 1 that the court erred in granting the motion of the Ciminelli defendants for summary judgment seeking contractual indemnification. The indemnification provision in the contract between Ciminelli and ICC required ICC to indemnify Ciminelli "for damages because of bodily injuries . . . arising out of or resulting from performance of [ICC's] Work." Ciminelli established as a matter of law that it was not negligent and that plaintiff's injuries arose out of ICC's work (*see Vega v FNUB, Inc.*, 217 AD3d 1475, 1479 [4th Dept 2023]). Contrary to ICC's contention, under the broad indemnification provision here, a finding of negligence by ICC was not required (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Vega*, 217 AD3d at 1479).

Entered: March 22, 2024 Ann Dillon Flynn
Clerk of the Court

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

209
CA 23-00622
PRESENT: WHALEN, P.J., LINDLEY, GREENWOOD, AND KEANE, JJ.

MATTHEW T. MARIACHER AND LOUISE MARIACHER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LPCIMINELLI, INC., LPCIMINELLI CONSTRUCTION CORP.,
I.C. CONSTRUCTION SERVICES, INC., LISA DOUCET, DOING
BUSINESS AS SHADES OF COLOR, SHADES OF COLOR, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

HODGSON RUSS LLP, BUFFALO (JULIA E. MIKOLAJCZAK OF COUNSEL), FOR DEFENDANTS-APPELLANTS LPCIMINELLI, INC. AND LPCIMINELLI CONSTRUCTION CORP.

LIPPMAN O'CONNOR, BUFFALO (MATTHEW J. DUGGAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS LISA DOUCET, DOING BUSINESS AS SHADES OF COLOR AND SHADES OF COLOR, INC.

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-APPELLANT I.C. CONSTRUCTION SERVICES, INC.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (WILLIAM J. HALLETT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (John B. Licata, J.), entered March 8, 2023. The order denied the motions of defendants LPCiminelli, Inc., LPCiminelli Construction Corp., Lisa Doucet, doing business as Shades of Color, Shades of Color, Inc., and I.C. Construction Services, Inc. for summary judgment dismissing plaintiffs' amended complaint and all cross-claims against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants LPCiminelli, Inc. and LPCiminelli Construction Corp. and the motion of defendants Lisa Doucet, doing business as Shades of Color, and Shades of Color, Inc. and dismissing the amended complaint and all cross-claims against those defendants, and as modified the order is affirmed without costs.

Same memorandum as in *Mariacher v LPCiminelli, Inc.* ([appeal No. 1] — AD3d — [Mar. 22, 2024] [4th Dept 2024]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

210.1
CA 23-00597
PRESENT: WHALEN, P.J., LINDLEY, GREENWOOD, AND NOWAK, JJ.

PATRICK KALETA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ASHLEY KALETA, DEFENDANT-APPELLANT.

MATTINGLY CAVAGNARO LLP, BUFFALO (CHRISTOPHER S. MATTINGLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES P. RENDA, WILLIAMSVILLE, COHEN CLAIR LANS GREIFER & SIMPSON LLP, NEW YORK CITY (DAVID V. SANCHEZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

CHARLES A. MESSINA, BLASDELL, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 22, 2022. The order, inter alia, granted plaintiff primary physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and facts without costs, the motion of defendant is granted insofar as it sought primary physical custody of the parties' child, the motion of plaintiff is denied insofar as it sought the same relief, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In this postjudgment matrimonial proceeding, plaintiff father and defendant mother each moved for an order directing, inter alia, that the custody arrangement established by their property settlement agreement (settlement agreement), which was incorporated but not merged into the judgment of divorce, be modified by awarding the movant primary physical custody of the parties' child. The mother now appeals from an order that, inter alia, granted the father primary physical custody of the child. We agree with the mother that Supreme Court's determination lacks a sound and substantial basis in the record.

The parties separated when the child was one year old, at which time the mother moved from the parties' shared residence in the Buffalo area to the Syracuse area. The parties have shared joint custody of the child, with neither party designated as the primary residential parent, since that separation. The settlement agreement provided that this custody arrangement would continue until the child became old enough to attend grammar school, at which point the parties would attempt to reach agreement as to the parent with whom the child would primarily reside for the purpose of attending school. In the

event the parties could not agree, the settlement agreement provided that the parties would seek judicial intervention without the necessity of showing a change in circumstances.

In making a custody determination, " 'the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of [the parties] to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is determinative because the court must review the totality of the circumstances' " (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]; *see Eschbach v Eschbach*, 56 NY2d 167, 171-173 [1982]). A court's evaluation of a child's best interests is entitled to great deference and will not be disturbed as long as it is supported by a sound and substantial basis in the record (*see Sheridan*, 129 AD3d at 1568; *Matter of Thillman v Mayer*, 85 AD3d 1624, 1625 [4th Dept 2011]).

Initially, we agree with the court that both parties are "fit parents" with "stable homes" who are "dedicated to guiding their child's well-being." The record also reflects that both parties have shown a willingness to coparent and foster the child's relationship with the other party for the benefit of the child. In determining that the child's primary physical custody should be awarded to the father, however, the court gave undue weight to the mother's residence in the Syracuse area. Although a parent's unilateral determination to move a child away from the other parent would be a factor for a court's consideration (*see Matter of Tekeste B.-M. v Zeineba H.*, 37 AD3d 1152, 1153 [4th Dept 2007]), the record here does not support the court's conclusion that the mother intentionally disregarded the child's best interests and interfered with the child's ability to bond with the father by moving away from the Buffalo area. Instead, the record establishes that, four years prior to the instant proceeding, the mother relocated with the father's full knowledge out of practical necessity, at which time the parties established a plan for relatively equal access of each parent to the child. Further, by focusing almost exclusively on its own expectation that the mother should move back to the Buffalo area, a scenario neither anticipated by the parties' settlement agreement nor realistically available to the mother on this record, the court failed to make "a careful and studied review of all the relevant factors" (*Eschbach*, 56 NY2d at 174), including the child's significant ties to the Syracuse area. We remind the court that " 'an award of custody must be based on the best interests of the child[ ] and not a desire to punish a[n allegedly] recalcitrant parent' " (*Tekeste B.-M.*, 37 AD3d at 1153; *see Verity v Verity*, 107 AD2d 1082, 1084 [4th Dept 1985], *affd* 65 NY2d 1002 [1985]). We are also compelled to remind the court that the disclosure of any statement made by a child during a confidential *Lincoln* hearing is improper, regardless of how innocuous that statement may appear to be (*see Matter of Carter v Work*, 100 AD3d 1557, 1558 [4th Dept 2012]; *Matter of Spencer v Spencer*, 85 AD3d 1244, 1246 [3d Dept 2011]).

Upon our review of the record, we conclude that the court's determination to award primary physical custody to the father lacks an

evidentiary basis in the record (*cf. Matter of DeVore v O'Harra-Gardner*, 177 AD3d 1264, 1266 [4th Dept 2019]). The evidence presented at the hearing established that the mother's weekday and daytime work schedule more closely aligns with the child's school schedule. Although the mother's work day will start earlier than the child's school day, the mother testified to the specific arrangements that she had made to allow the child to have a consistent routine in the morning. In contrast, the father testified that his work schedule includes at least two weeknight commitments and frequent out-of-town travel on weekends during the majority of the school year. The father had no specific plan for child care during those times, but instead he speculated that the then-five-year-old child could either come with him to work, stay with relatives in the Buffalo area, or even be returned to the mother. We conclude that, despite the fitness of both parents, it is in the best interests of the child to award primary physical residence of the child to the mother. We therefore reverse the order and we remit the matter to Supreme Court to fashion an appropriate visitation schedule with the father.

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

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

211
KA 19-02180
PRESENT: SMITH, J.P., CURRAN, MONTOUR, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

DON SPENCER WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered October 16, 2019. The judgment convicted defendant, upon a guilty plea, of aggravated family offense.

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 aggravated family offense (Penal Law § 240.75 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Mowery*, 213 AD3d 1300, 1300 [4th Dept 2023]; *People v Shaffer*, 210 AD3d 1452, 1452-1453 [4th Dept 2022]; *People v Davis*, 189 AD3d 2140, 2141 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

212

KA 22-00612

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MEGAN ZONA, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN, LLP, ROCHESTER (DAVID M. ABBATOY, JR., 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 (Michael L. Dollinger, J.), rendered December 15, 2021. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on count 2 of the indictment.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [3]), in connection with allegations that she committed a sex offense against the seven-year-old victim.

As defendant contends and the People correctly concede, the victim's trial testimony rendered the indictment with respect to count 2 duplicitous. "Even if a count facially charges one criminal act, that count is duplicitous if the evidence makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict" (*People v Dalton*, 27 AD3d 779, 781 [3d Dept 2006], *lv denied* 7 NY3d 754 [2006], *reconsideration denied* 7 NY3d 811 [2006]; *see People v Dukes*, 122 AD3d 1370, 1371 [4th Dept 2014], *lv denied* 26 NY3d 928 [2015]; *People v Casiano*, 117 AD3d 1507, 1510 [4th Dept 2014]). Here, count 2 of the indictment charged defendant with sexual abuse in the first degree regarding an alleged instance, occurring between July 2012 and January 2013, in which she subjected the victim to sexual contact when he was less than 11 years old. At trial, however, the victim testified to multiple acts of sexual contact during the relevant time frame, any one of which could serve as the sexual contact necessary to prove defendant's guilt of count 2.

Because each act of alleged sexual contact constitutes "a

separate and distinct offense” (*Dukes*, 122 AD3d at 1372 [internal quotation marks omitted]), the victim’s testimony that numerous such acts occurred during the relevant time frame rendered count 2 of the indictment duplicitous. Indeed, “ ‘it is impossible to verify that each member of the jury convicted defendant for the same criminal act’ ” in connection with count 2 (*People v Bennett*, 52 AD3d 1185, 1186 [4th Dept 2008], *lv denied* 11 NY3d 734 [2008]; *see generally People v Keindl*, 68 NY2d 410, 417-418 [1986]; *People v Kirk*, 96 AD3d 1354, 1357 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013]). Additionally, we conclude that, for similar reasons, it is impossible to determine whether defendant was convicted of an act for which she was not indicted (*see People v Graves*, 136 AD3d 1347, 1348 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]; *Dukes*, 122 AD3d at 1372).

Under the unique circumstances of this case, we do not think it is necessary to dismiss the indictment with leave to re-present to another grand jury (*cf. People v Baek*, 207 AD3d 1086, 1087-1088 [4th Dept 2022]; *Dukes*, 122 AD3d at 1372). We also decline to dismiss the indictment with prejudice (*cf. People v McNab*, 167 AD2d 858, 858 [4th Dept 1990]). Rather, the errors here are not ones that directly relate to the indictment and are easily corrected by a proper charge specifying the proof applicable to the relevant count (*see People v Jackson*, 174 AD2d 444, 446 [1st Dept 1991], *appeal dismissed* 80 NY2d 112 [1992]). We are not required to dismiss the indictment based on double jeopardy concerns inasmuch as defendant here was acquitted of a course of conduct crime and convicted of a single act crime. Consequently, this case is unlike those cases where the defendant is acquitted of some single act crimes and convicted of others, where it is impossible to determine with any confidence that the jury agreed on which act the People did not meet their ultimate burden (*cf. McNab*, 167 AD2d at 858). Consequently, we reverse and grant defendant a new trial on count 2 of the indictment (*see Jackson*, 174 AD2d at 444).

Contrary to defendant’s further contention, defense counsel was not ineffective in failing to seek dismissal of the indictment on statute of limitations grounds, inasmuch as such a motion had “ ‘little or no chance of success’ ” (*People v Caban*, 5 NY3d 143, 152 [2005]; *see generally People v Quinto*, 18 NY3d 409, 417-418 [2012]; *People v Turner*, 5 NY3d 476, 481 [2005]).

In light of our conclusion, defendant’s remaining contentions are academic.

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-00485

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

IN THE MATTER OF JUSTICE H.M. AND LIBERTY D.M.-S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JULIA S., RESPONDENT-APPELLANT.

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

GABRIELLE GANNON, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JORDYN E. SCHENK OF COUNSEL), ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 16, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed respondent and the subject children under the supervision of petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, although now expired, brings up for review the underlying fact-finding order wherein Family Court found that the mother neglected the subject children (*see Matter of Bentley C. [Zachary D.]*, 165 AD3d 1629, 1629 [4th Dept 2018]; *Matter of Syira W. [Latasha B.]*, 78 AD3d 1552, 1552 [4th Dept 2010]; *Matter of Jimmy D.*, 302 AD2d 892, 892 [4th Dept 2003], *lv denied* 100 NY2d 503 [2003]). We agree with the mother that the court's finding of neglect is not supported by the requisite preponderance of the evidence (*see generally* Family Ct Act § 1046 [b] [i]).

As relevant here, the Family Court Act defines a neglected child as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, [or] shelter . . . though financially able to do so or offered financial or other reasonable means to do so" (Family Ct Act § 1012 [f] [i] [A]). The statute also provides that a parent is responsible for educational neglect when,

under the same requisite conditions, the parent fails to supply the child with "adequate . . . education in accordance with the provisions of [the compulsory education part of Education Law article 65] . . . notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition" (*id.*; *see Matter of Matthew B.*, 24 AD3d 1183, 1183 [4th Dept 2005]).

"The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]; *see* Family Ct Act § 1046 [b] [i]). "First, there must be 'proof of actual (or imminent danger of) physical, emotional or mental impairment to the child' " (*Afton C.*, 17 NY3d at 9, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]). "In order for danger to be 'imminent,' it must be 'near or impending, not merely possible' " (*id.*, quoting *Nicholson*, 3 NY3d at 369). "This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior" (*Nicholson*, 3 NY3d at 369). "Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances . . . Critically, however, the statutory test is *minimum* degree of care—not maximum, not best, not ideal—and the failure must be actual, not threatened" (*Afton C.*, 17 NY3d at 9 [internal quotation marks omitted]).

As a preliminary matter, the Attorney for the Children (AFC) asserts on appeal that we may consider allegations drawn from the petition and evidence adduced at the dispositional hearing in determining whether petitioner established by a preponderance of the evidence that the mother neglected the children. That assertion is devoid of merit. "[O]nly competent, material and relevant evidence may be admitted" at a fact-finding hearing to determine whether a child is an abused or neglected child as defined by Family Court Act article 10 (§ 1046 [b] [iii]; *see* § 1044; *Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1491 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]), and "only the evidence presented at the fact-finding hearing" may be considered by the courts in determining whether the petitioner established by a preponderance of the evidence that the child is an abused or neglected child (*Matter of Sheila G.*, 61 NY2d 368, 386-387 [1984]; *see* §§ 1046 [b] [i]; 1047 [a]).

Upon consideration of the evidence presented at the fact-finding hearing, we agree with the mother that petitioner failed to establish that the mother neglected the children. Although there was evidence of some unsanitary conditions in the mother's apartment, petitioner's caseworker testified that the apartment "met minimal standards" when she personally observed it and when the petition was filed, and we therefore conclude that the evidence was not sufficient to establish that the mother neglected the children by failing to supply adequate

shelter (*see* Family Ct Act § 1012 [f] [i] [A]; *Matter of Silas W. [Natasha W.]*, 207 AD3d 1234, 1235 [4th Dept 2022]; *cf. Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1280 [4th Dept 2014]).

Next, to the extent that petitioner alleged and the court found that the mother committed educational neglect with respect to the older child, we agree with the mother that, contrary to the assertions of petitioner and the AFC, the court's determination lacks a sound and substantial basis in the record. It is undisputed that the older child had not attained the age of six by December 1 of the year in which the educational neglect was alleged to have taken place, and thus his attendance at school was not mandated by article 65 of the Education Law (*see* §§ 3205 [1] [a], [c]; 3212 [2] [b]; *Matthew B.*, 24 AD3d at 1183). Inasmuch as "article 65 did not require [the older child's] attendance at school, [the mother] had no duty to supply [the older child] with adequate education within the meaning of Family Court Act § 1012 (f) (i) (A)" (*Matthew B.*, 24 AD3d at 1183-1184).

We further agree with the mother that petitioner failed to meet its burden of establishing by a preponderance of the evidence that the mother neglected the children with respect to their hygiene and clothing. The testimony of petitioner's witnesses demonstrated, at most, that "the manner in which [the children] dressed and attended to hygiene [was] less than optimal, but it did not appear that those conditions resulted in any actual [or imminent] physical, emotional, or mental impairment to the children" (*Matter of Christian J.S. [Jodi A.F.]*, 132 AD3d 1355, 1357 [4th Dept 2015]; *see Matter of Jalesa P. [Georgia P.]*, 75 AD3d 730, 733 [3d Dept 2010]).

With respect to the mother's purported mental health condition, although "a finding of neglect based on mental illness need not be supported by a particular diagnosis or by medical evidence" (*Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1404 [4th Dept 2016]), " '[p]roof of mental illness alone will not support a finding of neglect . . . The evidence must establish a causal connection between the parent's condition, and actual or potential harm to the child[ren]' " (*Matter of Jesus M. [Jamie M.]*, 118 AD3d 1436, 1437 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]). Here, petitioner did not present any diagnostic or medical evidence at the fact-finding hearing and instead relied entirely on the mother's purported paranoid and disoriented behavior and rambling conversational style to establish that the mother suffered from mental illness. Even assuming, arguendo, that petitioner established that the mother suffered from an untreated mental health condition on those bases (*see e.g. Thomas B.*, 139 AD3d at 1403-1404), we conclude that petitioner failed to establish by the requisite preponderance of the evidence a causal connection between the mother's mental health condition and any actual or imminent harm to the children (*see Jesus M.*, 118 AD3d at 1437; *see also Matter of*

Lacey-Sophia T.-R. [Ariela (T.)W.], 125 AD3d 1442, 1445 [4th Dept 2015]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-00794
PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF MARK J. BONNER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VINA C. BONNER, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

KATHARINE F. WOODS, ROCHESTER, FOR RESPONDENT-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (James K. Eby, R.), entered October 31, 2022, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same memorandum as in *Matter of Bonner v Bonner* ([appeal No. 2] — AD3d — [Mar. 22, 2024] [4th Dept 2024]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

241
CAF 23-00795
PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF VINA C. BONNER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARK J. BONNER, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

KATHARINE F. WOODS, ROCHESTER, FOR PETITIONER-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (James K. Eby, R.), entered November 30, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner primary physical custody of the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 6, respondent-petitioner father appeals, in appeal No. 1, from an order that dismissed his custody petition. In appeal No. 2, the father appeals from an order that, inter alia, granted petitioner-respondent mother primary physical custody of the subject child. We affirm in both appeals.

Contrary to the father's contention, Family Court did not err in awarding primary physical custody of the subject child to the mother. It is well settled that " 'a court's determination regarding custody . . . , based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Matter of DeVore v O'Harra-Gardner*, 177 AD3d 1264, 1266 [4th Dept 2019]). Here, we perceive no basis to disturb the court's credibility assessment and factual findings, and we conclude that its

custody determination is supported by a sound and substantial basis in the record (*see id.*).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-01473
PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND KEANE, JJ.

IN THE MATTER OF TARA J. MELISH, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY J. RINNE, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

TARA J. MELISH, PETITIONER-APPELLANT PRO SE.

JEFFREY J. RINNE, RESPONDENT-RESPONDENT PRO SE.

MICHELE A. BROWN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered August 31, 2023, 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.

Same memorandum as in *Matter of Melish v Rinne* ([appeal No. 2] — AD3d — [Mar. 22, 2024] [4th Dept 2024]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-01474
PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND KEANE, JJ.

IN THE MATTER OF TARA J. MELISH, PETITIONER-APPELLANT,

V — MEMORANDUM AND ORDER

JEFFREY J. RINNE, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

TARA J. MELISH, PETITIONER-APPELLANT PRO SE.

JEFFREY J. RINNE, RESPONDENT-RESPONDENT PRO SE.

MICHELE A. BROWN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered August 31, 2023, in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petition and denied petitioner's motion for permission for the subject children to accompany her on a sabbatical from November 26, 2023 to January 28, 2024.

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

Memorandum: In appeal No. 2, petitioner mother appeals from an order that denied her motion seeking to enforce the sabbatical provision of the parties' custody agreement and allow her to take the parties' two children with her on her sabbatical to Barcelona, Spain, from November 26, 2023, through January 28, 2024, and dismissed her petition seeking the same relief. In appeal No. 1, the mother appeals from an order that dismissed the petition. Initially, we dismiss the appeal from the order in appeal No. 1 because that order is duplicative of the order in appeal No. 2 (*see Matter of Machado v Tanoury*, 142 AD3d 1322, 1322-1323 [4th Dept 2016]).

We agree with the father in appeal No. 2 that, because the period of time for which the mother sought permission to travel with the children expired during the pendency of this appeal, the mother's appeal has been rendered moot (*see Matter of Fredericks v Ambrose*, 100 AD3d 632, 632-633 [2d Dept 2012]; *see generally Matter of Upstate Univ. Hosp. v Jason L.*, 219 AD3d 1147, 1150 [4th Dept 2023]). Contrary to the mother's contention, under the circumstances of this case, the exception to the mootness doctrine does not apply (*see*

generally Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715 [1980]).

Entered: March 22, 2024

Ann Dillon Flynn
Clerk of the Court