SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 7, 2021

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED MAY 7, 2021

_____	854	CA 19 01080	COALITION FOR COBBS HILL V CITY OF ROCHESTER
_____	859	CA 19 01977	COBBS HILL VILLAGE TENANTS' ASSOCIA V CITY OF ROCHESTER
_____	960	CA 19 02261	CHARITIE JOHNSON In the Matter of SYLVIA FERINCZ
_____	967	CA 19 02325	NATIONAL FUEL GAS DISTRIBUTION CORP V NIAGARA FALLS WATER BOARD
_____	1003	CA 19 02293	RIEDMAN ACQUISITIONS, LLC V TOWN BOARD OF TOWN OF
_____	1004	CA 19 02370	RIEDMAN ACQUISITIONS, LLC V TOWN BOARD OF TOWN OF
_____	1018	KA 18 01173	PEOPLE V DERON MCGEE
_____	1027	CA 19 02196	PAULINE KINACH V TOPS MARKETS, LLC
_____	1028	CA 19 01828	SAMUEL J. CAPIZZI V BROWN CHIARI LLP
_____	1029	CA 19 02042	SAMUEL J. CAPIZZI V BROWN CHIARI LLP
_____	1034	CA 20 00258	RYAN LYNCH V PREFERRED MUTUAL INSURANCE COMPANY
_____	1075	CA 19 01501	TOWN OF TONAWANDA POLICE CLUB, INC. V TOWN OF TONAWANDA
_____	1080	KA 20 00563	PEOPLE V WILLIAM LEWIS
_____	1090	CA 19 01786	DIAMONDS M. CAIN-HENRY V RAMONA SHOT
_____	1093	CA 20 00364	FRANCK BISIMWA V ST. JOHN FISHER COLLEGE
_____	1096	CA 20 00486	NICOLE ELIZABETH DILL V CHARLOTTE LAHR
_____	1131	KA 17 00112	PEOPLE V BRIAN K. BAGLEY
_____	1142	CA 20 00028	PARSONS MCKENNA CONSTRUCTION CO., I V ALLIED INSURANCE COMPANIES
_____	1184	CA 19 01833	OSVALDO GARCIA V TOWN OF TONAWANDA
_____	1185	CA 20 00151	CHIAMPOU TRAVIS BESAW & KERSHNER, L V GERALD F. PULLANO
_____	1205	CA 19 02264	SUZANNE P. V JOINT BOARD OF DIRECTORS OF ERIE-

_____	1222	CA 20 00117	PB-7 DOE V AMHERST CENTRAL SCHOOL DISTRICT
_____	1240	CA 20 00266	NICHOLAS SIMS V SAMUEL A. REYES, M.D.
_____	1240.1	CA 20 01059	NICHOLAS SIMS V SAMUEL A. REYES, M.D.
_____	1259	CA 19 01858	CARL MYERS ENTERPRISES, INC. V TOWN OF CONESUS ZONING BOARD OF APP
_____	7	KA 17 02068	PEOPLE V NELSON F. MATEO, JR.
_____	56	KA 18 01541	PEOPLE V DAWUD ABDULLAH
_____	64	CA 19 02169	ROBERT L. DODGE V ERNEST W. BAKER, JR.
_____	96	KA 17 00901	PEOPLE V JONATHAN ORTIZ
_____	99	KA 20 00571	PEOPLE V JAMES R. WILCOX
_____	142	KA 18 02283	PEOPLE V JAKHARI MERIDY
_____	143	KA 15 01642	PEOPLE V VANDON JONES
_____	145	KA 19 01654	PEOPLE V JULIAN MURRAY
_____	149	CA 20 00689	NATIONSTAR MORTGAGE, LLC V GEORGE KARADIMAS
_____	155	CA 20 00507	TOM SCHLEE V CLARENCE E.
_____	161	KA 19 00078	PEOPLE V TAYLOR T. BOJE
_____	187	KA 20 00419	PEOPLE V CHRISTOPHER CREMEANS
_____	191	KA 17 01715	PEOPLE V JAMES E. HALL, II
_____	204.1	CA 20 00037	HABIBA ABDELALL V NIAGARA FRONTIER TRANSIT METRO S
_____	237	CAF 20 00355	Mtr of DEANGELO B.-K.
_____	238	CAF 20 00356	Mtr of GAKAI L.
_____	303	KA 20 01369	PEOPLE V BAJHAT IBRAHIM
_____	315	CA 20 00220	KEITH MARIANI V GUARDIAN FENCES OF WNY, INC.
_____	318	KA 18 01975	PEOPLE V GRANT PRICE
_____	325	OP 20 00556	MONTGOMERY BLAIR SIBLEY V CHAUNCEY JOSEPH WATCHES
_____	329	CA 19 02155	KIMBERLY STRIBING V WENDEL & LOECHER, INC.
_____	330	CA 19 02327	KIMBERLY STRIBING V WENDEL & LOECHER, INC.
_____	331	CA 20 01399	KIMBERLY STRIBING V WENDEL & LOECHER, INC.
_____	332	CA 20 01402	KIMBERLY STRIBING V WENDEL & LOECHER, INC.
_____	333	OP 20 00776	MONTGOMERY BLAIR SIBLEY V STEUBEN COUNTY PISTOL PE
_____	350	CAF 19 02017	Mtr of BALLE S.
_____	351	CAF 19 01596	Mtr of NATALEE F.

_____	364	KA 19 00204	PEOPLE V CHRISTOPHER C. BROWN
_____	365	KA 19 01899	PEOPLE V TASHEEM M. BROWN
_____	384	KA 17 00275	PEOPLE V ARSENIO J. JOHNSON
_____	394	CAF 19 02323	Mtr of FAITH K.
_____	395	CAF 20 00015	Mtr of FAITH K.
_____	396	CAF 20 00450	Mtr of FAITH K.
_____	404	TP 20 01019	JULIO NOVA V ANTHONY ANNUCCI
_____	406	KA 19 01737	PEOPLE V LEON THOMAS
_____	407	KA 20 00077	PEOPLE V JOHNNY Q. RUSSELL
_____	409	KA 18 02048	PEOPLE V DASHAWN SMITH
_____	410	KA 18 01079	PEOPLE V PARISH M. STREETER
_____	411	KA 19 00930	PEOPLE V JOHNTAVIOUS DODSON
_____	412	KA 18 00918	PEOPLE V KEVIN JOHNSON
_____	413	KA 17 00279	PEOPLE V JOSEPH A. DEVALLE
_____	414	CAF 20 00205	Mtr of LIL B. J.-Z.
_____	415	CAF 20 00240	Mtr of LIL B. J.-Z.
_____	419	CAF 20 00357	Mtr of DEANGELO B.-K.
_____	420	CAF 20 00358	Mtr of GAKAI L.
_____	438	CAF 19 01716	JOSE A. RODRIGUEZ V MYRNA RODRIGUEZ
_____	443	CA 20 00583	JENNIFER SKY V CATHOLIC CHARITIES OF BUFFALO, NY
_____	455	KA 17 00272	PEOPLE V WILLIE JENNINGS
_____	456	KA 19 01892	PEOPLE V WILLIE JENNINGS
_____	460	CA 20 00380	KATHY ANN JONES V JOHN P. SULLIVAN, M.D.
_____	461	CA 20 01026	STANLEY MARACLE V COLIN C. HART DEVELOPMENT COMPAN
_____	468	KA 18 01837	PEOPLE V ALEC W. LINN
_____	469	KA 14 00588	PEOPLE V LAVEEDA L. COLLINS
_____	470	KA 19 01635	PEOPLE V KADESHA MAYE
_____	473	KA 19 00154	PEOPLE V KEMAR PERTILLAR
_____	474	KA 17 00132	PEOPLE V TIMOTHY T. POWELL
_____	475	KA 19 01691	PEOPLE V KEIR A. GROSSE RHODE

_____	478	KA 19 00326	PEOPLE V JACOB A. MYERS
_____	479	CAF 19 02103	FRANCIS D. MENARD V CHRISTINA M. ROBERTS

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

854

CA 19-01080

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF COALITION FOR COBBS HILL, BY ITS CO-CHAIRPERSON THOMAS PASTECKI, COBBS HILL VILLAGE TENANTS' ASSOCIATION, BY ITS PRESIDENT LEE SENGBUSCH, LEE SENGBUSCH, CAROLINE REAMORE, KENNETH BOICE, CAROL WILSON, BARBARA VANWIE, BRENT GRATTAN, THE ABC STREETS NEIGHBORHOOD ASSOCIATION, INC., THE FRIENDS OF WASHINGTON GROVE, INC., UPPER MONROE NEIGHBORHOOD ASSOCIATION, BY ITS PRESIDENT CHRISTENA STEVENS, AND NUNDA BOULEVARD ASSOCIATION, BY ITS PRESIDENT JEFF MILLS, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, CITY OF ROCHESTER PLANNING COMMISSION, CITY OF ROCHESTER MANAGER OF ZONING, PLYMOUTH GARDENS, INC., ROCHESTER MANAGEMENT, INC., RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.

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

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (THOMAS J. WARTH OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS CITY OF ROCHESTER, CITY OF ROCHESTER PLANNING COMMISSION, AND CITY OF ROCHESTER MANAGER OF ZONING.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS PLYMOUTH GARDENS, INC., AND ROCHESTER MANAGEMENT, INC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (William K. Taylor, J.), entered May 2, 2019 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, dismissed the petition-complaint.

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

Memorandum: This appeal involves the redevelopment of Cobbs Hill Village, an affordable housing community for seniors located on property owned by respondent-defendant Plymouth Gardens, Inc. (Plymouth). In 1957, after receiving approval from the New York State

Legislature (L 1956, ch 453), respondent-defendant City of Rochester (City) sold the Cobbs Hill Village property to Plymouth's predecessor in interest. The deed conveying the property to Plymouth (1957 deed) contained several restrictive covenants, one of which provided that ownership of the property would revert to the City once the mortgage on it had been repaid in full. Another required that any plans or specifications for construction on the property "be subject to the approval of" respondent-defendant City of Rochester Planning Commission (CPC). In 1957, Cobbs Hill Village, which contained 60 apartment units, was constructed on the property.

In 2016, Plymouth and respondent-defendant Rochester Management, Inc. (collectively, corporate respondents) announced their intent to redevelop Cobbs Hill Village by demolishing the existing complex and constructing in its place several new apartment buildings containing over 100 apartment units (Project). Shortly thereafter, the City's corporation counsel supplied a letter that generally outlined the Project's approval process: (1) financing, (2) review pursuant to the State Environmental Quality Review Act ([SEQRA] ECL art 8), (3) site plan review, and (4) the CPC's approval.

With respect to the CPC's approval, the corporation counsel recommended that the CPC use the special permit approval standard in Rochester Zoning Code (Zoning Code) § 120-192 (B). With respect to financing, the Rochester City Council (City Council) enacted an ordinance granting the Mayor of Rochester (Mayor) the authority to enter an agreement extending the City's reversionary interest in the property so that Plymouth could obtain financing for the Project.

With respect to the SEQRA process, as relevant on appeal, the Mayor's office had a standing agreement with the City Council providing that the Mayor's office would act as lead agency for all projects involving both entities. A similar standing agreement between the Mayor and respondent-defendant City of Rochester Manager of Zoning (Zoning Manager) provided that the Zoning Manager would act as lead agency for actions involving those entities. Furthermore, the Zoning Manager had a similar agreement with the CPC whereby the Zoning Manager would be the lead agency for actions involving those entities. Ultimately, as a result of those overlapping standing agreements, the Zoning Manager acted as the lead agency on the Project. The corporate respondents submitted part 1 of the environmental assessment form (EAF), which indicated that the Project would have only a small impact on geological features, on plants and animals, and on a critical environmental area, and further indicated that the Project was consistent with community plans and community character. In issuing preliminary site plan findings, the Zoning Manager noted that the Project was a Type I action under SEQRA and that the Project had been submitted to the Monroe County Department of Planning and Development (Planning Department) pursuant to General Municipal Law § 239-m. The Zoning Manager issued a negative declaration, concluding that the Project would not result in any significant adverse effects on the environment.

After conducting a public hearing, the CPC initially reserved

decision on its review of the corporate respondents' application for approval of the Project's plans and specifications due to concerns about the Project and requested further information on the application. The corporate respondents submitted a revised application to address the CPC's concerns. Thereafter, the CPC conditionally approved the Project based on its evaluation of the Project under the standard set forth in Zoning Code § 120-192 (B). In response to the revised application, the Zoning Manager issued an amended negative declaration.

Petitioners-plaintiffs (petitioners), consisting of current Cobbs Hill Village tenants and organizations who represent those tenants and the people who live in adjacent neighborhoods, commenced this hybrid CPLR article 78 proceeding and declaratory judgment action asserting in a petition-complaint four causes of action. The first cause of action sought to annul the Zoning Manager's negative declaration based on assorted violations of SEQRA. The second cause of action sought to annul the CPC's determination conditionally approving the Project on the ground that the Project did not satisfy the Zoning Code's special permit standard. The third cause of action sought to annul the CPC's determination based on allegations that the Project violated, inter alia, the terms of the 1957 deed. The fourth cause of action sought to annul the CPC's determination based on allegations that the Project violated General Municipal Law § 239-m because the revised application was not resubmitted to the Planning Department. The corporate respondents moved for summary judgment seeking dismissal of, inter alia, the third cause of action, a motion that was effectively joined by the City, the CPC, and the Zoning Manager (collectively, City respondents). Petitioners appeal from a judgment that dismissed the petition-complaint in its entirety.

Initially, we note that this is properly only a CPLR article 78 proceeding because the relief sought by petitioners—i.e., review of the City respondents' administrative determinations—is available under CPLR article 78 without the necessity of a declaration (*see Matter of Weikel v Town of W. Turin*, 188 AD3d 1718, 1720 [4th Dept 2020]; *see generally* CPLR 7801; *Matter of Level 3 Communications, LLC v Chautauqua County*, 148 AD3d 1702, 1703 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]).

We conclude that Supreme Court properly dismissed the first cause of action. Contrary to petitioners' contention, we conclude that the Zoning Manager's establishment as lead agency on the Project pursuant to the overlapping standing agreements was not deficient (*see generally* 6 NYCRR 617.2 [v]; *Matter of Coca-Cola Bottling Co. of N.Y. v Board of Estimate of City of N.Y.*, 72 NY2d 674, 680 [1988]). A lead agency is "an involved agency principally responsible for undertaking, funding or approving" a project (6 NYCRR 617.2 [v]). An involved agency is "an agency that has jurisdiction by law to fund, approve, or directly undertake an action"—i.e., the discretionary authority to make such a determination (6 NYCRR 617.2 [t]). Under SEQRA, "[a] lead agency . . . may not delegate its responsibilities to any other agency" (*Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd.*, 253 AD2d 342, 350 [4th Dept 1999]).

Here, we note that the Mayor's office was an involved agency on the Project because the Mayor had the discretionary authority to approve or disapprove the ordinance needed to help obtain financing for the Project (*see* Rochester City Charter § 5-8 [C]; *see also* 6 NYCRR 617.2 [t]). Because the Mayor had approval authority over the Project's financing, it was not dispositive that the Mayor was not listed among the involved agencies in the EAF or that the Mayor did not identify herself as an involved agency in her communications with the City Council. Because the Mayor's office was an involved agency, it could have acted as lead agency based on its role in approving the Project's financing (*see generally Sunshine Chem. Corp. v County of Suffolk*, 104 AD2d 869, 871 [2d Dept 1984], *lv denied* 64 NY2d 604 [1985], *appeal dismissed* 64 NY2d 775 [1985]), and based on its standing agreement with the City Council (*see generally* SEQR Handbook at 60 [4th ed 2020]).

Additionally, there is no dispute that the Zoning Manager—as the entity responsible for, inter alia, issuing preliminary site plan findings prior to review by the CPC in this case—was an involved agency that was eligible to serve as lead agency pursuant to the standing agreements it had with the Mayor's office and the CPC (*see* Zoning Code § 120-191 [D]). Indeed, we conclude that, ultimately, the Zoning Manager properly acted as lead agency on the Project based on the overlapping standing agreements between those entities. We observe that this is not a case where the establishment of the Zoning Manager as lead agency was an improper attempt to shield the responsible agency from performing the requisite environmental review as part of its decision-making process, or where the proper lead agency abdicated its responsibilities under SEQRA (*see generally Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 234 [2007]; *Glen Head-Glenwood Landing Civic Council v Town of Oyster Bay*, 88 AD2d 484, 492-493 [2d Dept 1982]).

We also reject petitioners' contention with respect to the first cause of action that the Zoning Manager failed to comply with the requirements of SEQRA in issuing a negative declaration. The record establishes that the Zoning Manager took the requisite hard look and provided a reasoned elaboration of the basis for her determination regarding the potential impacts of the Project on traffic and lead contamination (*see Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 431 [2017], *rearg denied* 31 NY3d 929 [2018]; *Matter of Wooster v Queen City Landing, LLC*, 150 AD3d 1689, 1692 [4th Dept 2017]; *Matter of Wellsville Citizens for Responsible Dev., Inc. v Wal-Mart Stores, Inc.*, 140 AD3d 1767, 1768-1769 [4th Dept 2016]).

With respect to the traffic impacts of the Project, the Zoning Manager specifically considered a traffic study of the site, which was prepared by an outside firm and subsequently reviewed by the Monroe County Department of Transportation (DOT). Both the outside firm and the DOT concluded that the Project would not result in an impact on traffic safety or in a significant traffic increase during peak hours of travel. Further, the Zoning Manager considered that, as a

mitigation measure, the Project would include the creation of an additional road entrance, which was intended to offset any increase in traffic caused by the increased number of apartment units at the site. Although the Zoning Manager did not specifically evaluate every possible permutation of how traffic may be affected by the Project, that does not mean that the Zoning Manager did not take a hard look, and to conclude otherwise would effectively abandon the "rule of reason" that governs the SEQRA analysis (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]; *see Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 318 [2006]; *Matter of Neville v Koch*, 79 NY2d 416, 425 [1992]).

With respect to lead contamination at the Project site, the Zoning Manager properly relied on a soil study that concluded that there was no indication that there were any metals located on the premises (*see generally Friends of P.S. 163, Inc.*, 30 NY3d at 431). To the extent that petitioners contend the Zoning Manager failed to consider evidence of lead contamination already present at the Project site—i.e., from an outdoor shooting range operated on or near the site over a century ago—we note that this issue was never raised at any point during the administrative approval or SEQRA process, but rather was raised for the first time in petitioners' reply papers submitted in the underlying proceeding. Thus, we do not consider those facts in reviewing whether the Zoning Manager took a hard look at the potential risk posed by lead contamination (*see Matter of Miller v Kozakiewicz*, 300 AD2d 399, 400 [2d Dept 2002]; *Aldrich v Pattison*, 107 AD2d 258, 267-268 [2d Dept 1985]; *see generally Matter of Kahn v Planning Bd. of City of Buffalo*, 60 AD3d 1451, 1451-1452 [4th Dept 2009], *lv denied* 13 NY3d 711 [2009]). Based on the foregoing, we conclude that the Zoning Manager "complied with the requirements of SEQRA in issuing the negative declaration . . . [,] that the 'designation as a [T]ype I action does not, per se, necessitate the filing of an environmental impact statement . . . , [and that no such statement] was . . . required here' " (*Wooster*, 150 AD3d at 1692).

We also reject petitioners' contention that the Zoning Manager improperly issued a conditioned negative declaration in a Type I action. It is well settled that "the SEQRA regulations do not authorize the issuance of a conditioned negative declaration for Type I actions . . . A conditioned negative declaration may be issued only for unlisted action[s]" (*Matter of Ferrari v Town of Penfield Planning Bd.*, 181 AD2d 149, 151 [4th Dept 1992] [internal quotation marks omitted]; *see* 6 NYCRR 617.2 [h]; 617.7 [d]). In determining whether a lead agency has improperly issued a conditioned negative declaration in a Type I action, courts consider "(1) whether the project, as initially proposed, might result in the identification of one or more 'significant adverse environmental effects'; and (2) whether the proposed mitigating measures incorporated into part 3 of the EAF were 'identified and required by the lead agency' as a condition precedent to the issuance of the negative declaration" (*Matter of Merson v McNally*, 90 NY2d 742, 752-753 [1997]).

Although the Project's application plainly indicated that the Project, as initially proposed, might result in one or more

significant environmental impacts, it is equally plain that neither the EAF nor the amended EAF contained any mitigation measures *required* by the Zoning Manager as a *condition* of issuing the negative declaration. Rather, the record discloses that the mitigating measures incorporated into the Project were adopted *after* the Zoning Manager issued the negative declaration and, in any event, were "incorporated as a part of an open and deliberate process[to] negate[] the [P]roject's potential adverse effects" (*id.* at 753). There is nothing in the record to demonstrate that the negative declaration was conditioned on any changes made to the Project.

Petitioners also contend that the court erred in dismissing the second cause of action because the CPC's use of only the special permit standard of Zoning Code § 120-192 (B) to evaluate and approve the Project was arbitrary and capricious (*see generally* CPLR 7803 [3]; *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). Specifically, they argue that the CPC's review was deficient because it did not consider whether the Project violated restrictive covenants contained in the 1957 deed. We note, initially, that there is no dispute that the Project's plans and specifications were subject to the approval of the CPC pursuant to the express terms of the 1957 deed. However, the 1957 deed was silent on the standard the CPC should use in performing its evaluation.

We conclude that the CPC's use of the special permit standard in its review of the Project was neither arbitrary nor capricious. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 652 [2013] [internal quotation marks omitted]). Here, the City's corporation counsel provided a reasonable explanation for his decision to recommend that the CPC use the special permit standard when evaluating the Project. Specifically, he noted that the use of that standard would allow the CPC to consider "a broad gamut of issues" concerning the Project's potential adverse impacts. To the extent that petitioners contend that the CPC erred in not evaluating the Project with respect to the 1957 deed's restrictive covenants, we note that the 1957 deed merely requires the CPC to review and approve plans and specifications for any project on the site—it does not require the CPC to evaluate the Project for compliance with the other restrictions contained in the deed.

Furthermore, to the extent that petitioners contend that the CPC's evaluation of the Project under the special permit standard of Zoning Code § 120-192 (B) was arbitrary and capricious, we reject that contention as well (*see Matter of Osuchowski v City of Syracuse*, 56 AD3d 1189, 1189 [4th Dept 2008]; *see also* CPLR 7803 [3]). Section 120-192 (B) required the CPC to consider whether the Project: would be in harmony with the Zoning Code and the Comprehensive Plan; would have any substantial or adverse effects on the neighborhood; would dominate the area; would be adequately served by essential public functions; and would result in destruction, loss or damage of any natural or historical features (*see* § 120-192 [B] [3] [a] [1] [a]-

[e]). We note that the CPC's approval was accompanied with concrete findings that addressed each of the five factors set forth in that provision. Moreover, the CPC reached its determination after conducting multiple hearings and reviewing comments and recommendations about the Project. In addition, we note that the CPC initially reserved decision on the Project's application because of concerns about certain aspects of the project. In response, the corporate respondents submitted a revised application that addressed those concerns, after which the CPC issued its conditional approval. Thus, we conclude that the CPC's review of the Project under the Zoning Code was not arbitrary or capricious.

With respect to petitioners' contention that the court erred in granting the motion for summary judgment insofar as it sought dismissal of the third cause of action on the ground that petitioners lacked standing, we conclude that the court properly determined that they lacked standing to enforce the covenants in the 1957 deed. "Parties asserting third-party beneficiary rights under a contract must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost" (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006] [internal quotation marks omitted]). Although there existed a binding agreement between the City and Plymouth's predecessor in interest, we conclude that petitioners do not have standing with respect to the third cause of action because they failed to establish that the agreement was intended for the benefit of the tenants of Cobbs Hill Village or the surrounding neighbors (*see generally Branch v Riverside Park Community LLC*, 74 AD3d 634, 634-635 [1st Dept 2010], *lv denied* 15 NY3d 710 [2010]). Petitioners also failed to establish that the benefits of the agreement with respect to them were sufficiently immediate, which also supported the court's determination that they lacked standing to enforce the 1957 deed covenants (*see Mendel*, 6 NY3d at 786).

Finally, with respect to the court's dismissal of the fourth cause of action, petitioners contend that General Municipal Law § 239-m was violated because the Project was not resubmitted to the Planning Department to consider changes made to the Project. General Municipal Law § 239-m requires agencies to refer approval of, inter alia, site plans relating to real property located within 500 feet of "the boundary of any existing or proposed county or state park" to a county "planning agency" for a recommendation on the proposed action (§ 239-m [2], [3] [b] [ii]; *see* § 239-m [3] [a] [iv]). Failure to comply with the provision is a jurisdictional defect that renders the agency's action invalid (*see Matter of Ernalex Constr. Realty Corp. v City of Glen Cove*, 256 AD2d 336, 338 [2d Dept 1998]).

As relevant here, however, an agency is not required to provide multiple referrals to the planning agency unless "revisions [to the project] are so substantially different from the original proposal [that] the county or regional board should have the opportunity to review and make recommendations on the new and revised plans"

(*Ferrari*, 181 AD2d at 152). Here, we conclude that the changes made to the Project after the initial referral to the Planning Department were not so substantial that a second referral was necessary. Although the number of apartment units to be constructed and the height of those buildings have increased since the original referral, those changes to the Project, when viewed in its totality, were relatively minor. That is especially true when the changes are viewed in relation to the Project's footprint as originally submitted to the Planning Department. Thus, we conclude that the court properly dismissed the fourth cause of action alleging a violation of General Municipal Law § 239-m.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

859

CA 19-01977

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF COBBS HILL VILLAGE TENANTS' ASSOCIATION, BY ITS PRESIDENT LEE SENGBUSCH, LEE SENGBUSCH, CAROLINE REAMORE, KENNETH BOICE, CAROL WILSON, BARBARA VANWIE, BRENT GRATTAN, THE ABC STREETS NEIGHBORHOOD ASSOCIATION, INC., THE FRIENDS OF WASHINGTON GROVE, INC., UPPER MONROE NEIGHBORHOOD ASSOCIATION, BY ITS PRESIDENT CHRISTENA STEVENS, COALITION FOR COBBS HILL, BY ITS CO-CHAIRPERSON THOMAS PASTECKI, AND NUNDA BOULEVARD ASSOCIATION, BY ITS PRESIDENT JEFF MILLS, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, ROCHESTER CITY COUNCIL, CITY OF ROCHESTER MAYOR LOVELY WARREN, PLYMOUTH GARDENS, INC., ROCHESTER MANAGEMENT, INC., RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD G. CURTIS OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (THOMAS J. WARTH OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS CITY OF ROCHESTER, ROCHESTER CITY COUNCIL, AND CITY OF ROCHESTER MAYOR LOVELY WARREN.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS PLYMOUTH GARDENS, INC., AND ROCHESTER MANAGEMENT, INC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (William K. Taylor, J.), entered May 1, 2019 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, dismissed the amended petition-complaint.

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

Memorandum: This appeal involves the redevelopment of Cobbs Hill Village, an affordable housing community for seniors located on property owned by respondent-defendant Plymouth Gardens, Inc. (Plymouth). In 1957, after it received approval from the New York

State Legislature (L 1956, ch 453), respondent-defendant City of Rochester (City) sold the subject property—land that was formerly part of Cobbs Hill Park—to Plymouth's predecessor in interest. The deed conveying the property to Plymouth (1957 deed) contained several restrictions on the property's use and provided that ownership of the property would revert to the City once the mortgage on it had been repaid in full. Following the transfer of the property in 1957, Cobbs Hill Village, which contained 60 apartment units, was constructed on the property.

In 2016, Plymouth and respondent-defendant Rochester Management, Inc. (collectively, corporate respondents) sought to redevelop Cobbs Hill Village by demolishing the existing apartment complex and constructing, inter alia, new buildings containing a total of 104 apartment units (Project). To allow Plymouth to secure financing for the Project, inter alia, respondent-defendant Rochester City Council (City Council) adopted Ordinance No. 2018-224 (Ordinance), which authorized respondent-defendant City of Rochester Mayor Lovely Warren (Mayor) to enter into an agreement extending activation of the City's reversion interest to 2061 for the purpose of redeveloping the property. Previously, the City and Plymouth had agreed in 2009 to extend activation of the City's reversion interest until 2041, so that Plymouth could refinance the mortgage on the property.

Petitioners-plaintiffs (petitioners) thereafter commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination adopting the Ordinance and any subsequent agreement entered into by the City, the City Council and the Mayor (collectively, City respondents). Petitioners are composed of residents of Cobbs Hill Village (resident petitioners) and various neighborhood associations that oppose the Project (organizational petitioners). In their first cause of action, petitioners asserted, as relevant on appeal, that the determination adopting the Ordinance was arbitrary and capricious because the City respondents failed to adequately inquire into whether the corporate respondents had complied with the restrictions in the 1957 deed, whether the corporate respondents had previously made false statements to the City in connection with the 2009 agreement, and whether the Project itself was contrary to the intent of the 1957 deed. In their second cause of action, petitioners asserted that the determination should be annulled because the Ordinance constituted a lease that had to be approved by a supermajority of the City Council. Petitioners appeal from a judgment that granted respondents' motions for summary judgment and dismissed the amended petition-complaint in its entirety. We affirm.

Initially, we note that this is properly only a CPLR article 78 proceeding because the relief sought by petitioners is available under CPLR article 78 without the necessity of a declaration (*see Matter of Weikel v Town of W. Turin*, 188 AD3d 1718, 1720 [4th Dept 2020]; *see generally* CPLR 7801; *Matter of Level 3 Communications, LLC v Chautauqua County*, 148 AD3d 1702, 1703 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]). Indeed, we note that no declaration is necessary because, as relevant on appeal, petitioners do not challenge the

substantive validity of the Ordinance, but only the procedures by which it was enacted (*see generally Voelckers v Guelli*, 58 NY2d 170, 176 [1983]).

Petitioners contend that Supreme Court erred in granting respondents' motions insofar as they sought summary judgment dismissing the first cause of action on the ground that petitioners lacked standing. "Standing is a threshold requirement for a [party] seeking to challenge governmental action" (*Matter of Sheive v Holley Volunteer Fire Co., Inc.*, 170 AD3d 1589, 1590 [4th Dept 2019] [internal quotation marks omitted]). "To establish traditional common-law standing, petitioners were required to show that they 'suffered an injury in fact, distinct from that of the general public,' and that their alleged injury 'falls within the zone of interests' sought to be protected by the provisions in question" (*Matter of Barrett Paving Materials, Inc. v New York State Thruway Auth.*, 184 AD3d 1173, 1174 [4th Dept 2020], *lv denied* 35 NY3d 916 [2020], quoting *Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]). "The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution" (*Silver v Pataki*, 96 NY2d 532, 539 [2001], *rearg denied* 96 NY2d 938 [2001] [internal quotation marks omitted]; *see Consumers Union of U.S., Inc. v State of New York*, 5 NY3d 327, 350 [2005]). The burden of establishing standing to challenge a governmental action like the one at issue here is placed "on the party seeking review" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]).

Here, we agree with petitioners that the court erred insofar as it granted the motions for summary judgment with respect to the first cause of action on the ground that they did not have standing, as third-party beneficiaries, to enforce the 1957 deed (*see generally Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786-787 [2006]). Petitioners' first cause of action seeks to annul the Ordinance by challenging, as arbitrary and capricious, the *procedures* by which the City respondents enacted the Ordinance because those procedures did not adhere to the terms of the 1957 deed. Thus, the court erred to the extent its analysis only considered the narrow question whether petitioners had standing as third-party beneficiaries to the deed, rather than whether they had standing to challenge the procedures used in enacting the Ordinance.

We conclude that the resident petitioners established standing to challenge the procedures by which the City respondents enacted the Ordinance. As current residents of Cobbs Hill Village—i.e., the site to be redeveloped—the resident petitioners suffered an injury in fact because the Ordinance, which facilitated the Project's financing, would lead to the demolition of their current residences, force them to live through the disruptive construction process, and result in moving them into a new residence. Additionally, the resident petitioners would suffer injury as a result of the Ordinance due to

the increased number of tenants who would move into Cobbs Hill Village upon the Project's completion (*see generally Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301, 310-311 [2015]; *Matter of Muir v Town of Newburgh, N.Y.*, 49 AD3d 744, 746 [2d Dept 2008]).

With respect to the organizational petitioners, however, we conclude that only petitioner Cobbs Hill Village Tenants' Association, by its president Lee Sengbusch (Tenants' Association), had standing to challenge the enactment of the Ordinance. To establish organizational standing, a petitioner must show "that one or more of its members would have standing to sue; that the interests it asserts are germane to its purpose to such a degree as to satisfy the court that it is the appropriate representative of those interests; and 'that neither the asserted claim nor the appropriate relief requires the participation of the individual members' " (*Matter of Niagara Preserv. Coalition, Inc. v New York Power Auth.*, 121 AD3d 1507, 1510 [4th Dept 2014], *lv denied* 25 NY3d 902 [2015], quoting *Society of Plastics Indus.*, 77 NY2d at 775). Out of all of the organizational petitioners, only the Tenants' Association had standing with respect to the first cause of action because it is the only entity that satisfied the three requirements set forth above, i.e., by establishing that at least one of its members—as a resident of Cobbs Hill Village—had standing to sue, that the underlying proceeding is germane to the Tenants' Association's purpose to protect the interests of the tenants in their apartments, and that the relief that is sought—i.e., stopping the redevelopment project—does not require the direct participation of any of the Tenants' Association's individual members (*see Niagara Preserv. Coalition, Inc.*, 121 AD3d at 1509-1510).

In contrast, the remaining organizational petitioners did not establish standing with respect to the first cause of action because they were unable to show that any of their individual members had standing due solely to their enjoyment of the park surrounding Cobbs Hill Village. There was no showing that any of the individual members of the other organizational petitioners used or enjoyed the park to a greater degree than most other members of the general public, and therefore they did not establish the requisite injury in fact to support a determination that they had standing to sue under the first cause of action (*see Matter of Brummel v Town of N. Hempstead Town Bd.*, 145 AD3d 880, 881-882 [2d Dept 2016], *lv denied* 29 NY3d 903 [2017], *rearg denied* 29 NY3d 1047 [2017], *cert denied* — US —, 138 S Ct 516 [2017]; *see generally Society of Plastics Indus.*, 77 NY2d at 772-774).

Nonetheless, on the merits, we conclude that the court properly dismissed the first cause of action because the resident petitioners and the Tenants' Association failed to establish that the Ordinance should be annulled on the ground that the City respondents acted arbitrarily or capriciously in enacting it (*see generally Matter of Town of Ellery v New York State Dept. of Envtl. Conservation*, 159 AD3d 1516, 1518 [4th Dept 2018]; *Matter of Riverkeeper, Inc. v New York State Dept. of Envtl. Conservation*, 152 AD3d 1016, 1018-1019 [3d Dept 2017]). Here, the record conclusively demonstrates that the City respondents engaged in a comprehensive and extensive process before

enacting the Ordinance. Before they enacted the Ordinance, the City respondents subjected the Project's proposal—including its financing—to multiple levels of review. Importantly, the Ordinance was revised several times, and the City respondents considered, but ultimately rejected, alternative plans to redevelop the subject property. The City respondents also conducted three public hearings, which gave the public and all interested parties the opportunity to comment on the Ordinance prior to its enactment. Given the extensive procedure leading up to the Ordinance's enactment, we cannot say that the determination adopting the Ordinance was arbitrary or capricious.

Furthermore, we conclude that the court did not err in granting the motions insofar as they sought summary judgment dismissing the second cause of action because, contrary to petitioners' contention, the Ordinance did not constitute a lease that had to be approved by a supermajority of the City Council. Section 21-23 (C) of the Municipal Code of the City of Rochester requires that all ordinances authorizing a lease of City-owned real property must be approved by "3/4 of all the members" of the City Council. A lease is defined as a bilateral agreement "whereby one party gives up [its] control and possession of property to another in return for the latter's understanding to pay rent for its use" (*Feder v Caliguira*, 8 NY2d 400, 404 [1960]; *see* Black's Law Dictionary 1066 [11th ed 2019]). Indeed, "[t]he central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed-upon rental" (*Mirasola v Advanced Capital Group, Inc.*, 73 AD3d 875, 876 [2d Dept 2010] [internal quotation marks omitted]).

Here, contrary to petitioners' contention, there is no basis in the record for concluding that the Ordinance, by extending until 2061 the activation of the City's reversion interest in the property, constituted a lease agreement subject to the supermajority requirement. The Ordinance did not authorize the transfer of control over the property—it merely delayed the date on which the City's reversion would be triggered. Nothing about the Ordinance divested the owner, Plymouth, of its possession, dominion or control of the property (*see Feder*, 8 NY2d at 404). Moreover, at the time the Ordinance was enacted, the City was not the title owner of the property, and therefore it lacked any power to cede control over the property to Plymouth. Simply put, because the Ordinance did not involve the lease of City-owned property, and merely delayed the vesting of the City's reversion in property it had already alienated in 1957, the Ordinance did not have to be approved by a supermajority of the City Council.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

960

CA 19-02261

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF THE ESTATE OF
JOSEPH J. KUSNYER, JR., DECEASED.

CHARITIE JOHNSON, PETITIONER-APPELLANT;

SYLVIA FERINCZ AND KENNETH FERINCZ,
RESPONDENTS-RESPONDENTS.

MEMORANDUM AND ORDER

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CHAD A. DAVENPORT OF COUNSEL), FOR PETITIONER-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered November 13, 2019. The order, inter alia, dismissed the petition to compel the production of a will.

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

Memorandum: Petitioner commenced this proceeding to compel production of a will pursuant to SCPA 1401, seeking, inter alia, an order requiring respondents to be examined regarding the will decedent executed in 2007. That will included a provision that, "[i]n the event that [decedent] own[ed] [his residence] . . . at the time of [his] death, [he would] devise and bequeath said [residence], together with all household furniture and furnishings therein," to petitioner, his mail carrier. It is undisputed that, by warranty deed recorded in 2015, the validity of which is not challenged in this proceeding, decedent transferred his residence to his sister, respondent Sylvia Ferincz, and her son, respondent Kenneth Ferincz, and retained a life estate for himself. Respondents moved to dismiss the petition, submitting in support of their motion the affidavit of Sylvia, who averred that she was not in possession of the original will or any copy of it because decedent, during the final two years of his life, had reconsidered the will and destroyed it. Petitioner thereafter moved by order to show cause for a preliminary injunction and temporary restraining order pursuant to CPLR 6301, 6311, and 6313 enjoining respondents from, inter alia, transferring the residence.

Surrogate's Court considered the petition, the motion, and the order to show cause together and made a summary determination denying and dismissing the petition and denying petitioner's application for

injunctive relief (*see* CPLR 406, 409 [b]). Petitioner appeals, and we affirm.

Pursuant to SCPA 1401, "[w]henever it shall appear to the court . . . that there is reasonable ground to believe that any person has knowledge of the whereabouts or destruction of a will of a decedent the court may make an order requiring the person or persons . . . to attend and be examined." "The proceeding for production of a will is an independent special proceeding and has no relation to any other proceeding. It determines no rights but only directs the production and filing of a will" (26 Carmody-Wait 2d § 152.31 at 279-280; *see also Matter of Johnson*, 253 App Div 698, 700 [2d Dept 1938]; *Matter of Babakhanian*, 21 Misc 3d 1106[A], 2008 NY Slip Op 51982[U], *2 [Sur Ct, Nassau County 2008]). We conclude that the Surrogate properly exercised her discretion and dismissed the petition (*see generally* SCPA 1401; *Matter of Dessauer*, 96 AD3d 1560, 1561 [4th Dept 2012]). There is no dispute that the will existed, and in light of Sylvia's statement in her affidavit that decedent destroyed the will, the Surrogate "correctly held that a hearing on the SCPA 1401 petition would have been unavailing" inasmuch as the questions within the limited scope of the proceeding had been answered (*Matter of Philbrook*, 185 AD2d 550, 553 [3d Dept 1992]).

We likewise reject petitioner's contention that the Surrogate erred in denying her application for a temporary restraining order and preliminary injunction. Petitioner's application for preliminary relief with respect to the residence did not relate to the limited subject of the proceeding, i.e., the "whereabouts or destruction of" the will (SCPA 1401; *see Philbrook*, 185 AD2d at 552-553), and a proceeding pursuant to SCPA 1401 is not one in which petitioner would be "entitled to a judgment restraining" respondents from taking any action regarding the subject property (CPLR 6301).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

967

CA 19-02325

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

NATIONAL FUEL GAS DISTRIBUTION CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA FALLS WATER BOARD, DEFENDANT-APPELLANT.

SEAN W. COSTELLO, GENERAL COUNSEL, NIAGARA FALLS, FOR DEFENDANT-APPELLANT.

WILDER & LINNEBALL, LLP, BUFFALO (LAURA A. LINNEBALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered November 27, 2019. The order, among other things, denied defendant's motion to, inter alia, dismiss the complaint.

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

Memorandum: In this action arising from an incident in which an underground water main owned and operated by defendant broke and flooded the area of 18th Street in the City of Niagara Falls, causing damage to plaintiff's underground gas main, defendant appeals from an order that, inter alia, denied its motion to dismiss the complaint in its entirety or to strike from the complaint any theories of liability not specified in the notice of claim. We affirm.

A notice of claim must set forth, among other things, the time and place of an accident and the manner in which it occurred (*see* General Municipal Law § 50-e [2]). That statutory requirement is designed to enable the governmental entity involved to obtain sufficient information to promptly investigate, collect evidence, evaluate the merit of the claim, and assess the municipality's exposure to liability (*see Brown v City of New York*, 95 NY2d 389, 392-393, 394 [2000]). In considering the sufficiency of a notice of claim in the context of a motion to dismiss, a court is not confined to the notice of claim itself, but "may [also] look . . . [at] such other evidence as is properly before the court" (*D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994]).

We reject defendant's contention that the notice of claim asserted claims for negligence or trespass relating only to

excavation. Rather, consistent with the complaint, the notice of claim apprised defendant that it committed acts of "negligence" and "trespass" relating to the water main break. That was sufficient to enable defendant to conduct a proper investigation of the claim, particularly in light of the fact that defendant stationed a repair crew at the site of the water main break for several days after the incident and thus had the ability to immediately investigate the circumstances of the break and the damages sustained by plaintiff as a result of the break. Supreme Court thus properly denied the motion.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1003

CA 19-02293

PRESENT: CARNI, J.P., CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF RIEDMAN ACQUISITIONS, LLC
AND RYAN HOMES, INC.,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF MENDON,
RESPONDENT-DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SHELDON W. BOYCE, JR., TOWN ATTORNEY, ROCHESTER (DAVID C. SIELING OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

FORSYTH, HOWE, O'DWYER, KALB & MURPHY, P.C., ROCHESTER (ROBERT B. KOEGEL OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered July 9, 2019 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, among other things, granted in part the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying those parts of the petition-complaint seeking attorneys' fees and seeking to compel respondent-defendant to execute the new Sewer Transmission Agreement and Maintenance Contract, and granting judgment in favor of petitioners-plaintiffs as follows:

> It is ADJUDGED AND DECLARED that the Sewer Transmission Agreement and Maintenance Contract, executed September 22, 2006, was not properly voided by respondent-defendant and remains in full force and effect,

and as modified the judgment is affirmed without costs.

Memorandum: This case centers on the proposed development of a patio home community (project) on an 87-acre parcel of land (parcel) in the Town of Mendon (Town). Development of the project commenced in 2004 when petitioner-plaintiff Ryan Homes, Inc. (Ryan), which then owned the parcel, submitted a series of conceptual sketch plans to the Town of Mendon Planning Board (Planning Board). The project would ultimately have to be approved by respondent-defendant Town Board of Town of Mendon (Town Board) before it could go forward.

Because the project would result in higher density development, Ryan also needed to have a majority of the parcel's 87 acres rezoned from Residential Agricultural-5 Acres (RA-5) to planned unit development (PUD) under Code of the Town of Mendon (Town Code) former § 200-17. In November 2004, a simple majority of the Town Board voted in favor of rezoning the parcel for PUD. The Town Board thought that, under Town Law § 265, a supermajority was required to approve the rezoning, and therefore it concluded that the rezoning resolution had been defeated. Ryan commenced a hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to compel the Town Board to rezone the parcel for PUD. Supreme Court (Lunn, J.) granted the petition, concluding that only a simple majority was required to approve the rezoning resolution (*Ryan Homes, Inc. v Town Bd. of Town of Mendon*, 7 Misc 3d 709, 712-714 [Sup Ct, Monroe County 2005]). Thereafter, the Town Board rezoned the parcel for PUD, through enactment of Local Law No. 10 of 2004 (Local Law No. 10).

In December 2005, the Planning Board approved the project's preliminary site plan. In September 2006, the Town and the Town of Pittsford entered into a Sewer Transmission Agreement and Maintenance Contract (2006 Sewer Agreement), which would connect the project to the Town of Pittsford's sewer system—a condition necessary to obtain final approval of the project. The 2006 Sewer Agreement was to "continue in full force and effect for [40] years," and could only be "changed, modified or amended" in writing by the parties' mutual assent. In February 2011, the Planning Board granted final approval of Phase I of the project, with a provision that Ryan's failure to abide by certain conditions would cause the final approval to expire. In April 2015, after obtaining several extensions of time to satisfy the conditions, Ryan announced that it would not proceed on the project due to its economic unfeasibility.

In December 2017, petitioner-plaintiff Riedman Acquisitions, LLC (Riedman) purchased the parcel from Ryan with the intent to revive the project and make it more economically feasible. Ryan retained a reversion interest in the property that would vest if Riedman failed to obtain development approvals. Ryan and Riedman (petitioners) had already contacted the Town Board and the Planning Board for confirmation of their belief that the parcel remained zoned for PUD and that revisions to the project would be submitted for approval under former Town Code § 200-17 (G), which governed requests for changes to sketch plans.

Meanwhile, the Town Board, by means of a letter from the Town of Mendon Supervisor, unilaterally declared the 2006 Sewer Agreement null and void, and asked petitioners for a new agreement. Petitioners, the Town Board, and the Town of Pittsford thereafter attempted to negotiate terms for a new agreement (2018 Sewer Agreement). In June 2018, the Planning Board issued to the Town Board a favorable report on petitioners' revised sketch plan application (revised application), which was conditioned on approval of a sewer agreement. At a meeting one month later, however, the Town Board concluded that the parcel's zoning had reverted to RA-5 because the PUD zoning had been

conditioned on the completion of the final approval process, which had expired in 2015.

Petitioners submitted to the Town Board a letter in which they objected to the Town Board's conclusion that the zoning had reverted to RA-5, noting that Local Law No. 10 unconditionally rezoned the parcel to PUD, and that petitioners were never warned about the possibility of an automatic reversion. They also requested that the Town Board approve the 2018 Sewer Agreement. In August 2018, the Town Board recodified the Town Code to remove PUD zoning. In January 2019, the Town Board voted against the 2018 Sewer Agreement. It took no further action on the project's revised application.

Petitioners commenced the underlying hybrid CPLR article 78 proceeding and declaratory judgment action challenging, inter alia, the Town Board's failure to consent to the revised application, the recodification of the Town Code to eliminate PUD zoning, the Town Board's termination of the 2006 Sewer Agreement and its failure to approve the 2018 Sewer Agreement, and the determination that the parcel was no longer zoned for PUD. Petitioners also sought damages and attorneys' fees under 42 USC §§ 1983 and 1988 based on alleged due process and equal protection violations.

In appeal No. 1, the Town Board appeals from a judgment that granted the petition-complaint (petition) in part and, inter alia, declared that the parcel remained zoned for PUD and did not automatically revert to RA-5, annulled the Town Board's recodification of the Town Code, directed the Town Board to review petitioners' revised application for the project under the zoning code as it existed at the time the revised application was submitted, vacated the Town Board's rejection of the 2018 Sewer Agreement as arbitrary and capricious, determined that the Town Board had improperly terminated the 2006 Sewer Agreement, estopped it from voting down the 2018 Sewer Agreement, and granted petitioners' request for attorneys' fees. In appeal No. 2, the Town Board appeals from a supplemental judgment that, insofar as appealed from, awarded petitioners $41,090 in attorneys' fees.

Initially, we reject the Town Board's contention that the parcel's zoning automatically reverted to RA-5 when Ryan stopped moving forward on the original project, and instead we conclude that it has remained, at all times, zoned for PUD. Zoning regulations must be strictly construed against the municipality that enacted and seeks to enforce them, and any ambiguity must be resolved in favor of the property owner (*see Matter of Allen v Adami*, 39 NY2d 275, 277 [1976]; *Matter of Lodge Hotel, Inc. v Town of Erwin Planning Bd.*, 62 AD3d 1257, 1258 [4th Dept 2009]; *AHEPA 91 v Town of Lancaster*, 237 AD2d 978, 979 [4th Dept 1997]). Nonetheless, "where . . . 'the language of a[n] [ordinance] is clear and unambiguous, courts must give effect to its plain meaning' " (*Matter of Fox v Town of Geneva Zoning Bd. of Appeals*, 176 AD3d 1576, 1578 [4th Dept 2019]).

For a zoned parcel to automatically revert to a prior designation, such a possibility must "be clearly set forth in [the]

language of the zoning instrument" (*Matter of D'Angelo v Di Bernardo*, 106 Misc 2d 735, 737 [Sup Ct, Niagara County 1980], *affd* 79 AD2d 1092 [4th Dept 1981], *lv denied* 53 NY2d 606 [1981]). Furthermore, "even where the automatic reversion language is clear a notice and public hearing must take place before the reversion is permitted to be confirmed by the legislative body" (*id.*). In determining whether the zoning instruments contain the requisite clear language creating automatic reversion, the " 'ordinance is to be construed as a whole, reading all of its parts together to determine the legislative intent and to avoid rendering any of its language superfluous' " (*Fox*, 176 AD3d at 1578).

Here, we conclude that the parcel's zoning never automatically reverted from PUD to RA-5 because, strictly construed against the Town Board, the relevant *zoning instruments* did not contain any *express language* warning petitioners that the PUD zone would automatically revert if certain conditions were not met (*see Allen*, 39 NY2d at 277; *D'Angelo*, 106 Misc 2d at 737). Neither the rezoning ordinance passed by the Town Board that rezoned the parcel from RA-5 to PUD, nor Local Law No. 10—which effectuated the change in the parcel's zoning to PUD on the zoning map—contained any express language mentioning the possibility that the zoning could automatically revert (*see D'Angelo*, 106 Misc 2d at 737). Thus, inasmuch as petitioners were not sufficiently placed on notice of that possibility, we conclude that Supreme Court (Odorisi, J.) properly determined that the parcel remains zoned for PUD.

We also conclude that the court properly granted that part of the petition seeking to compel the Town Board to review petitioners' revised application because that ministerial act is "mandatory, not discretionary" and petitioners had "a clear legal right to the relief sought" (*Matter of Shaw v King*, 123 AD3d 1317, 1318-1319 [3d Dept 2014] [internal quotation marks omitted]; *see generally* CPLR 7803 [1]; *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]; *Matter of De Milio v Borghard*, 55 NY2d 216, 220 [1982]; *Matter of van Tol v City of Buffalo*, 107 AD3d 1626, 1627 [4th Dept 2013]). Whether the Town Board was required to review petitioners' revised application hinges on the proper interpretation of former Town Code § 200-17 (G). Former Town Code § 200-17 (G) provided, in relevant part, that "[i]f, in the site plan development, it becomes apparent that certain elements of the sketch plan . . . are unfeasible and in need of significant modification, the applicant shall then present a proposed solution to the Planning board as the preliminary site plan." After a proposed solution is approved by the Planning Board, it "shall so notify the Town Board," at which point "[p]reliminary site plan approval may then be given only with the consent of the Town Board." In interpreting that provision, we note that "[a]ny ambiguity in the language . . . must be resolved in favor of the property owner" (*Allen*, 39 NY2d at 277; *see AHEPA 91*, 237 AD2d at 979).

The Town Board contends that it was not required to review the revised application because petitioners did not submit it to the Town

Board in the form of a preliminary site plan, but rather as a sketch plan. Petitioners argue that the Town Board's interpretation is incorrect, and that the Town Board was required to review the revised application once the Planning Board issued a favorable report. In our view, former Town Code § 200-17 (G) is ambiguous with respect to the proper procedure. Nonetheless, resolving the ambiguity in favor of the property owners, we conclude that, under former section 200-17 (G), the revised application submitted to the Planning Board effectively served as a preliminary site plan and, once the Planning Board issued a favorable report, the Town Board was obligated to review the revised application for approval, and petitioners were not required to submit a whole new preliminary site plan for review. Thus, we conclude that the Town Board had a clear, nondiscretionary obligation to consider the favorable report and revised application (*see generally* CPLR 7803 [1]; *Shaw*, 123 AD3d at 1318-1319).

To the extent the Town Board contends that petitioners should have complied with the procedure of former Town Code § 200-17 (J) in submitting the revised application, we conclude that the Town Board is estopped from denying that former Town Code § 200-17 (G) applies because of its complete failure to dispel petitioners' reasonable belief that former section 200-17 (G) governed consideration of the revised application (*see generally Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668 [1976]; *Notaro v Power Auth. of State of N.Y.*, 41 AD3d 1318, 1319-1320 [4th Dept 2007], *lv dismissed* 9 NY3d 935 [2007]; *Landmark Colony at Oyster Bay v Board of Supervisors of County of Nassau*, 113 AD2d 741, 742-743 [2d Dept 1985]). The Town Board's remaining arguments against being compelled to consider the revised application are improperly raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]; *see also Olney v Town of Barrington*, 180 AD3d 1364, 1365 [4th Dept 2020]).

We agree with the Town Board, however, to the extent it contends that the court erred in granting that part of the petition seeking to compel the Town Board to approve the 2018 Sewer Agreement, and we therefore modify the judgment in appeal No. 1 accordingly. Town Law § 64 (6) provides that a town board has the general power to "award contracts for any of the purposes authorized by law and the same shall be executed by the supervisor in the name of the town after approval by the town board." As a corollary, a town supervisor or town attorney does not possess the authority to execute or authorize a contract on the town's behalf without the approval of the town board (*see Matter of Municipal Consultants & Publs. v Town of Ramapo*, 47 NY2d 144, 150 [1979]). Thus, the Town Board is not estopped from voting down the 2018 Sewer Agreement merely because its representatives were involved in negotiating the agreement's proposed terms—those representatives lacked lawful authority to bind the Town Board (*see City of Zanesville, Ohio v Mohawk Data Sciences Corp.*, 97 AD2d 64, 67 [4th Dept 1983]).

We further conclude that the Town Board's decision not to approve the 2018 Sewer Agreement was an exercise of its legislative power under Town Law § 64 (6), not an administrative decision (*see generally*

Klostermann v Cuomo, 61 NY2d 525, 541 [1984]). We may nonetheless review the validity of the Town Board's legislative determination not to approve the 2018 Sewer Agreement because petitioners sought a declaration to that effect (*see generally Matter of Lakeland Water Dist. v Onondaga County Water Auth.*, 24 NY2d 400, 407 [1969]; *Todd Mart v Town Bd. of Town of Webster*, 49 AD2d 12, 16-17 [4th Dept 1975]). In evaluating the validity of the Town Board's determination, we look to whether declining to approve the 2018 Sewer Agreement was arbitrary and capricious (*see Dauernheim, Inc. v Town Bd. of Town of Hempstead*, 33 NY2d 468, 474 [1974]; *Todd Mart*, 49 AD2d at 17; *see generally Cimato Bros. v Town of Pendleton*, 237 AD2d 883, 884 [4th Dept 1997]). Here, it was not arbitrary and capricious for the Town Board to decline to approve the 2018 Sewer Agreement because, in light of its general power to execute and award contracts on behalf of the Town, the Town Board could decide that it did not want to purchase sewer services from a neighboring town (*see generally Matter of Caiola v Town of Ossining*, 272 AD2d 324, 324-325 [2d Dept 2000], *lv denied* 95 NY2d 761 [2000]; *Fraccola v City of Utica Bd. of Water Supply*, 70 AD2d 768, 769 [4th Dept 1979]). The cases relied on by petitioners are inapposite because they involved applications requesting that a municipality establish or extend a sewer district under Town Law § 190—not the determination whether to execute a contract with another municipality under Town Law § 64 (6) (*cf. Matter of Svenningsen v Passidomo*, 62 NY2d 967, 969 [1984]; *Town of Lima v Harper*, 55 AD2d 405, 411 [4th Dept 1977], *affd* 43 NY2d 980 [1978]; *Matter of Clubside, Inc. v Town Bd., Town of Wallkill*, 297 AD2d 734, 735 [2d Dept 2002]). Indeed, we note that "[o]rdinarily, the *failure* of a legislative body to exercise its powers is not subject to review in the courts" (*Harper*, 55 AD2d at 411 [emphasis added]).

Nevertheless, we further conclude that the court properly determined that the Town Board unlawfully voided the 2006 Sewer Agreement, and that said agreement remains in effect. "[C]lear, complete writings should . . . be enforced according to their terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 160 [1990]). Thus, "[w]here the language of a contract is clear and unambiguous, interpretation of that contract and construction of its provisions are questions of law" (*Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16, 19 [4th Dept 1995], *lv dismissed in part and denied in part* 87 NY2d 953 [1996]; *see W.W.W. Assoc.*, 77 NY2d at 162). To that end, "[t]he court must ascertain the intent of the parties from the plain meaning of the language employed, giving the terms their plain, ordinary, popular and nontechnical meanings" (*Kula*, 212 AD2d at 19).

Here, the 2006 Sewer Agreement clearly and unambiguously provided that it "shall continue in full force and effect for [40] years from the date [of execution] and, during said period, . . . shall not be changed, modified or amended except by a writing duly made, executed and acknowledged by the parties or their successors in interest." Thus, the 2006 Sewer Agreement could only be cancelled or voided if both parties, i.e., the Town *and* the Town of Pittsford, agreed to do so in writing. Here, the record establishes that only the Town, unilaterally, cancelled the agreement through a letter from the town

supervisor, and there is nothing establishing that the Town of Pittsford also agreed to its cancellation. Thus, because the Town Board did not comply with the clear and unambiguous terms of the 2006 Sewer Agreement in attempting to terminate that agreement, we conclude that the 2006 Sewer Agreement has, at all relevant times, remained in effect and allows the project to be connected to the Town of Pittsford's sewer system. We reject the Town Board's contention that petitioners did not seek reinstatement of the 2006 Sewer Agreement inasmuch as petitioners specifically sought such a determination in the petition. We note, however, that the court did not declare the rights of the parties with respect to the 2006 Sewer Agreement, and consequently, we further modify the judgment in appeal No. 1 by issuing a declaration that the 2006 Sewer Agreement was not properly voided by the Town and remains in full force and effect.

The Town Board also contends that the court erred in granting petitioners' request for attorneys' fees under 42 USC § 1988 based on alleged substantive due process and equal protection violations under 42 USC § 1983. We agree, and we therefore further modify the judgment in appeal No. 1 accordingly and we reverse the supplemental judgment in appeal No. 2 insofar as appealed from. "[A]ttorney's fees are available under [42 USC §] 1988 where relief is sought on both State and Federal grounds, but nevertheless awarded on State grounds only. In such a case, if a constitutional question is involved, fees may be awarded if the constitutional claim is substantial and arises out of a common nucleus of operative fact as the State claim" (*Matter of Giaquinto v Commissioner of N.Y. State Dept. of Health*, 11 NY3d 179, 191 [2008] [internal quotation marks omitted]; *see Matter of Thomasel v Perales*, 78 NY2d 561, 568 [1991]). A constitutional claim is insubstantial "only if its unsoundness so clearly results from the previous decisions of [the courts] as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy" (*Hagans v Lavine*, 415 US 528, 538 [1974] [internal quotation marks omitted]; *see Ex parte Poresky*, 290 US 30, 32 [1933], *reh denied* 366 US 922 [1961]; *Cerberus Props., LLC v Kirkmire*, 121 AD3d 1556, 1558 [4th Dept 2014]; *see generally Matter of Johnson v Blum*, 58 NY2d 454, 458 [1983]).

We conclude that petitioners were not entitled to attorneys' fees because their federal due process and equal protection claims were insubstantial. "In the land-use context, 42 USC § 1983 protects against municipal actions that violate a property owner's right to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution" (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 626 [2004]; *see Schlossin v Town of Marilla*, 48 AD3d 1118, 1120 [4th Dept 2008]). The Court of Appeals has set forth a two-part test for substantive due process violations. First, petitioners "must establish a cognizable property interest, meaning a vested property interest, or more than a mere expectation or hope to [obtain approval of their application]; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to [obtain such approval]" (*Schlossin*, 48 AD3d at 1120 [internal quotation marks

omitted]; *see Bower Assoc.*, 2 NY3d at 627; *Acquest Wehrle, LLC v Town of Amherst*, 129 AD3d 1644, 1647 [4th Dept 2015], *appeal dismissed* 26 NY3d 1020 [2015]). Second, petitioners "must show that the governmental action was wholly without legal justification" (*Acquest Wehrle, LLC*, 129 AD3d at 1647 [internal quotation marks omitted]; *see Bower Assoc.*, 2 NY3d at 627).

Here, the court erred in granting petitioners' request for attorneys' fees because they did not show that "there is either a 'certainty or a very strong likelihood' that an application for approval would have been granted" (*Bower Assoc.*, 2 NY3d at 628, quoting *Harlen Assoc. v Incorporated Vil. of Mineola*, 273 F3d 494, 504 [2d Cir 2001]; *see RRI Realty Corp. v Incorporated Vil. of Southampton*, 870 F2d 911, 918 [2d Cir 1989], *cert denied* 493 US 893 [1989]). Specifically, we conclude that, because the Town Board retained significant discretion in ultimately approving or denying the revised application, petitioners did not have a clear entitlement to approval of the revised application—in short, approval of the revised application was not " 'virtually assured' " (*Bower Assoc.*, 2 NY3d at 628; *see East End Resources, LLC v Town of Southold Planning Bd.*, 135 AD3d 899, 901-902 [2d Dept 2016]; *see generally Clubside, Inc. v Valentin*, 468 F3d 144, 153-154 [2d Cir 2006]). Thus, it is unnecessary for us to consider whether, under the second prong, the Town Board acted "wholly without legal justification" (*Bower Assoc.*, 2 NY3d at 627).

We also conclude that petitioners did not establish that they had a substantial equal protection claim. "[A] violation of equal protection arises where *first*, a person (compared with other similarly situated) is selectively treated and *second*, such treatment is based on impermissible considerations such as[, inter alia,] malicious or bad faith intent to injure a person" (*id.* at 631; *see Clubside, Inc.*, 468 F3d at 158-159; *Harlen Assoc.*, 273 F3d at 499). Here, petitioners did not establish that the parcel, and development thereon, was similarly situated to any other property in the Town. Petitioners' generic assertions to the contrary were insufficient to substantiate the equal protection claim (*see generally Clubside, Inc.*, 468 F3d at 159). Consequently, because petitioners' underlying claims for due process and equal protection violations were " 'wholly insubstantial' " (*Johnson*, 58 NY2d at 458 n 2), we conclude that the court erred in awarding them attorneys' fees under 42 USC § 1988.

Because the Town Board has not raised any contentions on appeal challenging that part of the judgment in appeal No. 1 that annulled the recodification of the Town Code to remove PUD zoning and, on the record before us, PUD zoning is currently permitted by the Town Code, the Town Board's contention that the court erred in determining that the revised application should be reviewed under the Town Code as it existed before the recodification is academic.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1004

CA 19-02370

PRESENT: CARNI, J.P., CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF RIEDMAN ACQUISITIONS, LLC
AND RYAN HOMES, INC.,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF MENDON,
RESPONDENT-DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SHELDON W. BOYCE, JR., TOWN ATTORNEY, ROCHESTER (DAVID C. SIELING OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

FORSYTH, HOWE, O'DWYER, KALB & MURPHY, P.C., ROCHESTER (ROBERT B. KOEGEL OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from a supplemental judgment (denominated supplemental order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered August 14, 2019 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The supplemental judgment, insofar as appealed from, awarded petitioners attorneys' fees.

It is hereby ORDERED that the supplemental judgment insofar as appealed from is unanimously reversed on the law without costs and the award of attorneys' fees is vacated.

Same memorandum as in *Matter of Riedman Acquisitions, LLC v Town Bd. of Town of Mendon* ([appeal No. 1] — AD3d — [May 7, 2021] [4th Dept 2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1018

KA 18-01173

PRESENT: LINDLEY, J.P., NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERON MCGEE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered March 23, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). The charge arose after the police executed a search warrant at defendant's apartment and seized, inter alia, approximately four grams of cocaine and a scale containing cocaine residue.

Defendant contends that County Court erred in failing to order, sua sponte, a second competency examination under CPL article 730. We reject that contention. Defendant was found fit to proceed with trial by two examiners, and "[t]he trial court was entitled to give weight to the findings and conclusions of competency derived from the most recent examination" (*People v Morgan*, 87 NY2d 878, 880 [1995]). Additionally, the record establishes that defendant had "sufficient present ability to consult with his . . . lawyer with a reasonable degree of rational understanding" and "ha[d] a rational as well as factual understanding of the proceedings against him" (*People v Winebrenner*, 96 AD3d 1615, 1616 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012] [internal quotation marks omitted]). Notably, defendant interacted with the court and made a cogent argument for leniency in which he highlighted his consistent treatment efforts and desire to provide for his children, and "evinced a particularized understanding of the nature of the proceedings and what was unfolding" (*Morgan*, 87 NY2d at 880). Thus, we conclude that the court did not abuse its

discretion as a matter of law by failing, sua sponte, to order a second competency examination under article 730 (*see People v Tortorici*, 92 NY2d 757, 759 [1999], *cert denied* 528 US 834 [1999]).

Defendant further contends that the court erred in denying his motion for a mistrial when the prosecutor asked a defense witness on cross-examination, after the witness testified that he believed defendant could be a role model to kids in the neighborhood, whether it would "change [his] opinion that [defendant] would be a good role model for . . . children if [the witness] knew that [defendant] had a previous drug charge." "[T]he decision [whether] to grant or deny a motion for a mistrial is within the trial court's discretion" (*People v Ortiz*, 54 NY2d 288, 292 [1981]). Here, the court promptly sustained defendant's objection to the prosecutor's question prior to an answer being given by the witness, and thereafter, outside the presence of the jury, sought and obtained defense counsel's input in fashioning a remedy and curative instruction. In accordance with defense counsel's request, the court struck the prosecutor's question from the record and instructed the jury not to consider the question, and the jury is presumed to have followed that curative instruction (*see People v DeJesus*, 110 AD3d 1480, 1482 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]; *People v Hawkes*, 39 AD3d 1209, 1210 [4th Dept 2007], *lv denied* 9 NY3d 845 [2007]). Thus, it cannot be said that the court abused its discretion in denying defendant's motion for a mistrial (*see generally People v Ward*, 107 AD3d 1605, 1606 [4th Dept 2013], *lv denied* 21 NY3d 1078 [4th Dept 2013]).

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence with respect to the element of possession because his motion for a trial order of dismissal was not " 'specifically directed' at the alleged error" asserted on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, " 'we necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1027

CA 19-02196

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

PAULINE KINACH, AS EXECUTRIX OF THE ESTATE OF
PAUL KINACH, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOPS MARKETS, LLC, DEFENDANT,
AND BATHCANPUL, LLC, DEFENDANT-APPELLANT.

NASH CONNORS, P.C., BUFFALO (MATTHEW A. LOUISOS OF COUNSEL), FOR DEFENDANT-APPELLANT.

RALPH W. FUSCO, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered October 30, 2019. The order denied the motion of defendant Bathcanpul, LLC for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiff's decedent fell at a supermarket operated by defendant Tops Markets, LLC (Tops). The building was owned by defendant Bathcanpul, LLC (Bathcanpul) and leased to Tops. This negligence action was thereafter commenced to recover damages for the decedent's injuries. Bathcanpul moved for summary judgment dismissing the complaint against it on the ground that its status as an out-of-possession landlord precluded liability. Supreme Court denied the motion, and we now affirm.

Bathcanpul's failure to support its motion with an accurate copy of the pleadings "require[d] denial of the motion, regardless of the merits" (*Tudisco v Mincer*, 126 AD3d 1501, 1501 [4th Dept 2015]). Contrary to Bathcanpul's contention, the court providently exercised its discretion in refusing to disregard that oversight (*cf. Galpern v Air Chefs, L.L.C.*, 180 AD3d 501, 502 [1st Dept 2020]). In any event, as the court correctly determined in the alternative, Bathcanpul failed to meet its initial burden of establishing that it was an out-of-possession landlord (*see Thompson v Corbett*, 13 AD3d 1060, 1061-1062 [4th Dept 2004]; *Kreimer v Rockefeller Group*, 2 AD3d 407, 408 [2d Dept 2003]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1028

CA 19-01828

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

SAMUEL J. CAPIZZI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BROWN CHIARI LLP, JAMES E. BROWN AND DONALD P. CHIARI, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS BROWN CHIARI LLP AND DONALD P. CHIARI.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT JAMES E. BROWN.

WEBSTER SZANYI LLP, BUFFALO (KEVIN A. SZANYI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 13, 2019. The judgment declared that plaintiff was an equity partner in defendant Brown Chiari LLP, when he resigned from it.

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

Memorandum: After resigning from defendant law firm Brown Chiari LLP (firm or defendant firm), plaintiff attorney commenced this action seeking, among other things, a declaration that the firm was dissolved and money damages, including profits that he alleged had been wrongfully withheld from him. Defendants James E. Brown and Donald P. Chiari have maintained that they were the only partners in the firm and that plaintiff is not entitled to relief because he was not a partner.

This is not the first time the business relationship of plaintiff, Brown, and Chiari has been the subject of litigation. Those parties were previously defendants in an action brought by a fourth attorney upon that attorney's resignation from a prior incarnation of the law firm of "Brown Chiari" (prior firm). After a nonjury trial in the prior litigation, Supreme Court determined that all four attorneys were partners in the prior firm (*Frascogna v Brown, Chiari, Capizzi & Frascogna, LLP*, Sup Ct, Erie County, Dec. 22, 2006, Eugene M. Fahey, J., index No. 2004/8335), despite the testimony of

plaintiff and Chiari that they did not consider themselves partners in the prior firm. Among the facts noted by the court were that each of the four attorneys received a percentage of the prior firm's income; the prior firm's tax returns identified each as a partner; each received a Schedule K-1 with a capital account; each personally guaranteed a line of credit; and banking resolutions were signed by each, giving them broad authority to transact on behalf of the prior firm. The court highlighted those facts as supporting the existence of a four-person partnership. Consequently, the prior firm was dissolved. Defendant firm was formed shortly thereafter.

After a nonjury trial in the instant matter, Supreme Court (Timothy J. Walker, A.J.) issued two judgments (denominated decisions and orders). The judgment on appeal in appeal No. 1 declared that plaintiff was an equity partner in defendant firm when he resigned from it. The judgment on appeal in appeal No. 2 declared that the firm had been dissolved upon plaintiff's resignation. We affirm in each appeal.

Our scope of review after a nonjury trial is as broad as that of the trial court (*see Howard v Pooler*, 184 AD3d 1160, 1163 [4th Dept 2020]; *Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170 [4th Dept 2005]), and we have "virtually plenary power to 'render the judgment [we] find[] warranted by the facts' " (*Baba-Ali v State of New York*, 19 NY3d 627, 640 [2012], quoting *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). In conducting our review, we weigh the evidence presented and award judgment as warranted by the record, giving due deference to the court's evaluation of the credibility of the witnesses and the quality of proof (*see City of Syracuse Indus. Dev. Agency*, 20 AD3d at 170; *see also Mosley v State of New York*, 150 AD3d 1659, 1660 [4th Dept 2017]).

We perceive no basis for disturbing the court's determination that plaintiff was a partner in the firm. "A partnership is an association of two or more persons to carry on as co-owners a business for profit" (Partnership Law § 10 [1]). Where, as here, there is no written partnership agreement in place, the provisions of the Partnership Law apply (*see Congel v Malfitano*, 31 NY3d 272, 287-288 [2018]). Although, under the Partnership Law, "the sharing of business profits constitutes prima facie evidence of the existence of a partnership . . . , it is not dispositive" (*Fasolo v Scarafile*, 120 AD3d 929, 931 [4th Dept 2014], *lv dismissed* 24 NY3d 992 [2014]; *see* § 11 [4]). Rather, we look to the parties' conduct, intent, and relationship to determine whether a partnership existed in fact (*see Hammond v Smith*, 151 AD3d 1896, 1897 [4th Dept 2017]). "The relevant factors are (1) the parties' intent, whether express or implied; (2) whether there was joint control and management of the business; (3) whether the parties shared both profits and losses; and (4) whether the parties combined their property, skill, or knowledge . . . No single factor is determinative; a court considers the parties' relationship as a whole" (*id.*).

With respect to the first factor of the analysis, the parties'

intent to establish a three-person partnership is evident from the manner in which they structured defendant firm in the wake of the *Frascogna* decision. If Brown and Chiari—two highly experienced and capable attorneys—intended at that time to form a partnership that excluded plaintiff, they had the benefit of that decision to serve as a guide. Brown and Chiari could have executed a written partnership agreement detailing the terms of partnership, or they could have structured defendant firm differently from the prior firm by eliminating or substantially limiting the business practices that were identified by the *Frascogna* decision as indicia of partnership. They did neither. Indeed, the evidence presented at trial established that plaintiff's position in defendant firm was much the same as it had been in the prior firm. For example, plaintiff received 20% of profits from 2007 to 2013. The firm's 2007-2015 tax returns identified plaintiff, Brown, and Chiari as the firm's partners and indicated that none owned an interest of 50% or more. Plaintiff received a Schedule K-1 with a capital account every year, and he personally guaranteed the firm's line of credit. Further, plaintiff signed banking resolutions giving him authority to borrow money on the firm's behalf. In other words, the parties recreated pre-*Frascogna* conditions at their newly formed firm, and we conclude that the parties' conduct in doing so constitutes strong evidence of their intent to establish a three-person partnership that included plaintiff, thereby establishing the first factor.

Although that factor is not determinative (*see Hammond*, 151 AD3d at 1897), other factors are present. With respect to the third factor, the sharing of profits and losses is undisputed. With respect to the fourth factor, combined property, skill, and knowledge is inherent in any legal practice. Although joint control and management arguably is not present, that second factor was not present in *Frascogna* either. Considering the parties' relationship as a whole (*see Hammond*, 151 AD3d at 1897) and giving due deference to the trial court (*see City of Syracuse Indus. Dev. Agency*, 20 AD3d at 170), we conclude that the court properly determined that plaintiff was a partner in the firm.

In reaching that conclusion, we reject the contention of defendants that, based upon plaintiff's past sworn statements, plaintiff is judicially estopped from taking the position that he is a partner in the firm. "The doctrine of judicial estoppel provides that where a party assumes a position in a legal proceeding and succeeds in maintaining that position, that party may not subsequently assume a contrary position because [the party's] interests have changed" (*Jones v Town of Carroll*, 177 AD3d 1297, 1298 [4th Dept 2019] [internal quotation marks omitted]). Here, the elements of judicial estoppel are lacking. Although plaintiff previously took the position that he was not a partner in the prior firm, that position did not prevail (*see id.*; *Grove v Cornell Univ.*, 151 AD3d 1813, 1817 [4th Dept 2017]). Even if it had prevailed, we conclude that plaintiff's position here is not contrary to his position in the *Frascogna* litigation. Plaintiff testified at trial that he changed his opinion of his ownership status around the time of the formation of defendant firm based upon his understanding of the *Frascogna* decision. In our view,

plaintiff acted reasonably in doing so.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1029

CA 19-02042

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

SAMUEL J. CAPIZZI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BROWN CHIARI LLP, JAMES E. BROWN AND
DONALD P. CHIARI, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS BROWN CHIARI LLP AND DONALD P. CHIARI.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT JAMES E. BROWN.

WEBSTER SZANYI LLP, BUFFALO (KEVIN A. SZANYI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 15, 2019. The judgment, insofar as appealed from, declared that the law firm of Brown Chiari LLP dissolved upon plaintiff's resignation.

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

Same memorandum as in *Capizzi v Brown Chiari LLP* ([appeal No. 1] — AD3d — [May 7, 2021] [4th Dept 2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1034

CA 20-00258

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

RYAN LYNCH, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

PREFERRED MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (ERIN K. SKUCE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an amended order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered February 5, 2020. The amended order denied the motion of defendant for summary judgment and the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting defendant's motion, dismissing the complaint, and granting judgment on the counterclaim in favor of defendant as follows:

> It is ADJUDGED and DECLARED that defendant is not obligated to provide coverage for the losses alleged in plaintiff's complaint,

and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff, the holder of a homeowner's insurance policy issued by defendant, commenced this action alleging that defendant wrongfully disclaimed coverage for damage to his home and seeking a money judgment. Defendant answered, asserting affirmative defenses and a counterclaim seeking a declaratory judgment, and thereafter moved for summary judgment dismissing the complaint and entering judgment in defendant's favor on the counterclaim. Plaintiff cross-moved for partial summary judgment with respect to the affirmative defenses and counterclaim. Defendant now appeals and plaintiff cross-appeals from an amended order that, in relevant part, denied the motion and cross motion.

We agree with defendant that Supreme Court erred in denying its motion. Specifically, we conclude that defendant met its initial

burden on its motion by establishing as a matter of law that plaintiff's loss is excluded from coverage because it resulted from a design defect constituting "inherent vice" or "latent defect" within the meaning of the policy, and plaintiff failed to raise an issue of fact in opposition. "A latent defect within the meaning of a policy exclusion is an imperfection in the material used . . . It has also been defined as a defect that is hidden or concealed from knowledge as well as from sight and which a reasonable customary inspection would not reveal" (*Luttenberger v Allstate Ins.*, 122 Misc 2d 365, 366 [Dist Ct, Suffolk County 1984]; *see St. John Fisher Coll. v Continental Corp.*, 184 AD2d 1063, 1063 [4th Dept 1992], *lv denied* 80 NY2d 761 [1992]). "[I]nherent vice" is defined as "[a] property or good's defect, hidden or obvious, that causes or contributes to damage suffered by the property or good" (Black's Law Dictionary 1877 [11th ed 2019]). Here, defendant met its initial burden on its motion by submitting the expert affidavit of a professional engineer, who inspected the home and opined that the bulging of the walls in the living room was "likely the result of rafter spread due to an inherent pre-existing design defect relating to the construction of the vaulted ceiling and wall structure in the living room when the residence was constructed approximately 25 years" earlier, an opinion that was consistent with the opinion of plaintiff's engineer.

In opposition to the motion, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

For the foregoing reasons, we also reject plaintiff's contention that the court erred in denying his cross motion.

Therefore, we modify the amended order by granting defendant's motion, dismissing the complaint, and granting judgment on the counterclaim in favor of defendant by adjudging and declaring that defendant is not obligated to provide coverage for the losses alleged in plaintiff's complaint.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1075

CA 19-01501

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF TOWN OF TONAWANDA POLICE CLUB, INC., AND HOWARD M. SCHOLL, III, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, TOWN BOARD OF TOWN OF TONAWANDA, TOWN OF TONAWANDA POLICE DEPARTMENT, AND JEROME C. USCHOLD, III, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE, RESPONDENTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (SEAN P. BEITER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BARTLO, HETTLER, WEISS & TRIPI, KENMORE (PAUL D. WEISS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered August 1, 2019 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the petition in part, vacating the first through sixth decretal paragraphs, and reinstating the amended charges against petitioner Howard M. Scholl, III, and as modified the judgment is affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, dismissal of the amended disciplinary charges against Howard M. Scholl, III (petitioner), a directive that any further disciplinary proceedings against petitioner must be brought pursuant to Section 75 of the Civil Service Law and the collective bargaining agreement (CBA) between respondent Town of Tonawanda and petitioner Town of Tonawanda Police Club, Inc., and to compel respondents to reinstate petitioner's salary and benefits nunc pro tunc. Petitioner, a police officer with respondent Town of Tonawanda Police Department, was suspended without pay pending a disciplinary hearing after respondents learned that he was driving his personal vehicle and collided with another vehicle, and then falsely reported to the police officers who responded to the scene of the accident that his wife was driving the vehicle at the time of the collision. Respondents initiated disciplinary proceedings against

petitioner pursuant to Town Law § 155 and the disciplinary procedures outlined in the police manual, which was adopted by resolution of respondent Town Board of the Town of Tonawanda (Town Board). Respondents now appeal from a judgment that, inter alia, granted the petition. We modify the judgment by denying the petition in part, vacating that part of the judgment prohibiting respondents from conducting disciplinary proceedings pursuant to Town Law § 155 and that part directing respondents to abide by Civil Service Law § 75 and the collective bargaining agreement regarding disciplinary issues, and by reinstating the amended charges against petitioner.

Initially, we agree with respondents that Supreme Court erred in granting that part of the petition seeking a determination that the police manual was not properly adopted by the Town Board pursuant to Town Law § 155. Town Law § 155 states that "[t]he town board shall have the power and authority to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges" against members of the town police department. Here, although the police manual does not specifically reference Town Law § 155, the police manual contains language that mirrors that statute. Thus, the police manual invokes the Town Law and, contrary to the court's determination, the lack of any specific reference to section 155 in the police manual does not mean that the police manual was not adopted pursuant to that section of the Town Law, and does not preclude respondents from using the procedures set forth in the police manual (*see generally Matter of Town of Wallkill v Civil Serv. Empls. Assn., Inc. [Local 1000, AFSCME, AFL-CIO, Town of Wallkill Police Dept. Unit, Orange County Local 836]*, 84 AD3d 968, 971 [2d Dept 2011], *affd* 19 NY3d 1066 [2012]; *Matter of Koonz v Corrigan*, 117 AD2d 912, 914 [3d Dept 1986], *lv denied* 68 NY2d 602 [1986]).

Furthermore, Town Law § 155 does not specify the methods to be used by a town board when adopting rules and regulations regarding police discipline, and thus the statute does not require that police disciplinary procedures be adopted by passing a local law rather than a resolution (*see generally Matter of City of Schenectady v New York State Pub. Empl. Relations Bd.*, 30 NY3d 109, 114-117 [2017]; *Matter of Town of Wallkill v Civil Serv. Empls. Assn., Inc. [Local 1000, AFSCME, AFL-CIO, Town of Wallkill Police Dept. Unit, Orange County Local 836]*, 19 NY3d 1066, 1069 [2012]). As petitioners correctly concede, town boards may act by adopting local laws or resolutions, and the Town Board adopted the 2019 police manual for the 2019 calendar year by resolution.

Inasmuch as we agree with respondents that the disciplinary procedures set forth in the police manual are controlling, we further agree with respondents that the court erred in directing them to resolve petitioner's disciplinary proceedings pursuant to Civil Service Law § 75 and the CBA (*see Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, 6 NY3d 563, 570 [2006]). To the extent that the police manual contains references to Civil Service Law § 75, it is well settled that section 75 did not repeal or modify Town Law § 155 (*see Town of*

Wallkill, 19 NY3d at 1069; *Patrolmen's Benevolent Assn. of City of N.Y., Inc.*, 6 NY3d at 573). Indeed, "Civil Service Law § 76 (4) states that '[n]othing contained in section [75] or [76] of this chapter shall be construed to repeal or modify any *general, special or local*' preexisting laws" (*Town of Wallkill*, 19 NY3d at 1069; *see City of Schenectady*, 30 NY3d at 114-116), and Town Law § 155, which gives towns the power and authority to adopt rules regarding police discipline, was enacted prior to Civil Service Law §§ 75 and 76 (*see Town of Wallkill*, 19 NY3d at 1069). Thus, where, as here, a town board has adopted disciplinary rules pursuant to Town Law § 155, those rules are controlling and Civil Service Law § 75 and any collective bargaining agreement are inapplicable (*see id.*). Inasmuch as respondents have the authority to initiate disciplinary proceedings pursuant to Town Law § 155, we further conclude that the court erred in granting that part of the petition seeking dismissal of the amended charges against petitioner (*see generally id.*).

Finally, we reject respondents' contention that the court erred in reinstating petitioner's salary and benefits. Section A-15 of the adopted police manual states that, "[p]ending the hearing and determination of charges of incompetency or misconduct, an officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty (30) days." Inasmuch as more than 30 days had elapsed since petitioner's suspension on February 13, 2019, the court properly directed respondents to reinstate petitioner's salary and benefits nunc pro tunc.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1080

KA 20-00563

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM H. LEWIS, DEFENDANT-APPELLANT.

TULLY RINCKEY PLLC, ROCHESTER (PETER J. PULLANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 16, 2017. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree, predatory sexual assault against a child (two counts), and endangering the welfare of a child (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [4]), two counts of predatory sexual assault against a child (§ 130.96), and three counts of endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that County Court erred in admitting in evidence a videotape of his confession to a police officer because the recording was so inaudible and unintelligible that the prejudicial effect of its use outweighed the probative value (*see People v Highsmith*, 254 AD2d 768, 769-770 [4th Dept 1998], *lv denied* 92 NY2d 983, 1033 [1998]). In any event, that contention is without merit. The determination whether to permit the admission of a recording in evidence lies in the sound discretion of the trial court (*see People v Dalton*, 164 AD3d 1645, 1645 [4th Dept 2018], *lv denied* 32 NY3d 1170 [2019]), and there is "no abuse of discretion in admitting in evidence recordings having parts that are less than clear" where, as here, "they are not so inaudible and indistinct that the jury would have to speculate concerning [their] contents and would not learn anything relevant from them" (*id.* [internal quotation marks omitted]; *see People v Jackson*, 94 AD3d 1559, 1561 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]).

Defendant contends that he was deprived of a fair trial based on several instances of prosecutorial misconduct. Defendant's contention

is preserved for our review only in part (*see* CPL 470.05 [2]) and is, in any event, without merit. With respect to defendant's argument that the prosecutor failed to disclose *Brady* material, we conclude that the material in question—evidence that the victims visited the residence of a registered sex offender while supervised by their mother and evidence from the report of the nurse's examination of the victims— was either not relevant or not exculpatory (*see People v Ulett*, 33 NY3d 512, 515 [2019]; *People v Boykins*, 160 AD3d 1348, 1349 [4th Dept 2018], *lv denied* 31 NY3d 1145 [2018]). While defendant preserved his challenge to two inflammatory statements made by the prosecutor during summation (*see People v Romero*, 7 NY3d 911, 912 [2006]; *People v White*, 70 AD3d 1316, 1317 [4th Dept 2010], *lv denied* 14 NY3d 845 [2010]), we conclude that the comments were not so egregious as to deprive defendant of a fair trial (*see People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv denied* 29 NY3d 1031 [2017]).

Defendant's sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1090

CA 19-01786

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

DIAMONDS M. CAIN-HENRY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROMANA SHOT, ET AL., DEFENDANTS,
CEDRICK J. MORGAN AND SIBO C. SIMKIN-JAMES,
DEFENDANTS-RESPONDENTS.

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JENNIFER S. ADAMS, WILLIAMSVILLE (KEVIN J. GRAFF OF COUNSEL), FOR DEFENDANT-RESPONDENT SIBO C. SIMKIN-JAMES.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (ERICKA B. ELLIOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT CEDRICK J. MORGAN.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered September 20, 2019. The order granted the motion of defendant Cedrick J. Morgan and the cross motion of defendant Sibo C. Simkin-James to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion and cross motion are denied, and the complaint against defendants Cedrick J. Morgan and Sibo C. Simkin-James is reinstated.

Memorandum: Plaintiff commenced this action seeking, inter alia, to recover for injuries she allegedly sustained when a vehicle operated by Cedrick J. Morgan and owned by Sibo C. Simkin-James (collectively, defendants) came into contact with the vehicle plaintiff was operating. Morgan moved and Simkin-James cross-moved to dismiss the complaint against them pursuant to CPLR 3211 (a) (5), asserting that, approximately two months after the accident, plaintiff signed a release, offered by a representative of Morgan’s insurance carrier, which, in exchange for the sum of $1,500, relieved both Morgan and Simkin-James of “any and all claims, actions, causes of action . . . on account of or in any way growing out of any and all known and unknown personal injuries and damages” resulting from the accident. In opposition to the motion and cross motion, plaintiff asserted that the release had been obtained through fraud and misrepresentation. Plaintiff appeals from an order granting the motion and cross motion, and we reverse.

Defendants met their initial burden of establishing that they were released from any claims by submitting the release executed by plaintiff (*see Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]). The burden thus shifted to plaintiff to show that the release was voidable based on fraud (*see id.*). Plaintiff submitted an affidavit in which she averred that, in the midst of negotiating a settlement of her personal injury claim for pain and suffering, a representative of Morgan's insurer told her that, "under New York Law, [plaintiff] would not be able to sue . . . because [she] did not have any major surgeries or life-threatening injuries." Plaintiff further averred that, based on those representations, she agreed to sign the release in exchange for $1,500. Accepting plaintiff's allegations as true (*see Ford v Phillips*, 121 AD3d 1232, 1234 [3d Dept 2014]), we conclude that plaintiff sufficiently alleged grounds on which to invalidate the release (*see id.* at 1235; *cf. Phillips v Savage*, 159 AD3d 1581, 1581 [4th Dept 2018]; *see generally Centro Empresarial Cempresa S.A.*, 17 NY3d at 276). Thus, the complaint against defendants should not have been dismissed at this juncture, and Supreme Court erred in granting the motion and cross motion (*see Ford*, 121 AD3d at 1235-1236; *Gonzalez v 40 Burnside Ave., LLC*, 107 AD3d 542, 543-544 [1st Dept 2013]; *cf. Gray v Miller*, 248 AD2d 1000, 1000-1001 [4th Dept 1998]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1093

CA 20-00364

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

FRANCK BISIMWA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ST. JOHN FISHER COLLEGE, TERRI L. TRAVAGLINI, IN HER OFFICIAL CAPACITY AS ASSISTANT DEAN OF STUDENTS AT ST. JOHN FISHER COLLEGE AND TERRI L. TRAVAGLINI, INDIVIDUALLY, DEFENDANTS-APPELLANTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (JOSHUA M. AGINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COUCH WHITE, LLP, ALBANY (ELIZABETH L. CALLAHAN OF COUNSEL), AND THE LAW OFFICE OF ROBERT KING, PLLC, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered November 20, 2019. The order granted in part and denied in part the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking to dismiss the first and second causes of action against defendant Terri L. Travaglini, to dismiss the third cause of action in its entirety, and to dismiss the claim for punitive damages, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, while enrolled as a freshman at defendant St. John Fisher College (College), was found responsible following a student conduct hearing for several violations of the College's student code of conduct, including sexual misconduct and assault, arising from a sexual encounter with another student. As a result, he was expelled. Although plaintiff was also later criminally prosecuted on charges of rape in the first and third degrees, a jury found him not guilty of those alleged crimes. Plaintiff and the College thereafter entered into a settlement and release agreement in which each party agreed to various terms to resolve any disputes between them. While neither party admitted any wrongdoing and plaintiff remained expelled, the College acknowledged that if new evidence, including the trial testimony of several witnesses, had been available during the student conduct hearing, a different result may have been reached in the disciplinary proceeding. Among other terms, the College agreed to expunge the notation of disciplinary action and sanctions from plaintiff's transcript and to expunge references to

disciplinary action from any other records of the College made available to third parties.

Plaintiff subsequently commenced this action against the College and defendant Terri L. Travaglini, individually and in her official capacity as Assistant Dean of Students at St. John Fisher College, alleging causes of action for, inter alia, breach of contract and defamation. In relevant part, plaintiff alleged that defendants breached the agreement and defamed him when, in response to his authorizations for the release of information as part of his applications to the University at Buffalo (UB) and SUNY Buffalo State College (Buffalo State), Travaglini disclosed to those educational institutions information regarding the finding of responsibility against plaintiff for his violations of the student code of conduct and his resulting expulsion. Defendants now appeal from an order insofar as it denied that part of their pre-answer motion seeking dismissal of the first and second causes of action, alleging breach of contract, and the third cause of action, alleging defamation, to the extent it is based on the disclosure to Buffalo State.

Defendants contend that Supreme Court erred in denying that part of their motion seeking to dismiss the breach of contract causes of action against Travaglini for failure to state a cause of action (*see* CPLR 3211 [a] [7]) because she is not a party to the agreement. We agree, and we therefore modify the order accordingly. Here, plaintiff failed to state a cause of action alleging breach of contract against Travaglini individually because she is not a party to the agreement, which is exclusively between plaintiff and the College (*see Itzkowitz v Ginsburg*, 186 AD3d 579, 581 [2d Dept 2020]; *Environmental Appraisers & Bldrs., LLC v Imhof*, 143 AD3d 756, 757 [2d Dept 2016]). To the extent that plaintiff alleged that Travaglini was liable in her official capacity as Assistant Dean of Students, he effectively alleged that Travaglini acted as an agent on behalf of the College (*see Environmental Appraisers & Bldrs., LLC*, 143 AD3d at 757-758). " 'When an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of contract unless there is clear and explicit evidence of the agent's intention to be personally bound' " (*Simmons v Washing Equip. Tech.*, 51 AD3d 1390, 1392 [4th Dept 2008]; *see Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]). Plaintiff did not allege that Travaglini intended to be personally bound (*see Environmental Appraisers & Bldrs., LLC*, 143 AD3d at 757-758; *Simmons*, 51 AD3d at 1392).

We nonetheless reject defendants' further contention that the court erred in denying that part of their motion seeking to dismiss the breach of contract causes of action against the College based on documentary evidence (*see* CPLR 3211 [a] [1]). "When a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]). "The motion may be granted if 'documentary evidence utterly

refutes [the] plaintiff's factual allegations' . . . , thereby 'conclusively establishing a defense as a matter of law' " (*id.*). "One example of such proof is an unambiguous contract that indisputably undermines the asserted causes of action" (*id.*). In that regard, "[a] written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties" (*Brad H. v City of New York*, 17 NY3d 180, 185 [2011]). In construing an agreement, "language should not be read in isolation" (*id.*); rather, it " 'must be read as a whole to give effect and meaning to every term' " (*Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017]; *see Paramax Corp. v VoIP Supply, LLC*, 175 AD3d 939, 941-942 [4th Dept 2019]).

Here, upon reading the agreement as a whole to give effect and meaning to every term, we conclude that there is no merit to defendants' contention that the agreement permitted the disclosure of plaintiff's non-expunged disciplinary history to third parties such as other educational institutions. The first relevant paragraph of the agreement, which defendants ignore in presenting their argument, prohibited the parties from communicating any defamatory or disparaging statements to third parties but left undisturbed the College's "right to perform any action in its normal course of business, including without limit disclosing any student conduct history *other than violations found at the Student Conduct Hearing*" (emphasis added). The agreement thus clearly contemplated that the College's right to disclose plaintiff's disciplinary history was circumscribed to the extent that the College could not, as it might normally do in the course of its business, disclose violations found during the subject student conduct hearing against plaintiff. That reading is reinforced by the second relevant paragraph, which indicated that the College agreed to expunge the notation of disciplinary action and sanctions from plaintiff's transcript and, *in addition*, provided that "references to any disciplinary action shall be expunged from any other [College] records that are made available to third parties." Taken together, the relevant paragraphs provide that, whatever was disclosed by the College to third parties, it would not include any reference to the disciplinary action taken against plaintiff as a result of the subject incident.

Defendants nonetheless contend that the final sentence of the second relevant paragraph, which allowed the College to retain records of the underlying disciplinary proceeding, permitted the disclosure of the finding of responsibility against plaintiff. That contention also lacks merit. The final sentence stated that the College "shall retain records of the underlying disciplinary proceedings consistent with its record retention protocols generally applicable to records of such proceedings, which shall be treated as confidential student records under applicable law and [College] policies." As plaintiff correctly contends, the final sentence allowed the College to retain for its own internal record-keeping purposes the record of the underlying disciplinary proceeding and provided that, for purposes of such retention, the record would be treated as confidential. But *retention* of records by the College is decidedly different from *disclosure*

thereof to third parties, and the final sentence is preceded by one unambiguously stating that references to any disciplinary action would be expunged from any records that the College made available to third parties. Thus, contrary to defendants' assertion, even if an "applicable law" permitted disclosure such that there would be no violation of that law, the agreement here barred disclosure of any non-expunged disciplinary history.

We further conclude that the additional documentary evidence submitted by defendants in support of their motion to dismiss, i.e., the authorizations for release of information executed by plaintiff, does not establish as a matter of law that plaintiff abandoned his contractual rights under the agreement (*see Town of Mexico v County of Oswego*, 175 AD3d 876, 877-878 [4th Dept 2019]). It is well established that "[c]ontractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). "Such abandonment 'may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage' " (*id.*). "However, waiver 'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish a contractual protection" (*id.*). "Generally, the existence of an intent to forgo such a right is a question of fact" (*id.*).

Here, the documentary evidence shows that plaintiff authorized the College to disclose to UB "[i]nformation in [his] student conduct record" about the subject incident and to Buffalo State "any and all information regarding [him], however personal and confidential it may appear to be, including copies of any and all records and reports, contained in the files of [the College] . . . for the purpose of determining [his] suitability for possible admission." As alleged in the complaint, however, plaintiff executed those authorizations for the release of information to UB and Buffalo State on the understanding that, consistent with the agreement, the information disclosed by the College would not include any references to disciplinary action related to the subject incident. In other words, under the facts as alleged in the complaint, which we must accept as true, plaintiff's intent in executing the authorizations was not to waive his contractual rights but rather to have the College release any pertinent information it may have possessed *other than* references to the disciplinary action arising from the subject incident. To the extent that the plaintiff's authorizations and his additional preemptive disclosure to Buffalo State suggest otherwise, the complaint further alleged that plaintiff contemplated that the College would simply "confirm the statements that [he] had made" preemptively, i.e., that he had been "accused of a crime he did not commit" and was "found innocent by a jury after trial." In light of those allegations, any intent by plaintiff to forgo his contractual right of nondisclosure—which should not be lightly presumed and is generally a question of fact (*see Fundamental Portfolio Advisors, Inc.*, 7 NY3d at 104)—cannot be determined at this stage in the litigation (*see Town of Mexico*, 175 AD3d at 877-878). We therefore conclude that the documentary evidence submitted in support of defendants' motion to

dismiss failed to "utterly refute[] plaintiff's factual allegations" and thus did not "conclusively establish[ ] a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Town of Mexico*, 175 AD3d at 878).

Defendants also contend that the court erred in denying that part of their motion seeking to dismiss the defamation cause of action to the extent that it is based on the disclosure to Buffalo State. We agree, and we therefore further modify the order accordingly. "Where a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation" (*Armstrong v Simon & Schuster, Inc.*, 85 NY2d 373, 380 [1995]). It is undisputed here that the information disclosed to Buffalo State was not false in and of itself; rather, as the parties and the court recognized, plaintiff's theory is defamation by implication based on omissions from the disclosure to Buffalo State and the alleged false suggestions or implications arising therefrom.

" 'Defamation by implication' is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" (*id.* at 380-381). We now join the other Departments in adopting the heightened legal standard for a claim of defamation by implication (*see Partridge v State of New York*, 173 AD3d 86, 91 [3d Dept 2019]; *Udell v NYP Holdings, Inc.*, 169 AD3d 954, 957 [2d Dept 2019]; *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 37-38 [1st Dept 2014]). Under that standard, "[t]o survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference" (*Stepanov*, 120 AD3d at 37-38; *see Partridge*, 173 AD3d at 91; *Udell*, 169 AD3d at 957). We reject plaintiff's contention that the heightened standard is limited to cases involving the press or the media. Although the rationale for adopting the heightened standard includes achieving balance between "a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment protection for publishing substantially truthful statements" (*Stepanov*, 120 AD3d at 38), the rationale is not limited to First Amendment considerations and instead also includes fairness to a declarant who intended or endorsed only the true meaning of the subject statement (*see Partridge*, 173 AD3d at 91).

Here, a reasonable reading of the substantially true disclosure to Buffalo State of plaintiff's violations of the student code of conduct and expulsion from the College does not imply that plaintiff is "a rapist" as plaintiff alleged in his complaint or "a convicted rapist" as plaintiff's counsel asserted in opposition to the motion to dismiss. The disclosure that plaintiff was found responsible in a student disciplinary proceeding for sexual misconduct and assault as defined in a student code of conduct does not imply that there was a criminal proceeding, let alone that the result of any such criminal proceeding was a conviction for rape as defined by the Penal Law. We

thus conclude that "there is no reasonable reading of th[e] true fact[s in the disclosure to Buffalo State] that can lend itself to a defamatory implication" that plaintiff is a convicted rapist (*Stepanov*, 120 AD3d at 39).

Plaintiff nonetheless further contends that the disclosure falsely suggested that he had, in fact, committed the acts of which he was accused, despite the new evidence and record expungement as set forth in the agreement. Even assuming, arguendo, that plaintiff pleaded this theory, we conclude that the omission of the terms of the agreement did not impart any false inference. Plaintiff was found responsible for violations of the student code of conduct and was expelled, which the College truthfully disclosed to Buffalo State, and while the College acknowledged in the agreement that new evidence *may* have resulted in a different result at the student conduct hearing, the College did not admit that plaintiff was not responsible for the violations and did not reverse plaintiff's expulsion. As defendants contend, although plaintiff may wish that additional information from the College would have provided further context for the truthful information that was conveyed, the disclosure to Buffalo State did not imply anything false about plaintiff (*see Martin v Hearst Corp.*, 777 F3d 546, 553 [2d Cir 2015], *cert denied* 577 US 816 [2015]; *Stepanov*, 120 AD3d at 39-40; *cf. Partridge*, 173 AD3d at 94).

Finally, we agree with defendants that, in the absence of the remaining defamation claim and with only the breach of contract causes of action surviving, plaintiff's claim for punitive damages should be dismissed. We therefore further modify the order accordingly. "As a general rule, '[p]unitive damages are not recoverable in a breach of contract action in which no public rights are alleged to be involved' . . . because the purpose of punitive damages 'is not to remedy private wrongs but to vindicate public rights' " (*City of Buffalo City Sch. Dist. v LPCiminelli, Inc.*, 159 AD3d 1468, 1471 [4th Dept 2018]; *see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]). Here, the breach of contract causes of action do not seek to vindicate public rights; rather, they involve allegations of an ordinary breach of contract between a private university and former student (*see City of Buffalo City Sch. Dist.*, 159 AD3d at 1471).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1096

CA 20-00486

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

NICOLE ELIZABETH DILL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLOTTE LAHR, ESTATE HOMES, INC., DEFENDANTS, AND THOMAS ESTATES MANUFACTURED HOUSING COMMUNITY, LLC, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROLLINSON LAW FIRM, SYRACUSE (MICHAEL P. GRAINGER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered September 17, 2019. The order denied that part of the motion of defendants Thomas Estates Manufactured Housing Community, LLC, and Estate Homes, Inc., seeking summary judgment dismissing the complaint against defendant Thomas Estates Manufactured Housing Community, LLC.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell while descending the exterior stairs of a manufactured home situated on land leased from defendant Thomas Estates Manufactured Housing Community, LLC (Thomas). Supreme Court denied that part of the motion of Thomas and defendant Estate Homes, Inc. (collectively, defendants) seeking summary judgment dismissing the complaint against Thomas, and Thomas appeals. We affirm.

Defendants failed to meet their initial burden on the motion of establishing that Thomas owed no duty to plaintiff. " '[C]ontrol is the test which measures generally the responsibility in tort of the owner of real property' " (*see Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]). "[W]hen a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, we look not only to the terms of the agreement but to the parties' course of conduct—including, but not limited to, the landowner's ability to access the premises—to determine whether the landowner in fact surrendered control over the property such that the landowner's duty

is extinguished as a matter of law" (*id.* at 380-381). Defendants failed to establish as a matter of law that Thomas "relinquished complete control" of the premises to the owner of the manufactured home (*id.* at 381). In support of their motion, defendants submitted evidence that Thomas's property manager periodically drove by the manufactured homes placed on Thomas's land and that she looked for safety issues as well as violations of community rules and the Town building code. If the property manager found any safety issues or violations, she notified the homeowner to remedy them within 10 days. Failure of the homeowner to do so could result in eviction from the land. Notably, the property manager specifically stated that her inspection included the exterior stairs of the manufactured homes; indeed, several months before the accident, the property manager issued a "Community Rules Violation Notice" with respect to the stairs in question. We conclude that defendants' own submissions raise a triable issue of fact whether the property manager's course of conduct could have given rise to reliance by persons in the community, such as plaintiff, on Thomas's power to find and enforce the remediation of dangerous conditions on the subject property (*see id.* at 379-380; *Balash v Melrod*, 167 AD3d 1442, 1442-1443 [4th Dept 2018]; *see also Ritto v Goldberg*, 27 NY2d 887, 889 [1970]) and thus whether Thomas thereby exercised control over the property (*see Gronski*, 18 NY3d at 381-382).

In addition, although Thomas's reservation of the rights to visit or to inspect the premises and to approve certain alterations, additions, or improvements made to the manufactured homes on its land does not by itself establish the requisite degree of control to support the imposition of liability (*see Addeo v Clarit Realty, Ltd.*, 176 AD3d 1581, 1582 [4th Dept 2019]; *Ferro v Burton*, 45 AD3d 1454, 1454-1455 [4th Dept 2007]), an exception to that general principle applies where, as here, the plaintiff has alleged the existence of specific statutory violations with respect to the alleged defect (*see Addeo*, 176 AD3d at 1582-1583; *Ferro*, 45 AD3d at 1454-1455).

Finally, we conclude that defendants failed to meet their initial burden on their motion of establishing as a matter of law that Thomas did not have actual or constructive notice of the defective condition of the stairs. As previously noted, defendants' own submissions established that, prior to the accident, Thomas's property manager issued a "Community Rules Violation Notice" to the homeowner asserting the property manager's belief that the stairs did not comply with the applicable building code, thereby raising at least a question of fact whether Thomas had "constructive, if not actual, notice of the allegedly dangerous condition" (*Wiedenbeck v Lawrence*, 170 AD3d 1669, 1670 [4th Dept 2019]; *see generally Center v Hampton Affiliates*, 66 NY2d 782, 784 [1985]; *Pauszek v Waylett*, 173 AD3d 1631, 1633 [4th Dept 2019]). Even assuming, arguendo, that defendants met their burden, we conclude that plaintiff raised an issue of fact with respect to Thomas's actual notice of the defective condition of the stairs (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In opposition to the motion, plaintiff submitted five photographs of the stairs that she obtained from defendants during discovery, and those photographs, which were taken before plaintiff's accident, depicted

the deficiencies of the stairs asserted by plaintiff.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1131

KA 17-00112

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN K. BAGLEY, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (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 (Frederick G. Reed, A.J.), rendered January 6, 2017. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child, rape in the second degree, rape in the third degree, criminal sexual act in the third degree, endangering the welfare of a child, escape in the first degree, resisting arrest and unlawful fleeing a police officer in a motor vehicle in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of escape in the first degree under count six of the indictment and dismissing that count of the indictment and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, predatory sexual assault against a child (Penal Law § 130.96), rape in the second degree (§ 130.30 [1]), rape in the third degree (§ 130.25 [2]), criminal sexual act in the third degree (§ 130.40 [2]), endangering the welfare of a child (§ 260.10 [1]), and escape in the first degree (§ 205.15 [2]), defendant contends that the evidence is legally insufficient to support the conviction of escape in the first degree. We agree. Here, a police officer informed defendant that he was under arrest and attempted to pull him from the driver's seat of a vehicle, at which time defendant drove off, dragging officers across a parking lot. Under these circumstances, we conclude that defendant was not in custody at the time of the alleged escape (*see* § 205.15 [2]; *People v Lee*, 275 AD2d 995, 996 [4th Dept 2000], *lv denied* 95 NY2d 966 [2000]; *People v Caffey*, 134 AD2d 923, 923 [4th Dept 1987], *lv denied* 70 NY2d 930 [1987]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the remaining abovementioned crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349

[2007]), and according deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we conclude that the verdict with respect to those crimes 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 the DNA evidence because he was "a little bit" "woozy" while in the hospital and therefore unable to consent to the collection of a DNA sample. We reject that contention. The testimony at the suppression hearing established that defendant stood up from his hospital bed, conversed lucidly with the police, and then gave the officers directions en route to the police station. Upon arrival at the police station, defendant read and signed a DNA consent form. That testimony established that defendant voluntarily agreed to provide a sample for DNA testing (*see People v Osborne*, 88 AD3d 1284, 1285 [4th Dept 2011], *lv denied* 19 NY3d 999 [2012], *reconsideration denied* 19 NY3d 1104 [2012]; *cf. People v Skardinski*, 24 AD3d 1207, 1208 [4th Dept 2005]).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct inasmuch as he failed to object to any of the alleged improprieties during summation (*see People v Larregui*, 164 AD3d 1622, 1624 [4th Dept 2018], *lv denied* 32 NY3d 1126 [2018]). In any event, "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Pendergraph*, 150 AD3d 1703, 1704 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017] [internal quotation marks omitted]; *see Larregui*, 164 AD3d at 1624-1625). We reject defendant's further contention that he was denied effective assistance of counsel. With respect to most of the instances of alleged ineffective assistance, defendant failed to meet his burden of demonstrating the " 'absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Norman*, 183 AD3d 1240, 1242 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]). Defense counsel's representation was not ineffective with respect to the remaining instances, which are based on defense counsel's failure to raise certain objections (*see People v Ashkar*, 130 AD3d 1568, 1569 [4th Dept 2015], *lv denied* 26 NY3d 1142 [2016]; *People v Lyon*, 77 AD3d 1338, 1339 [4th Dept 2010], *lv denied* 15 NY3d 954 [2010]). Rather, upon viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant also contends that he was denied due process because he did not have the opportunity to address allegations made by the prosecutor during sentencing concerning uncharged instances of child sexual abuse. We reject that contention inasmuch as the record reflects that the court did not consider those allegations, and thus defendant could not have been prejudiced by their introduction at sentencing (*see People v Rogers*, 156 AD3d 1350, 1350 [4th Dept 2017],

lv denied 31 NY3d 986 [2018]; *People v Gibbons*, 101 AD3d 1615, 1616 [4th Dept 2012]). Furthermore, the sentence is not unduly harsh or severe.

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

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1142

CA 20-00028

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

PARSONS MCKENNA CONSTRUCTION CO., INC., AND
AUBURN REAL ESTATE CO., INC.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ALLIED INSURANCE COMPANIES, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY SCHOONMAKER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered December 24, 2019. The judgment denied the motion of defendant-appellant for summary judgment, granted the cross motion of plaintiffs for summary judgment and declared, inter alia, that defendant-appellant is obligated to defend and indemnify plaintiffs in an underlying action.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the cross motion, vacating the declaration, granting the motion in part and granting judgment in favor of defendant-appellant as follows:

> It is hereby ADJUDGED and DECLARED that defendant-appellant is not obligated to defend and indemnify plaintiff Auburn Real Estate Co., Inc. in the underlying action,

and as modified the judgment is affirmed without costs.

Memorandum: Defendant-appellant (defendant) appeals from a judgment that, inter alia, declared that it is obligated to defend and indemnify plaintiffs in an underlying personal injury action. In the underlying action, an injured laborer asserted claims against plaintiff Auburn Real Estate Co., Inc. (Auburn) to recover damages for injuries that he sustained while working on a construction project on premises owned by Auburn. The general contractor on the project was plaintiff Parsons McKenna Construction Co., Inc. (Parsons), which contracted with the laborer’s employer to perform certain work. An insurance policy issued by defendant to the laborer’s employer listed Parsons as an additional insured, but “only with respect to liability

for ‘bodily injury’ . . . caused by [the employer’s] ongoing operations for [Parsons] . . . and only to the extent that such ‘bodily injury’ . . . is caused by [the employer’s] negligence, acts or omissions or the negligence, acts or omissions of those performing operations on [the employer’s] behalf.”

Plaintiffs conceded at oral argument that Auburn is not covered under the policy, and thus we modify the judgment by granting defendant’s motion with respect to Auburn (*see New York State Thruway Auth. v Ketco, Inc.*, 119 AD3d 659, 661 [2d Dept 2014]).

With respect to Parsons, we agree with defendant that Supreme Court erred in granting plaintiffs’ cross motion for summary judgment on their declaratory judgment causes of action against defendant. Although Parsons, unlike Auburn, is listed as an additional insured on the face of the policy, and although the laborer was undoubtedly “performing operations” on his employer’s behalf (*cf. Pioneer Cent. Sch. Dist. v Preferred Mut. Ins. Co.*, 165 AD3d 1646, 1647-1648 [4th Dept 2018]), we nevertheless conclude that issues of fact with respect to proximate cause preclude an award of summary judgment (*cf. Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 321 [2017]; *Pioneer Cent. Sch. Dist.*, 165 AD3d at 1647). Therefore, we further modify the judgment by denying the cross motion and vacating the declaration.

Defendant’s remaining contention lacks merit.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1184

CA 19-01833

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

OSVALDO GARCIA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, COUNTY OF ERIE,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

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

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

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

Appeal from a decision of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered October 1, 2019. The decision granted the motions of defendants Town of Tonawanda and County of Erie for summary judgment.

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

Memorandum: Plaintiff purports to appeal from a memorandum decision that granted the motions of defendant Town of Tonawanda and defendant County of Erie for summary judgment dismissing the complaint against them. We dismiss the appeal. "[N]o appeal lies from a mere decision" (*Gunn v Palmieri*, 86 NY2d 830, 830 [1995]; *see Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]). Although the Erie County Clerk's electronic docket labeled the document as a "decision and order," the document appealed from is denominated "Memorandum Decision" and, on its face, is a mere decision from which no appeal lies (*see generally Plastic Surgery Group of Rochester, LLC v Evangelisti*, 39 AD3d 1265, 1266 [4th Dept 2007]). Thus, since no order or judgment has been entered pursuant to the decision, the appeal has not been presented to us in a proper manner and must be dismissed (*see Kuhn*, 129 AD2d at 967).

All concur except DEJOSEPH, J., who dissents in accordance with the following memorandum: I respectfully dissent and would not

dismiss the appeal (*see Nicol v Nicol*, 179 AD3d 1472, 1473 [4th Dept 2020]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1185

CA 20-00151

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

CHIAMPOU TRAVIS BESAW & KERSHNER, LLP, AND
45 BRYANT WOODS, LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GERALD F. PULLANO, DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (DAVID J. MCNAMARA OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (BRIAN N. LEWANDOWSKI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 3, 2020. The order, insofar as appealed from, determined that it would be unconscionable to enforce an acceleration clause.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, those parts of defendant's second counterclaim seeking to enforce the acceleration clause and seeking late charges are granted, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant, who was a former partner in plaintiff Chiampou Travis Besaw & Kershner, LLP (CTBK), also held an interest in plaintiff 45 Bryant Woods, LLC (45BW), which owned the building in which CTBK's offices were located. Pursuant to CTBK's Second Amended and Restated Partnership Agreement (agreement), a withdrawing partner who has given the requisite notice is entitled to the "Full Value" of his or her partnership interest, "with such amount being paid in equal quarterly installments over a ten-year period, with interest . . . being paid on the unpaid balance at the time of each quarterly payment."

Defendant opted to withdraw from the partnership and provided the requisite notice. CTBK thereafter executed a promissory note (note) and commenced making the quarterly payments. The note included a provision that, "[i]f this Note or any payment of principal or interest thereon shall not be paid within ten (10) days after any applicable due date, [CTBK] shall pay a late charge equal to five percent (5%) of the delinquent payment." The note further provided that, if CTBK failed to cure any default, "the Note and all indebtedness of [CTBK] [would] become immediately due and payable," and CTBK agreed to be liable for "all costs and expenses (including

reasonable attorneys' fees) incurred by [defendant] in the collection of th[e] Note and/or enforcement of any security for th[e] Note."

Upon receipt of the first payment, defendant realized that CTBK was using normal amortization to calculate amounts owed. Defendant believed that the agreement required using fixed principal payments plus interest amortization. When CTBK refused to adjust its payment scheme, defendant sent a notice of default seeking the entire unpaid balance of principal and interest, as well as "all applicable late charges." Ultimately, plaintiffs commenced this action against defendant seeking, inter alia, a determination that its calculation of defendant's full value and its amortization method were correct and a determination that defendant had no further interest in 45BW, and defendant counterclaimed for, inter alia, payment of the unpaid balance pursuant to the acceleration clause.

As a result of various motions and cross motions, Supreme Court issued several decisions and orders, determining that CTBK's calculation of defendant's value in CTBK was correct, that defendant's method of amortization was correct, that CTBK was in default under the agreement and note and that defendant was not required to withdraw from 45BW. Nevertheless, the court declined to award defendant summary judgment on the issue of acceleration and denied his request for attorneys' fees, without prejudice. The court determined that there were factual questions on the issue whether equity should intervene to relieve CTBK of acceleration of the debt.

Following a nonjury trial, the court concluded that CTBK and defendant had a "bona fide dispute" over the method to be used to calculate payments and that CTBK immediately paid defendant the " 'calculated shortage' " after the court found CTBK in default and that defendant was not prejudiced by the default. As a result, the court found that enforcing the acceleration clause "would be unconscionable" and denied defendant's second counterclaim, to accelerate the debt. The court granted defendant's request for costs and expenses, including attorneys' fees, incurred in collection under the note. Defendant now appeals from those parts of the order that are adverse to him, and we conclude that the court erred in refusing to enforce the acceleration clause of the note and in refusing to award defendant late charges for the delinquent payments.

With respect to the issue of late charges, although a party cannot seek "late charges for nonpayment of installments claimed to be due *after* acceleration" (*Green Point Sav. Bank v Varana*, 236 AD2d 443, 443 [2d Dept 1997]; *see Carreras v Weinreb*, 33 AD3d 953, 955 [2d Dept 2006]), defendant sought late charges that had accumulated or attached on the payments that were deficient *before* any acceleration of the note (*see Gizzi v Hall*, 309 AD2d 1140, 1141 [3d Dept 2003]; *cf. Carreras*, 33 AD3d at 955; *see also Matter of County of Ulster [ERED Enters., Inc.]*, 121 AD3d 111, 116 [3d Dept 2014], *lv dismissed* 24 NY3d 988 [2014]). Inasmuch as the note provided for such charges in the event of a default in any payment of principal or interest, we conclude that defendant is entitled to such charges.

With respect to acceleration of the debt, plaintiffs and defendant cite to *Fifty States Mgt. Corp. v Pioneer Auto Parks* (46 NY2d 573, 576-577 [1979], *rearg denied* 47 NY2d 801 [1979]) as the seminal case in determining whether equity should intervene to preclude enforcement of the acceleration clause. Assuming, arguendo, that *Fifty States Mgt. Corp.* applies to actions involving promissory notes in addition to those involving leases and mortgages (*see e.g. Letter Grade, Inc. v Jasmine Tech., Inc.*, 50 AD3d 383, 383 [1st Dept 2008]; *Valsirv Realty Co. v Tenenbaum*, 304 AD2d 748, 749 [2d Dept 2003]; *Suits v Suits*, 266 AD2d 813, 813-814 [4th Dept 1999]; *Tunnell Publ. Co. v Straus Communications*, 169 AD2d 1031, 1032 [3d Dept 1991]), we conclude that this is not one of the "rare cases" in which it would not be equitable to enforce the acceleration clause (*Fifty States Mgt. Corp.*, 46 NY2d at 577). "In the vast majority of instances . . . these clauses have been enforced at law in accordance with their terms . . . Absent some element of fraud, exploitive overreaching or unconscionable conduct on the part of the [obligee] to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties" (*id.*). The Court of Appeals has recognized that unconscionable overreaching may be found in situations where there was "a good faith mistake, *promptly cured by the party in default* with no prejudice to the creditor" (*id.* [emphasis added]; *see generally Di Matteo v North Tonawanda Auto Wash*, 101 AD2d 692, 692-693 [4th Dept 1984], *appeal dismissed* 63 NY2d 675 [1984]). Although "[e]ach case must be decided on its own particular facts" (*Tunnell Publ. Co.*, 169 AD2d at 1032), "[p]ayment in accordance with contractual terms, in and of itself, does not constitute an injustice" (*Key Intl. Mfg. v Stillman*, 103 AD2d 475, 478 [2d Dept 1984], *mod on other grounds* 66 NY2d 924 [1985]), and "financial hardship standing alone does not create a penalty or forfeiture which would warrant equitable relief" (*Brainerd Mfg. Co. v Dewey Garden Lanes*, 78 AD2d 365, 367 [4th Dept 1981], *appeal dismissed* 53 NY2d 701 [1981]).

Even assuming, arguendo, that the court properly determined that there was a good faith mistake by CTBK and an absence of prejudice to defendant, we conclude that CTBK did not promptly cure the default and that defendant did not engage in any fraud, exploitive overreaching or unconscionable conduct that would justify a court to refuse to enforce the terms of the note.

After the court determined that CTBK was in default, it promptly paid the money that would have been due to defendant had the correct amortization method been used, i.e., the " 'calculated shortage.' " It did not, however, pay any of the late charges or any other amounts due as a result of its default and litigation. The note specifically states that a default includes the failure to perform any other part of the note, and the note imposed a late charge for "any" delinquent payment of principal or interest. The "word 'any' means 'all' or 'every' and imports no limitation" (*Zion v Kurtz*, 50 NY2d 92, 104 [1980], *rearg denied* 50 NY2d 1060 [1980]). Thus, under the terms of the note, CTBK was required to pay a late charge and, inasmuch as no late charges were paid to defendant, CTBK did not promptly cure or

attempt to cure the entire default. As a result, we conclude that equity should not intervene to relieve CTBK of enforcement of the acceleration clause of the note. We therefore reverse the order insofar as appealed from, grant those parts of defendant's second counterclaim seeking to enforce the acceleration clause and seeking late charges, and we remit the matter to Supreme Court for a calculation of the amount of late charges owed to defendant as well as the amount of the accelerated debt.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1205

CA 19-02264

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

SUZANNE P., ADMINISTRATRIX OF THE ESTATE OF MITCHELL P., DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT, ALSO KNOWN AS THE ERIE-WYOMING JOINT WATERSHED BOARD, DEFENDANT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered December 3, 2019. The order, among other things, granted plaintiff's motion for a directed verdict.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied, defendant's motion is granted, and the complaint is dismissed.

Memorandum: As summarized in our decision on the prior appeal in this matter (*Suzanne P. v Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.*, 175 AD3d 1093 [4th Dept 2019]), plaintiff commenced this action against various entities, including defendant, seeking damages for the death of her son (decedent). Decedent had initially entered Buffalo Creek, at a location in the Town of West Seneca, with several friends to clean off after getting muddy while engaged in recreation along nearby trails. As the group waded and swam in the creek, decedent went over a waterfall created by a low head dam, was submerged, and sustained drowning injuries that ultimately proved fatal. The subject dam, part of a project to control creek flow and flooding, was one of several designed and constructed in the 1950s by a federal agency now known as the Natural Resources Conservation Service (NRCS) and subsequently operated and maintained by defendant pursuant to certain contracts with the NRCS, including a governing operation and maintenance agreement (agreement).

Supreme Court granted the summary judgment motions of the other entities, but denied defendant's motion for such relief, and we subsequently affirmed in the prior appeal. With respect to

defendant's motion, we rejected the contention that defendant had established as a matter of law that it did not owe decedent a duty of care (*id.* at 1094). Initially, we agreed with defendant that, assuming its potential liability was premised solely on its obligations under the agreement with the NRCS, the court erred in determining that the third exception in *Espinal v Melville Snow Contrs.* (98 NY2d 136, 140 [2002]) applied because, we reasoned, the agreement was not so comprehensive and exclusive that it entirely displaced the NRCS's duty to maintain the premises safely (*Suzanne P.*, 175 AD3d at 1095). Contrary to defendant's contention, however, we further concluded that "it failed to eliminate triable issues of fact regarding ownership of the subject dam" (*id.*). We held that, "[w]hile [defendant] established that it did not own the creek or the banks adjacent thereto . . . , its submissions [were] insufficient to establish as a matter of law that it did not own the subject dam, which allegedly constituted and created the dangerous condition" (*id.*). We rejected defendant's contention that the deposition testimony of a district field manager for one of the two conservation districts whose board members comprise defendant established that defendant was a contractor only and not an owner because the district field manager had actually testified in his deposition that he did not know who owned the dams (*id.*). We also reasoned that "the language of the agreement, which was submitted by [defendant] in support of its motion, indicate[d] that ownership of the dams may have been transferred to [defendant], and [defendant] failed to establish as a matter of law that no such transfer could or did occur" (*id.*).

The court subsequently conducted the first phase of a bifurcated trial on the issue of ownership only. Following plaintiff's presentation of evidence, defendant moved for a directed verdict pursuant to CPLR 4401 on the ground that, in contrast to the summary judgment record previously before this Court, the evidence at trial established that defendant did not own the dams. Plaintiff opposed the motion and moved for a directed verdict in her favor. The court reserved decision on the motions, and the jury then returned a verdict finding that defendant did not own the dams at the time of decedent's accident. The court thereafter granted plaintiff's motion for a directed verdict, denied as moot defendant's motion for a directed verdict, and awarded plaintiff judgment, as a matter of law, that defendant owned the subject dam structure at the time of decedent's accident. Defendant appeals, contending that the court should have granted its motion. We agree.

It is well settled that "a directed verdict is appropriate where the . . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party . . . In determining whether to grant a motion for a directed verdict pursuant to CPLR 4401, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1287-1288 [4th Dept 2014] [internal quotation marks omitted]; *see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

Here, even affording plaintiff every inference that may properly be drawn from the evidence presented—i.e., the testimony of the district field manager and the agreement—and considering the evidence in a light most favorable to her, we conclude that there is no rational process by which the jury could reach a finding that defendant owned the subject dam at the time of decedent's accident (*see Bentley v City of Amsterdam*, 170 AD2d 725, 725-726 [3d Dept 1991], *lv denied* 78 NY2d 858 [1991]). First, unlike the unilluminating deposition testimony relied upon by defendant in support of its earlier summary judgment motion (*cf. Suzanne P.*, 175 AD3d at 1095), the district field manager's testimony at trial, which was based on his experience and his understanding of the operation of the agreement, conveyed that defendant did not own the subject dam.

Second, with respect to the agreement, we determined on the prior appeal based on defendant's submissions and the rationales advanced by the parties (*see generally Misicki v Caradonna*, 12 NY3d 511, 519 [2009]) that "the language of the agreement . . . indicate[d] that ownership of the dams may have been transferred to [defendant], and [defendant] failed to establish as a matter of law that no such transfer could or did occur" (*Suzanne P.*, 175 AD3d at 1095). We agree with defendant that the evidence at the subsequent trial, as supported by the legal arguments advanced by defendant in support of its motion for a directed verdict, established that there is no rational basis upon which to conclude that such a transfer could have occurred. The evidence at trial demonstrated that the NRCS constructed the dams, which were permanently affixed to land underlying Buffalo Creek, for the purpose of reducing the water velocity in that section of the creek. Thus, as argued by defendant in support of its CPLR 4401 motion and on appeal, the dams are structures that constitute fixtures annexed to the realty and are part thereof (*see Matter of Metromedia, Inc. [Foster & Kleiser Div.] v Tax Commn. of City of N.Y.*, 60 NY2d 85, 90 [1983]; *Matter of First Fed. Sav. & Loan Assn. of Syracuse v Srogi*, 105 AD2d 1081, 1081 [4th Dept 1984]). Inasmuch as the trial evidence also established the NRCS had no ownership interest in Buffalo Creek or the abutting land, no transfer of ownership of the subject dam by NRCS could have occurred under the terms of the agreement given that " '[a] grantor cannot convey what the grantor does not own' " (*Nationstar Mtge., LLC v Goodman*, 187 AD3d 1635, 1637 [4th Dept 2020]; *see O'Brien v Town of Huntington*, 66 AD3d 160, 167 [2d Dept 2009], *lv dismissed and appeal dismissed* 14 NY3d 935 [2010], *lv denied* 21 NY3d 860 [2013]). In other words, contrary to plaintiff's assertions, the NRCS had no "[t]itle to real property," including the dams, that could "vest in [defendant]" pursuant to the terms of the agreement.

Based on the foregoing, we conclude that the court erred in denying defendant's motion for a directed verdict.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1222

CA 20-00117

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

PB-7 DOE, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

AMHERST CENTRAL SCHOOL DISTRICT, AMHERST CENTRAL HIGH SCHOOL AND JOHN KOCH, ALSO KNOWN AS JACK KOCH, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS AMHERST CENTRAL SCHOOL DISTRICT AND AMHERST CENTRAL HIGH SCHOOL.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR DEFENDANT-APPELLANT JOHN KOCH, ALSO KNOWN AS JACK KOCH.

PHILLIPS & PAOLICELLI, LLP, NEW YORK CITY (DIANE M. PAOLICELLI OF COUNSEL), AND FANIZZI & BARR, P.C., NIAGARA FALLS, FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 17, 2020. The order, inter alia, granted the motion of plaintiff for permission to proceed under the pseudonym “PB-7 Doe.”

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

Opinion by SMITH, J.:

In 2019, plaintiff commenced this personal injury action pursuant to the Child Victims Act ([CVA] *see* CPLR 214-g), alleging that she was sexually abused over a period of several years in the early 1980s while attending school at defendant Amherst Central High School (School) by a person who purported to be a guidance counselor there. In the complaint, plaintiff referred to herself as “PB-7 Doe” and, several weeks after commencing the action, she moved by order to show cause for permission to use that pseudonym. Defendants appeal from an order granting that motion, and we affirm.

Initially, we decline to address defendants’ contention that Supreme Court properly determined that Civil Rights Law § 50-b does not apply because they are not aggrieved by that part of the order (*see* CPLR 5511).

Contrary to defendants' contention, there is nothing in the CVA that indicates that the legislature, when enacting the statute, intended to bar the use of pseudonyms. The CVA was enacted on February 14, 2019 (*see* L 2019, ch 11, § 3). Well before that date, however, New York State courts permitted parties to proceed using a title and caption containing a fictitious name in certain circumstances (*see e.g. Anonymous v Anonymous*, 158 AD2d 296, 297 [1st Dept 1990]), and the courts of New York continue to permit that practice where the circumstances warrant it (*see e.g. Doe v Bloomberg, L.P.*, — NY3d —, —, 2021 NY Slip Op 00898, *7 n 9 [2021]). In addition, although not binding on this Court, the federal courts also permit a party to proceed using a pseudonym if special circumstances warrant anonymity (*see e.g. Roe v Wade*, 410 US 113, 120 n 4 [1973]; *Roe v Aware Woman Ctr. for Choice, Inc.*, 253 F3d 678, 685-687 [11th Cir 2001], *cert denied* 534 US 1129 [2002]; *Does I thru XXIII v Advanced Textile Corp.*, 214 F3d 1058, 1067-1069 [9th Cir 2000]). The CVA does not include any language that would change the state of the law with respect to the use of pseudonyms. Thus, any change in the existing law could arise only by implication. "[I]t is a general rule of statutory construction[, however,] that a clear and specific legislative intent is required to override the common law" (*Hechter v New York Life Ins. Co.*, 46 NY2d 34, 39 [1978]; *see Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 351 [2011]; *see also Fumarelli v Marsam Dev.*, 92 NY2d 298, 306 [1998]). No such clarity exists in the CVA. It is long settled that this Court will not infer "that it was the intention of the [l]egislature to make a radical change in the policy of the state" from the legislature's failure to include a provision in a statute (*Matter of Lampson*, 33 App Div 49, 59 [4th Dept 1898], *affd* 161 NY 511 [1900]).

In addition, several trial courts have addressed the legislature's intent in enacting the CVA with respect to the use of pseudonyms and concluded that the legislature

> "left it up to each alleged victim to determine whether to seek anonymity. The legislature also necessarily left it to the courts to assess each individual case. Litigants seeking to proceed under a pseudonym are not new to the courts. The case law that has developed in non-Child Victims Act cases applies equally to Child Victims Act cases" (*Doe v MacFarland*, 66 Misc 3d 604, 614 [Sup Ct, Rockland County 2019]; *see also HCVAWCR-Doe v Roman Catholic Archdiocese of N.Y.*, 68 Misc 3d 1215[A], 2020 NY Slip Op 50966[U], *2 [Sup Ct, Westchester County 2020]).

Based on the case law that preexisted the enactment of the CVA and the lack of any indication that the legislature intended to change that law by enacting the CVA, we agree with the reasoning of those trial courts and we conclude that no such intent existed. Consequently, we conclude that the legislature did not intend in enacting the CVA to eliminate the use of pseudonyms in cases commenced pursuant to that

statute.

Nevertheless, permission to use a pseudonym will not be granted automatically. The First Department has "remind[ed] the bench and bar that, even where the parties seek to stipulate to such relief, the trial court should not pro forma approve an anonymous caption, but should exercise its discretion to limit the public nature of judicial proceedings 'sparingly' and 'then, only when unusual circumstances necessitate it' " (*Anonymous v Anonymous*, 27 AD3d 356, 361 [1st Dept 2006]; *see Applehead Pictures LLC v Perelman*, 80 AD3d 181, 192 [1st Dept 2010]; *see also Koziol v Koziol*, 60 AD3d 1433, 1434 [4th Dept 2009], *appeal dismissed* 13 NY3d 764 [2009]). In determining whether to grant a plaintiff's request to proceed anonymously, the court must " 'use its discretion in balancing plaintiff's privacy interest against the presumption in favor of open trials and against any potential prejudice to defendant' " (*Anonymous v Lerner*, 124 AD3d 487, 487 [1st Dept 2015]). " '[C]laims of public humiliation and embarrassment . . . are not sufficient grounds for allowing a plaintiff . . . to proceed anonymously' " (*id.* at 488).

Thus, when confronted with a request to proceed using a pseudonym, a motion court must balance the interests of the parties, the public, and justice. Although no single factor is more important than another, the factors used in federal courts provide appropriate guidelines by which to review the propriety of such a motion. One federal court, in reviewing a request to proceed using a pseudonym, stated that

> "[a]mong the factors courts have considered in balancing these competing interests are: 1) whether the plaintiff is challenging governmental activity or an individual's actions, 2) whether the plaintiff's action requires disclosure of information of the utmost intimacy, 3) whether identification would put the plaintiff at risk of suffering physical or mental injury, 4) whether the defendant would be prejudiced by allowing the plaintiff to proceed anonymously, and 5) the public interest in guaranteeing open access to proceedings without denying litigants access to the justice system. . . . Related to the third factor is the concern 'whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties . . .'
>
> As to the first and fifth factors, whether the defendants are governmental entities is significant because a challenge to governmental policy ordinarily implicates a public interest and the government has less of a concern with protecting its reputation than a private individual" (*Doe No. 2 v Kolko*, 242 FRD 193, 195 [ED NY 2006]).

In addition, the federal courts have stated that "fictitious names are allowed when necessary to protect the privacy of . . . rape victims, and other particularly vulnerable parties or witnesses" (*Doe v Blue Cross & Blue Shield United of Wis.*, 112 F3d 869, 872 [7th Cir 1997]). Thus, a court has discretion to permit the use of a pseudonym where the complaint "allege[s] a matter implicating a privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings" (*"J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215, 215 [1st Dept 2005]; *see Doe v Doe*, 189 AD3d 406, 407 [1st Dept 2020]).

Here, we conclude that the court properly granted plaintiff's motion. We note that the sole document that plaintiff initially submitted in support of her motion was plainly insufficient to justify granting permission to use a pseudonym. Plaintiff submitted only an affidavit of her counsel, which was based on information and belief rather than personal knowledge. In seeking permission to proceed using a pseudonym, the movant must submit evidence to support the relief requested, and "the most basic prerequisite [is] an affidavit of a person with knowledge of the facts" (*HCVAWCR-Doe*, 2020 NY Slip Op 50966[U], *4). Similarly, the expert affidavit that plaintiff later submitted in support of the motion suffers from the same defect, i.e., it was not based on an interview with plaintiff nor based on any knowledge of her situation or the facts of this case (*see generally Romano v Stanley*, 90 NY2d 444, 451-452 [1997]), and thus provides no support for plaintiff's position.

Nevertheless, in reply, plaintiff submitted an affidavit based on her personal knowledge in support of the motion. Contrary to defendants' contention, the court properly considered that affidavit inasmuch as all defendants "had an opportunity to respond and submit papers in surreply" (*Payne v R-D Maintenance Unlimited, Inc.*, 77 AD3d 1298, 1299 [4th Dept 2010]; *see Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1169-1170 [4th Dept 2020]). In that affidavit, plaintiff alleged that she was employed by the county in which these allegations arose, that her job may be in jeopardy as a result of the allegations, and that she experienced "emotional distress, suicidal thoughts, depression, anxiety, feelings of worthlessness, and many other psychological damages, painful feelings, emotions, nightmares, flashbacks, as well as physical manifestations of these problems" that would recur if her name was publicized.

Applying the factors and the balancing test set forth above, we conclude that the court did not abuse its discretion in granting the motion. Although it would have been preferable to have plaintiff's allegations supported by expert medical testimony or opinion, the information that plaintiff provided supports the court's determination. In addition, the record establishes that plaintiff has disclosed her name to defendants, thereby minimizing any prejudice arising from her use of a pseudonym for the purposes of discovery and investigation, and defendants have not asserted any other prejudice that they will sustain therefrom. An additional factor supporting the court's determination is that plaintiff did not seek, nor did the court order, that the records in the case be sealed or that public

access be denied. Thus, the public's interest in open court proceedings is preserved (*cf. Doe v Roman Catholic Archdiocese of N.Y.*, 64 Misc 3d 1220[A], 2019 NY Slip Op 51216 [U], *5 [Sup Ct, Westchester County 2019]). Although the School and defendant Amherst Central School District are governmental entities, which supports plaintiff's position, defendant John Koch, also known as Jack Koch (Koch) is an individual, which favors defendants' position. Thus, there is no clear advantage to either side with respect to that factor. Because other significant factors support the court's determination, we conclude that there was no abuse of its discretion.

Defendants' remaining contentions lack merit. Koch's contention that he is prejudiced because plaintiff is using a pseudonym while he is sued under his true name is misplaced inasmuch as he will sustain the same prejudice regardless of which name plaintiff uses. His contentions concerning the prejudice to him that arises from being sued under his true name is not relevant to this motion, which concerns only plaintiff's use of a pseudonym (*cf. Doe*, 189 AD3d at 406-407). Finally, defendants' contentions concerning the difficulties they may encounter in discovery are based on mere speculation. Accordingly, we conclude that the order should be affirmed.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1240.1

CA 20-01059

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

NICHOLAS SIMS, PLAINTIFF-RESPONDENT,

V ORDER

SAMUEL A. REYES, M.D., ET AL., DEFENDANTS,
AND SETON IMAGING, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 5, 2020. The order, inter alia, held in abeyance enforcement of certain provisions of a February 7, 2020 order for a period of six months.

It is hereby ORDERED that said appeal is unanimously dismissed with costs (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

1240

CA 20-00266

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

NICHOLAS SIMS, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

SAMUEL A. REYES, M.D., ET AL., DEFENDANTS,
AND SETON IMAGING, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 7, 2020. The order, among other things, granted in part the motion of defendant Seton Imaging to compel plaintiff to provide revised HIPAA-compliant authorizations.

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

Opinion by TROUTMAN, J.:

In this medical malpractice action, a dispute arose concerning the specific wording of an authorization provided by plaintiff as required by *Arons v Jutkowitz* (9 NY3d 393 [2007]). Supreme Court directed plaintiff to provide authorizations containing certain language, and we conclude that the court's ruling did not constitute an abuse of discretion. Accordingly, the order should be affirmed.

Plaintiff commenced this medical malpractice action to recover damages for injuries that he sustained as a result of a failure to diagnose a tumor. Seton Imaging (defendant) demanded authorizations compliant with the Health Insurance Portability and Accountability Act of 1996 ([HIPAA] Pub L 104-191, 110 US Stat 1936) allowing plaintiff's treating physicians to speak with defendant's attorney. In response, plaintiff provided authorizations that included the following language:

> "***READ BELOW AND PAGE 2 FOR IMPORTANT INFORMATION***
>
> The attorneys for the defendants in this lawsuit have indicated that they intend to contact you,

> and will attempt to meet with you to discuss the medical treatment you have provided, and perhaps other issues that relate to a lawsuit I commenced. Although I am required to provide these defense lawyers with a written authorization permitting them to contact you, the law does not obligate you in any way to meet with them or talk to them. That decision is entirely yours. If you decide to meet with their lawyers, I would ask that you let me know, because I would like the opportunity to be present or have my attorneys present."

The foregoing language (*see Charlap v Khan*, 41 Misc 3d 1070, 1072 [Sup Ct, Erie County 2013, Curran, J.]) was printed in bold and in a typeface larger than that used throughout the rest of the authorization.

Defendant objected to that language, asserting a right to interview plaintiff's treating physicians privately. Plaintiff refused to provide revised authorizations. Defendant offered, as a compromise, to accept revised authorizations that included the following language:

> "the purpose of the requested interview with the physician is solely to assist defense counsel at trial. The physician is not obligated to speak with defense counsel prior to trial. The interview is voluntary."

Unable to reach a compromise with plaintiff, defendant moved, inter alia, to compel plaintiff to provide revised authorizations. The court granted the motion in part, directing plaintiff, as relevant here, to provide revised HIPAA-compliant authorizations containing defendant's proposed language, unemphasized and in the same size font as the rest of the authorization. Plaintiff appeals.

The CPLR provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). Although the statute establishes a right to broad discovery, that right is not unlimited (*see Forman v Henkin*, 30 NY3d 656, 661-662 [2018]). The Court of Appeals has recognized the importance of protecting parties from " 'unnecessarily onerous application of the discovery statutes' " (*id.* at 662, quoting *Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998]). Relatedly, the Court of Appeals has refused to limit parties to the formal discovery devices enumerated in CPLR article 31 (*see Arons*, 9 NY3d at 409), identifying ex parte interviews of fact witnesses as "informal discovery of information that [might] serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes" (*Niesig v Team I*, 76 NY2d 363, 372 [1990]; *see Arons*, 9 NY3d at 407). Informal discovery may often be more efficient and economical for nonparties, too. For example, in the absence of informal discovery, " '[i]nstead of communicating with an attorney during a 10-minute

telephone call, a physician could be required to attend a four-hour deposition or to provide a time-consuming response to detailed and lengthy interrogatories' " (*Arons*, 9 NY3d at 409, quoting *Kish v Graham*, 40 AD3d 118, 129 [4th Dept 2007, Pine, J., dissenting], *revd* 9 NY3d 393 [2007]).

Physicians, of course, cannot freely discuss their patients' medical histories. Since the promulgation of HIPAA's Privacy Rule (45 CFR parts 160, 164), physicians are forbidden by federal law from disclosing protected health information (*see Arons*, 9 NY3d at 412-413). Thus, in order to facilitate the continued practice of informal discovery with respect to nonparty physicians, the Court of Appeals created a procedural framework for parties to conduct such discovery without running afoul of the Privacy Rule (*see id.* at 409-411; *McCarter v Woods*, 106 AD3d 1540, 1541-1542 [4th Dept 2013]). Under that framework, when a plaintiff has affirmatively put his or her medical condition in controversy, he or she must, upon the defendant's request, furnish HIPAA-compliant authorizations permitting plaintiff's treating physicians to speak to defendant's attorney (*see Arons*, 9 NY3d at 415). The furnishing of such an authorization to the defense is not designed to further the rights of either party to the litigation;[1] it is merely a "procedural prerequisite" of an interview with the nonparty physician (*id.* at 402), who is free to decline the interview (*see id.* at 416).

Since *Arons*, few disputes concerning the specific wording of an authorization have made their way to the appellate courts. The relative dearth of appellate litigation may be due in large part to the Office of Court Administration's adoption of a standard form, titled "Authorization to Permit Interview of Treating Physician by Defense Counsel" (https://www.nycourts.gov/forms/hipaa.shtml; *see Akalski v Counsell*, 29 Misc 3d 936, 939 [Sup Ct, Westchester County 2010]), which would seem to offer a straightforward way for parties to meet this simple procedural prerequisite. Indeed, the last time a dispute involving the precise wording of an *Arons* authorization made its way to this Court, we concluded that the court properly directed the parties to use that very form (*see Grieco v Kaleida Health*, 82 AD3d 1671, 1672 [4th Dept 2011]).

Of course, parties are not required to use this readily available form, nor is the court required to insist upon its use, although that

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[1] The assertion by defendant of a right to a private interview with plaintiff's treating physicians, outside the presence of plaintiff's attorney, is inconsistent with *Arons*, which explicitly states that the physician may decline defendant's request for an interview and does not explicitly or implicitly bar the presence of plaintiff's attorney at such an interview (*see* 9 NY3d at 409-416). Defendant concedes that the physician is free to have his or her own attorney present for the interview or to decline the interview outright. If defendant's attorney and the physician are unable to agree on the terms of the interview, it need not take place.

may lead to disputes over the precise wording of the authorizations. When such a dispute arises, its resolution falls comfortably within the court's " 'broad discretion to control discovery,' " and, unless there is a clear abuse of that discretion, we will not disturb the court's ruling (*Voss v Duchmann*, 129 AD3d 1697, 1698 [4th Dept 2015]; *see Forman*, 30 NY3d at 662; *Lisa I. v Manikas*, 183 AD3d 1096, 1097 [3d Dept 2020]; *Hann v Black*, 96 AD3d 1503, 1504 [4th Dept 2012]). Here, the wording that was approved by the court is identical to the wording that previously met with the approval of the Second Department in *Porcelli v Northern Westchester Hosp. Ctr.* (65 AD3d 176, 178 [2d Dept 2009]), it is similar to the language contained in the standard form, and there is no dispute that it is consistent with the applicable law. Thus, we cannot say that the court clearly abused its broad discretion in granting that part of the motion seeking to compel plaintiff to provide revised authorizations (*see Voss*, 129 AD3d at 1698; *Grieco*, 82 AD3d at 1672).

All concur except BANNISTER, J., who dissents and votes to modify in accordance with the following opinion: I respectfully dissent. In my view, the language at issue in plaintiff's HIPAA-compliant authorizations, which requested that his treating physicians inform plaintiff if they chose to speak with the attorney representing Seton Imaging (defendant), was in no way improper, illegal, or misleading. Therefore, I conclude that Supreme Court abused its discretion in granting that part of defendant's motion seeking to compel plaintiff to provide revised authorizations.

The contested wording in the authorization advises the physicians that "[i]f you decide to meet with [defendant's] lawyers, I would ask that you let me know, because I would like the opportunity to be present or have my attorneys present." Defendant objected to that language, arguing that it interfered with its right to interview plaintiff's treating physicians privately. My colleagues and I agree that defendant does not have a *right* to a private interview with plaintiff's treating physicians. To the extent that defendant relies on *Arons v Jutkowitz* (9 NY3d 393 [2007]) for the creation of that right, I agree with my colleagues that defendant is mistaken. In *Arons*, the Court of Appeals held that, in order to facilitate informal discovery, which offers "considerable advantages" (*id.* at 410), trial courts can compel plaintiffs to provide HIPAA authorizations permitting their treating physicians to discuss the medical conditions at issue in the litigation with a defendant's attorney (*see id.* at 415). Nevertheless, the Court recognized that ex parte interviews with nonparty witnesses are informal discovery measures and that a physician's participation in such an interview is entirely voluntary and cannot be compelled (*see id.* at 410, 416). Thus, *Arons* plainly did not confer on a defendant's attorney a *right* to meet privately with a plaintiff's physicians.

The particular language at issue in this case simply requests, and does not require, that the physician inform plaintiff if the physician chooses to participate in the informal interview with defendant's attorney so that plaintiff, or his attorneys, can have an opportunity to be present. In my view, that language cannot be viewed

as a condition on the informal discovery; rather, it is simply a request that the physician is free to accept or reject (*cf. Rivera v Lutheran Med. Ctr.*, 22 Misc 3d 178, 185-186 [Sup Ct, Kings County 2008], *affd* 73 AD3d 891 [2d Dept 2010]). In other words, plaintiff is not insisting that his attorneys be present for any interview, and it is clear from the language used that the decision whether to inform plaintiff of his or her cooperation remains with the physician (*see Miller v Kingston Diagnostic Ctr.*, 33 Misc 3d 496, 498-499 [Sup Ct, Ulster County 2011]). In my view, including that request in an authorization would in no way negate the permission given in the HIPAA authorization or make the physician any less inclined to agree to the informal interview.

Despite the fact that the language is not improper, illegal, or misleading and despite the fact that defendant failed to present any other basis which prevents plaintiff from asking his physicians to inform him if they decide to speak with defendant's attorney, my colleagues conclude that the court did not abuse its discretion because defendant's proposed language was approved by the Second Department in *Porcelli v Northern Westchester Hosp. Ctr.* (65 AD3d 176 [2d Dept 2009]). While that language may have been accepted in *Porcelli*, nothing in that case can be relied on for authority to compel plaintiff to remove the language at issue in our case. Rather, the *Porcelli* court recognized that providing information on the HIPAA authorizations to the physician is consistent with the goal of "ensur[ing] that [the physician] who agrees to be interviewed will not unwittingly disclose privileged information regarding a medical condition not at issue in the litigation" (*id.* at 185). The opportunity for plaintiff or his attorneys to be present during defendant's informal discovery interview of plaintiff's treating physician would similarly ensure that privileged or confidential information is not disclosed (*see generally Arons*, 9 NY3d at 408).

In my view, the language in plaintiff's original authorization in this case was not improper. It did not, for example, advise the physician to do anything improper or "express a preference that the witness not meet with the adversary," (*Charlap v Khan*, 41 Misc 3d 1070, 1085 [Sup Ct, Erie County 2013]). Thus, I conclude that the court abused its discretion in granting the motion to the extent that it sought to compel plaintiff to provide a revised HIPAA-compliant authorization, and I would modify the order accordingly.

Mark W. Bennett

Entered: May 7, 2021

Clerk of the Court

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

1259

CA 19-01858

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, AND DEJOSEPH, JJ.

IN THE MATTER OF CARL MYERS ENTERPRISES, INC.
AND TOWN OF CONESUS, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF CONESUS ZONING BOARD OF APPEALS, THOMAS BRUCKEL, PATRICIA BRUCKEL, SALLY HIRTH AND ROBERT SIRACUSA, RESPONDENTS-APPELLANTS.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (BRIDGET A. O'TOOLE OF COUNSEL), FOR RESPONDENT-APPELLANT TOWN OF CONESUS ZONING BOARD OF APPEALS.

KNAUF SHAW LLP, ROCHESTER (JONATHAN R. TANTILLO OF COUNSEL), FOR RESPONDENTS-APPELLANTS THOMAS BRUCKEL, PATRICIA BRUCKEL, SALLY HIRTH AND ROBERT SIRACUSA.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT CARL MYERS ENTERPRISES, INC.

Appeals from a judgment (denominated order) of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered September 11, 2019 in a CPLR article 78 proceeding. The judgment, inter alia, granted the petition and annulled a determination of respondent Town of Conesus Zoning Board of Appeals.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying that part of the petition seeking to annul the determination of respondent Town of Conesus Zoning Board of Appeals on the ground that it violated Town Law § 267-a (12), and vacating the eighth ordering paragraph and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Livingston County, for further proceedings in accordance with the following memorandum: By a vote of 3 to 2, respondent Town of Conesus Zoning Board of Appeals (ZBA) denied an application by petitioner Carl Myers Enterprises, Inc. (CME) for a conditional use permit. CME thereafter commenced this CPLR article 78 proceeding to annul that determination. Supreme Court, inter alia, granted the petition and annulled the challenged determination on the ground that it was not unanimous as purportedly required by Town Law § 267-a (12). Respondents now appeal.

Upon a "rehearing," a zoning board of appeals may "reverse, modify or annul its original order, decision or determination" only with the "unanimous vote of all members then present" (Town Law

§ 267-a [12]; *see Matter of Ireland v Town of Queensbury Zoning Bd. of Appeals*, 169 AD2d 73, 77 [3d Dept 1991], *lv dismissed* 79 NY2d 822 [1991]; *Matter of Stevens v Hewson*, 152 AD2d 956, 956 [4th Dept 1989]). Respondents argue that the challenged determination in this case was not rendered upon a "rehearing" to which the unanimity rule of section 267-a (12) applies. We agree. For purposes of section 267-a (12), a "rehearing" occurs only after a successful "motion" "by any member of the board" "to review any order, decision or determination of the board," and it is undisputed that the challenged determination in this case was not rendered following a successful motion by any ZBA member to review any prior order, decision or determination of the ZBA. Thus, the ZBA permissibly made the challenged determination by a split vote (*see* § 267-a [13] [a]; *Matter of Clute v Town of Wilton Zoning Bd. of Appeals*, 197 AD2d 265, 268 [3d Dept 1994]). Notably, petitioners do not contend that the ZBA was barred from considering the application underlying the challenged determination without having first approved a motion for a rehearing (*cf. Stevens*, 152 AD2d at 956).

Contrary to the court's ruling, the fact that a different justice in a prior proceeding had ordered the ZBA to revisit a related zoning application concerning the same property was irrelevant to whether the unanimity rule of Town Law § 267-a (12) applied to the particular determination challenged in this proceeding. Plainly, the prior judicial order was not itself a successful "motion" "by any [ZBA] member" "to review any order, decision or determination of the [ZBA]" such that the ZBA was barred from "revers[ing], modify[ing] or annul[ling] its original order, decision or determination" without a unanimous vote (§ 267-a [12]). Section 267-a (12), in short, operates only when a zoning board of appeals elects on its own initiative to review or reconsider its own prior determination, not when it acts on a new or revised application or when it revisits a prior ruling at the direction of a court.

In light of the foregoing, we conclude that the court erred in granting the petition on the ground that the challenged determination violated the unanimity requirement of Town Law § 267-a (12). We therefore modify the judgment accordingly and, because the court did not address the petition's alternative grounds for annulling the challenged determination, we remit the matter to Supreme Court to consider those grounds (*see Lundy Dev. & Prop. Mgt., LLC v Cor Real Prop. Co., LLC*, 181 AD3d 1180, 1181 [4th Dept 2020]). Respondents' remaining contentions do not warrant reversal or further modification of the judgment.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

7

KA 17-02068

PRESENT: WHALEN, P.J., SMITH, CENTRA, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NELSON F. MATEO, JR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered August 21, 2017. 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 affirmed.

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]) in connection with an incident in which a victim was shot once in his left leg. Defendant contends that Supreme Court erred in refusing to suppress his statements to the police because the police officer who interviewed him engaged in deception concerning the evidence against him and made promises concerning his release that caused him to falsely incriminate himself, and because the officer downplayed the *Miranda* warnings. We reject those contentions.

With respect to defendant's allegations of deception by the police, although the officer who questioned defendant admittedly misrepresented certain evidence, " 'misleading a defendant into believing that he or she had been under surveillance' . . . or 'indicat[ing] to [a] defendant that he [or she] might help himself [or herself] by cooperating,' does not rise to the level of fundamentally unfair deceptive practices that deny a defendant due process or render statements to police involuntary" (*People v Wolfe*, 103 AD3d 1031, 1035 [3d Dept 2013], *lv denied* 21 NY3d 1021 [2013]; *see People v Morrow*, 167 AD3d 1516, 1517 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]; *People v Holley*, 148 AD3d 1605, 1606 [4th Dept 2017], *lv denied* 29 NY3d 1080 [2017]). Similarly, the officer's promise to speak to the judge about defendant "does not render defendant's statement

involuntary because the promise did not create a substantial risk that the defendant might falsely incriminate himself" (*People v Rossi*, 26 AD3d 782, 783 [4th Dept 2006], *lv denied* 7 NY3d 762 [2006] [internal quotation marks omitted]).

Contrary to defendant's contention concerning the *Miranda* warnings, "[i]n determining whether police officers adequately conveyed the [*Miranda*] warnings, . . . [t]he inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his [or her] rights as required by *Miranda*" (*Florida v Powell*, 559 US 50, 60 [2010] [internal quotation marks omitted]; *see People v Dunbar*, 24 NY3d 304, 315 [2014], *cert denied* 575 US 1005 [2015]). Here, the court did not err in refusing to suppress defendant's statements on the ground that the officer downplayed his *Miranda* rights (*see generally Dunbar*, 24 NY3d at 316). We note that the officer's practice of rapidly reading the *Miranda* warnings and indicating that they were "no big deal" is to be discouraged. A preamble given by a questioning officer with the intent to "undercut the meaning of [the] *Miranda* warnings, [thereby] depriving [a defendant] of an effective explanation of [his or her] rights," is a basis for suppression (*id.*; *see People v Rutledge*, 25 NY3d 1082, 1083 [2015], *revg* 116 AD3d 645, 645-646 [1st Dept 2014]). Under the circumstances of this case, however, we conclude that the officer's brief statement before providing the warnings did not undercut their meaning, and thus "the warnings given to defendant reasonably apprised him of his rights" (*People v Bakerx*, 114 AD3d 1244, 1247 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]; *cf. Dunbar*, 24 NY3d at 315-316).

We reject defendant's further contention that he was deprived of a fair trial because the People failed to timely provide him with evidence that a person had made a 911 call implicating a different person in the shooting. "To establish a *Brady* violation, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material . . . In New York, where a defendant makes a specific request for [an item of discovery], the materiality element is established provided there exists a 'reasonable possibility' that it would have changed the result of the proceedings" (*People v Fuentes*, 12 NY3d 259, 263 [2009], *rearg denied* 13 NY3d 766 [2009]). Here, as the People correctly concede, the phone tip implicating another person as the shooter was *Brady* material that was not timely provided to the defense (*see generally People v Carver*, 114 AD3d 1199, 1199 [4th Dept 2014]). Nevertheless, defendant was not deprived of a fair trial by that error because, although " 'the People unquestionably have a duty to disclose exculpatory material in their control,' a defendant's constitutional right to a fair trial is not violated when, as here, he is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witness or as evidence during his case" (*People v Cortijo*, 70 NY2d 868, 870 [1987]; *see People v Daniels*, 115 AD3d 1364, 1365 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014]).

Defendant contends that the verdict is against the weight of the evidence because there was a lack of evidence corroborating his admissions to the police and because the evidence suggests that another person was involved in the incident in question. He further contends that, in performing our weight of the evidence review, this Court should consider the fact that the jury acquitted him of the other three counts of the indictment, i.e., attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), assault in the second degree (§ 120.05 [2]), and criminal use of a firearm in the second degree (§ 265.08 [1]). With respect to the alleged lack of corroborative evidence, CPL 60.50 provides that, where a defendant confesses to a crime, the prosecution must come forward with "additional proof that the offense charged has been committed." That statutory requirement "is satisfied by the production of some proof, of whatever weight, that a crime was committed by someone" (*People v Daniels*, 37 NY2d 624, 629 [1975]). Here, there is abundant evidence that someone possessed a weapon and used it to shoot another person, and thus that requirement was met (*see People v Hawkins*, 110 AD3d 1242, 1242-1243 [4th Dept 2013], *lv denied* 22 NY3d 1041 [2013]). Viewing the evidence in light of the elements of the crime 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 is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]), notwithstanding that defendant was acquitted of the other charges in the indictment (*see generally People v Rayam*, 94 NY2d 557, 563 [2000]).

Insofar as defendant contends that the conviction of the weapon charge is repugnant to the acquittal of the other charges in the indictment, defendant failed to raise that contention before the jury was discharged, and thus he failed to preserve that argument for our review (*see People v Spears*, 125 AD3d 1401, 1402 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]). In any event, " '[a] conviction will be reversed [as repugnant] only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered' " (*People v Madore*, 145 AD3d 1440, 1441 [4th Dept 2016], *lv denied* 29 NY3d 1034 [2017], quoting *People v Tucker*, 55 NY2d 1, 7 [1981], *rearg denied* 55 NY2d 1039 [1982]; *see generally People v Muhammad*, 17 NY3d 532, 538-541 [2011]). Here, we conclude that the acquittal of the assault, attempted assault, and firearm charges did not necessarily negate an essential element of the weapon charge of which defendant was convicted (*see generally People v Gonzalez*, 138 AD2d 623, 624 [2d Dept 1988]; *People v Coleman*, 123 AD2d 440, 441 [2d Dept 1986], *lv dismissed* 69 NY2d 826 [1987]).

Defendant further contends that he was deprived of effective assistance of counsel because, inter alia, defense counsel failed to object to the allegedly repugnant verdict. Because, as discussed above, the verdict is not repugnant, "[d]efense counsel was not ineffective in failing to object to the verdict" on that ground (*People v Brooks*, 139 AD3d 1391, 1393 [4th Dept 2016], *lv denied* 28 NY3d 1026 [2016]). We have reviewed defendant's remaining contention

concerning ineffective assistance of counsel and conclude that it lacks merit. Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

56

KA 18-01541

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAWUD ABDULLAH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Rory A. McMahon, A.J.), rendered May 17, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the third degree, harassment in the second degree and criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), harassment in the second degree (§ 240.26 [1]), and criminal contempt in the second degree (§ 215.50 [3]). We affirm.

Initially, we reject defendant's contention that County Court erred in failing to conduct a sufficient inquiry into his request to represent himself at trial. "[A]n application to proceed pro se must be denied unless defendant effectuates a knowing, voluntary and intelligent waiver of the right to counsel . . . To this end, trial courts must conduct a 'searching inquiry' to clarify that defendant understands the ramifications of such a decision" (*People v Stone*, 22 NY3d 520, 525 [2014]). In other words, a "searching inquiry" is required to "warn defendant of the risks inherent in representing himself [or herself]" and to "apprise him [or her] of the value of counsel" (*People v Kaltenbach*, 60 NY2d 797, 799 [1983] [internal quotation marks omitted]; *see People v Crampe*, 17 NY3d 469, 481 [2011], *cert denied* 565 US 1261 [2012]).

Here, upon our review of "the whole record, not simply . . . [the] waiver colloquy" (*People v Providence*, 2 NY3d 579, 581 [2004]), we conclude that defendant made a knowing, voluntary and intelligent

waiver of his right to counsel. The court conducted the requisite searching inquiry, during which defendant stated that he had been through a jury trial in a prior case and had a level of familiarity with criminal trials. Defendant also repeatedly expressed dissatisfaction with defense counsel. The court " 'had numerous opportunities to see and hear . . . defendant firsthand, and, thus, had general knowledge of defendant's age, literacy and familiarity with the criminal justice system' " (*People v Chandler*, 109 AD3d 1202, 1203 [4th Dept 2013], *lv denied* 23 NY3d 1019 [2014]; *see People v Anderson*, 94 AD3d 1010, 1012 [2d Dept 2012], *lv denied* 19 NY3d 956 [2012], *reconsideration denied* 19 NY3d 1101 [2012]). Additionally, the court fulfilled its obligation to ensure that defendant was " 'aware of the dangers and disadvantages of self-representation' " (*Providence*, 2 NY3d at 582; *see Chandler*, 109 AD3d at 1203).

Defendant further contends that the jury instruction improperly changed the theory of the prosecution as charged in the indictment and narrowed by the bill of particulars, and subjected him to prosecution for an uncharged offense. That contention is not preserved for our review (*see People v Hursh*, 191 AD3d 1453, 1454 [4th Dept 2021]; *People v Lynch*, 191 AD3d 1476, 1477 [4th Dept 2021]; *see generally People v Allen*, 24 NY3d 441, 449-450 [2014]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict convicting him of that crime is against the weight of the evidence with respect to the element of possession of a dangerous instrument (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim testified at trial that defendant arrived at her apartment with a wine bottle, which he used to attack her. "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]), and we perceive no basis to disturb its determination. The victim's testimony with respect to the wine bottle was not "manifestly untrue, physically impossible, contrary to experience, or self-contradictory," and therefore was not incredible as a matter of law (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018] [internal quotation marks omitted]; *see People v Smith*, 73 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]).

Additionally, although the wine bottle was never recovered, that fact does not render the verdict against the weight of the evidence (*see People v Cohens*, 81 AD3d 1442, 1444 [4th Dept 2011], *lv denied* 16 NY3d 894 [2011]). Further, although in performing a weight of the evidence review we may consider the jury's verdict on other counts

(*see People v Rayam*, 94 NY2d 557, 563 n [2000]), we conclude that defendant's acquittal of an assault charge does not warrant a different conclusion with respect to the weapon possession charge (*see generally People v Freeman*, 298 AD2d 311, 311-312 [1st Dept 2002], *lv denied* 99 NY2d 582 [2003]). To the extent defendant contends that the evidence was legally insufficient to support the criminal possession of a weapon in the third degree conviction due to his acquittal of assault in the second degree, we conclude that his "masked repugnancy argument" is unpreserved because he did not raise it prior to the jury's discharge (*People v Smith*, 197 AD2d 373, 373 [1st Dept 1993], *lv denied* 82 NY2d 903 [1993] [internal quotation marks omitted]).

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

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

64

CA 19-02169

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

ROBERT L. DODGE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERNEST W. BAKER, JR., AND ANNE L. BAKER,
DEFENDANTS-RESPONDENTS.

MATTHEW R. ST. MARTIN, NEWARK, FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered November 7, 2019. The order denied the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and granting judgment in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that the fence constructed on defendants' property violates a valid and enforceable restrictive covenant in the deeds to the parties' properties,

and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Wayne County, for further proceedings in accordance with the following memorandum: Plaintiff and defendants own adjoining properties in Wayne County with views of Sodus Bay, and those properties can be traced to one original grantor, nonparty Sodus Bay Heights Land Co., Inc. (Land Company). The Land Company created a subdivision and, between the years of 1924 and 1937, it sold numerous parcels in accordance with its planned development. Plaintiff and defendants obtained title to their property through chains of title that date back to owners who purchased their property directly from the Land Company. Both properties are subject to two relevant restrictive covenants that run with the land. The first stated "[t]hat no line fence shall be erected on said lot without the written consent of the [Land Company], or its successors or assigns." The second stated "[t]hat no unnecessary trees or other obstructions shall be permitted on said lot which shall hide the view of other residents in Sodus Bay Heights."

Immediately after purchasing their property, defendants sought to erect a fence on their property line, but plaintiff informed them that such fence was prohibited by the restrictive covenants. Defendants nevertheless obtained a permit from the Village of Sodus (Village) to

construct the fence and constructed the fence. Plaintiff thereafter commenced this action seeking, inter alia, a declaration that the restrictive covenants are valid and enforceable and that the fence constructed by defendants is in violation of the restrictive covenants. Plaintiff then moved for summary judgment on the complaint. Supreme Court denied plaintiff's motion, finding that defendants "secured written consent of the successor of the [Land Company]," i.e., the Village and, as a result, complied with the first restrictive covenant. With respect to the second covenant, the court determined that there was a triable issue of fact whether the fence as constructed "hides [plaintiff's] view."

Although we agree with the court that there are triable issues of fact whether the fence hides plaintiff's view, we conclude that plaintiff established as a matter of law that the first restrictive covenant is valid and enforceable and that defendants violated the first restrictive covenant when they constructed the fence without the written consent of the Land Company, or its successors or assigns. We further conclude that defendants failed to raise a triable issue of fact to defeat the motion.

Generally, "[r]estrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy" (*Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 431 [2004]), and it is well settled that the party seeking to enforce such a restriction "must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction" (*Greek Peak v Grodner*, 75 NY2d 981, 982 [1990]). Here, plaintiff established as a matter of law the scope and the existence of a restriction against fences.

Additionally, we agree with plaintiff that the phrase "line fence" is not ambiguous and has a definite meaning (*see Fogle v Malvern Courts, Inc.*, 554 Pa 633, 636, 722 A2d 680, 682 [1999]). We further agree with plaintiff that, even though the Village granted a permit approving the construction of a fence, the issue whether a restrictive covenant may be enforced is separate and distinct from the issue of a municipality's authority to grant a permit under its zoning codes (*see Chambers*, 1 NY3d at 432; *Rautenstrauch v Bakhru*, 64 AD3d 554, 555 [2d Dept 2009]). As a result, the only remaining issue is whether the Village was a "successor" of the Land Company with the authority to issue the requisite written consent for a fence.

As noted, the first restrictive covenant in the chain of title for plaintiff's and defendants' properties prohibited line fences "without the written consent of [the Land Company], *or its successors or assigns*" (emphasis added). In 1967, the Land Company sold its remaining seven parcels to the Village, and the parties dispute whether that deed made the Village a "successor" of the Land Company or simply the owner of the parcels listed in the deed.

In support of his motion, plaintiff submitted the deed from the Land Company and certain individuals to the Village, which "grant[ed] and release[d] unto [the Village], its successors and assigns forever,

all that tract or parcel *of land* . . . bounded and described as follows" (emphasis added). The deed then identifies the seven parcels of land. At the end, the deed provides that it "is intended to convey to the Village . . . all the right, title and interest of [the Land Company] and [certain individuals], sole owners of all the common stock of said corporation at the time of its dissolution."

It is well settled that a clear and complete written agreement should be enforced in accordance with its terms (*see generally South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]), and deeds must be construed under the same rules as any other contract (*see Loch Sheldrake Assoc. v Evans*, 306 NY 297, 304 [1954]). Here, the plain language of the deed establishes that the Land Company and certain individuals granted the Village "tract[s] or parcel[s] of land" and all of the "right, title and interest" of the Land Company and the individuals who were shareholders "at the time of [the Land Company's] *dissolution*" (emphasis added). In our view, plaintiff established that the only reasonable interpretation of the deed is that it transferred *only* the Land Company's property interests in those seven parcels and did *not* transfer its corporate identity (*see generally Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017]). Indeed, "a dissolved corporation is precluded from engaging in new business . . . and 'has no existence, either de jure or de facto, except for a limited de jure existence for the sole purpose of winding up its affairs' " (*Long Oil Heat, Inc. v Polsinelli*, 128 AD3d 1296, 1297-1298 [3d Dept 2015]). Thus, we conclude that plaintiff established as a matter of law that the Village did not become the Land Company's corporate "successor" and, as a result, did not have the independent, contractual right to grant written consent for the fence.

Based on the above, we conclude that plaintiff met his initial burden with respect to the claims that the first restrictive covenant is valid and enforceable and that defendants violated the first restrictive covenant. In opposition, defendants failed to raise a triable issue of fact. As a result, the court erred in denying the motion insofar as it sought summary judgment declaring that the fence constructed on defendants' property violates a valid and enforceable restrictive covenant in the deeds to the parties' properties. We thus modify the order accordingly and remit the matter to Supreme Court for further proceedings concerning any additional appropriate relief to be accorded plaintiff.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

96

KA 17-00901

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN ORTIZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, EASTON THOMPSON KASPEREK SHIFFRIN LLP (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 7, 2016. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted robbery in the first degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]). The case arose from the shooting death of the victim during an attempted robbery. One of the People's witnesses was a participant in the crime who agreed to testify against defendant as part of a plea bargain. Supreme Court delivered an accomplice as a matter of fact charge with respect to that witness. Defendant contends that the court erred in failing to charge that the witness was an accomplice as a matter of law (*see* CPL 60.22; *People v Sage*, 23 NY3d 16, 23-24 [2014]). Defendant failed to preserve that contention for our review because he did not request such a charge nor did he object to the charge as given (*see People v Lipton*, 54 NY2d 340, 351 [1981]; *People v Blume*, 92 AD3d 1025, 1027 [3d Dept 2012], *lv denied* 19 NY3d 957 [2012]), and we decline to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We note that the testimony of the witness in question was "amply corroborated" by other evidence (*People v Fortino*, 61 AD3d 1410, 1411 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]; *see People v Reed*, 115 AD3d 1334, 1336 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014]), and the prosecutor did not dispute at trial that the witness's testimony needed to be corroborated. We reject defendant's further contention that he was denied effective assistance of counsel.

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

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

99

KA 20-00571

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JAMES R. WILCOX, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Oswego County Court (Walter W. Hafner, Jr., J.), dated February 7, 2020. The order, insofar as appealed from, granted that part of defendant's omnibus motion seeking to dismiss counts one and two of the indictment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to dismiss counts one and two of the indictment is denied, those counts of the indictment are reinstated, and the matter is remitted to Oswego County Court for further proceedings on the indictment.

Memorandum: As the result of a traffic stop of a vehicle in which defendant was a passenger that led to the discovery of, among other things, methamphetamine and a "one-pot" used in the manufacture of that controlled substance, defendant was indicted on charges of, as relevant here, criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [2]) under count one of the indictment and unlawful manufacture of methamphetamine in the second degree (§ 220.74 [2]) under count two. In his pretrial omnibus motion, as later supplemented, defendant sought, inter alia, dismissal of the indictment on several grounds. The People, as limited by their brief, appeal from an order to the extent that it granted those parts of the motion seeking to dismiss the indictment in its entirety pursuant to CPL 210.20 (1) (c) and CPL 210.35 on the ground that the grand jury proceeding was defective and seeking to dismiss count two of the indictment pursuant to CPL 210.20 (1) (b) on the ground that the evidence before the grand jury was not legally sufficient with respect to that count.

The People first contend that County Court, in dismissing the indictment pursuant to CPL 210.20 (1) (c) and CPL 210.35, erred by determining that the prosecution improperly refused to present to the grand jury defendant's request for certain witnesses, i.e., two of the vehicle's other occupants who had provided new statements ostensibly

exculpating defendant. We reject that contention. "CPL article 190 governs the conduct of the grand jury and the parties which appear before that body" (*People v Thompson*, 22 NY3d 687, 697 [2014], *rearg denied* 23 NY3d 948 [2014]). "Under this statutory regime, the exclusive 'legal advisors of the grand jury are the court and the district attorney' . . . , and their decision to present certain items of evidence and to exclude others is for the most part limited only by the rules of evidence applicable at trial" (*id.*). "In the same vein, the prosecutor enjoys 'broad powers and duties, as well as wide discretion in presenting the People's case' to the grand jury" (*id.*, quoting *People v Huston*, 88 NY2d 400, 406 [1996]; *see People v Lancaster*, 69 NY2d 20, 25 [1986], *cert denied* 480 US 922 [1987]). "Indeed, the prosecutor 'determines the competency of witnesses to testify,' and he or she 'must instruct the jury on the legal significance of the evidence' " (*Thompson*, 22 NY3d at 697, quoting *People v Di Falco*, 44 NY2d 482, 487 [1978]; *see Huston*, 88 NY2d at 406).

"Of course, the grand jurors are empowered to carry out numerous vital functions independently of the prosecutor, for they ha[ve] long been heralded as the shield of innocence . . . and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source" (*Thompson*, 22 NY3d at 698 [internal quotation marks omitted]; *see People v Sayavong*, 83 NY2d 702, 706 [1994]; *People v Minet*, 296 NY 315, 323 [1947]). Thus, CPL 190.50 (3) "grants the grand jury the power to subpoena witnesses, including witnesses not called by the People, and the prosecutor must comply with the grand jury's order for such testimony" (*Thompson*, 22 NY3d at 698). Pursuant to that subdivision, "[i]f the grand jurors ask to hear from a witness, the prosecutor has no recourse to prevent the witness from appearing, save for a motion for an order vacating or modifying their subpoena on the ground that 'such is in the public interest' " (*id.*, quoting CPL 190.50 [3]). "In addition, the defendant may specifically ask the grand jury to exercise its power to call a witness of his or her selection, and '[t]he grand jury may as a matter of discretion grant such request and cause such witness to be called' " (*id.*, quoting CPL 190.50 [6]). "In the non-adversarial context of grand jury proceedings, however, the defendant's statutory power to seek the appearance of a witness is one of 'limited extent' " (*id.* at 698-699, quoting *Lancaster*, 69 NY2d at 26).

Contrary to the People's contention, "under CPL 190.50 (6)[,] the decision whether to grant a defendant's request to call a person as a witness is solely within the discretion of the grand jury," and "[t]he grand jury is given that discretion in the exercise of its function to 'uncover the facts accurately and conduct a reliable investigation' " (*People v Hill*, 8 AD3d 1076, 1076 [4th Dept 2004], *affd* 5 NY3d 772 [2005], quoting *Huston*, 88 NY2d at 409; *see People v Baptiste*, 160 AD3d 976, 978 [2d Dept 2018], *lv denied* 31 NY3d 1145 [2018]). The statute thus imposes an obligation on the People to inform the grand jury of a defendant's request to call witnesses, and the grand jury, not the prosecutor, is independently empowered with the prerogative to grant or deny such a request (CPL 190.50 [3], [6]; *see Thompson*, 22

NY3d at 699; *People v Calkins*, 85 AD3d 1676, 1677 [4th Dept 2011]; *People v Butterfield*, 267 AD2d 870, 872 [3d Dept 1999], *lv denied* 95 NY2d 833 [2000]; *see also People v Manragh*, 32 NY3d 1101, 1104-1105 [2018, Rivera, J., concurring]). In other words, a prosecutor may not "suppress[a] defendant's request to call . . . witness[es] nor strip[ ] the grand jury of its discretion to grant or deny that request" (*Thompson*, 22 NY3d at 699). Instead, "[a]lthough [a] prosecutor [cannot] avoid presenting [a requested] witness's name for a vote, the prosecutor [is] free, in the role of advisor to the grand jury, to explain that the witness [does] not have relevant information [or] primarily offer[s] inadmissible hearsay testimony, and if unpersuasive in this effort, the prosecutor [may seek] a court order quashing the subpoena or limiting the witness's testimony as provided in CPL 190.50 (3)" (*Manragh*, 32 NY3d at 1105 n 1 [Rivera, J., concurring]; *accord Thompson*, 22 NY3d at 699-700). We thus conclude that the court properly determined that the People, despite their stated concerns about the admissibility of the proposed testimony, violated their statutory obligation by refusing to present to the grand jury defendant's request that two of the vehicle's other occupants be called as witnesses.

We nonetheless agree with the People that, under the circumstances of this case, the court erred in determining that the extraordinary remedy of dismissal of the indictment was warranted based on the People's failure to present defendant's request to the grand jury. A court may enforce the abovementioned statutory rules "by dismissing an indictment that 'fails to conform to the requirements of [CPL article 190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result' " (*Thompson*, 22 NY3d at 699, quoting CPL 210.35 [5]; *see* CPL 210.20 [1] [c]; *People v Hill*, 5 NY3d 772, 773 [2005]). "The 'exceptional remedy of dismissal' is available in 'rare cases' of prosecutorial misconduct upon a showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant" (*Thompson*, 22 NY3d at 699, quoting *Huston*, 88 NY2d at 409, 410). "In general, this demanding test is met only where the prosecutor engages in an 'over-all pattern of bias and misconduct' that is 'pervasive' and typically willful, whereas isolated instances of misconduct, including the erroneous handling of evidentiary matters, do not merit invalidation of the indictment" (*id.*, quoting *Huston*, 88 NY2d at 408; *see People v Pelchat*, 62 NY2d 97, 106-107 [1984]). " '[T]he statutory test, which does not turn on mere flaw, error or skewing . . . is very precise and very high' " (*Thompson*, 22 NY3d at 699, quoting *People v Darby*, 75 NY2d 449, 455 [1990]).

Here, even if the People had properly presented defendant's request and the grand jury had then voted to subpoena the witnesses, the People would have been able to vacate the first witness's subpoena pursuant to CPL 190.50 (3) because, as a codefendant under consideration by the same grand jury who had not asserted his qualified right to testify voluntarily (*see* CPL 190.50 [5]), he could "not be compelled to testify" (*People v Cooper*, 303 AD2d 776, 778 [3d Dept 2003], *lv denied* 100 NY2d 560 [2003]; *see* NY Const art I, § 6; *People v Steuding*, 6 NY2d 214, 216-217 [1959], *rearg denied* 7 NY2d 805

[1959]). Similarly, although the second witness was not under consideration for indictment by the grand jury because he had already entered a guilty plea, the second witness, if subpoenaed, would have been entitled, given the contents of his new sworn statement that contradicted his original sworn statement to the police, to assert his Fifth Amendment right against further incriminating himself or exposing himself to perjury charges (*see People v Jones*, 176 AD3d 1397, 1398-1399 [3d Dept 2019], *lv denied* 35 NY3d 942 [2020]; *see generally People v Cantave*, 21 NY3d 374, 379-381 [2013], *mot to clarify op denied* 21 NY3d 1070 [2013]). Moreover, even if the witnesses had provided admissible testimony before the grand jury consistent with their new statements, such testimony would have been inculpatory in part inasmuch as those statements placed defendant in the vehicle with items used to manufacture methamphetamine. The witnesses also would have faced impeachment based on their original sworn statements to the police that had implicated defendant.

We thus conclude that "this was not one of the rare cases of prosecutorial misconduct entitling a defendant to the exceptional remedy of dismissal, because there is no showing that, in the absence of the complained-of misconduct, the grand jury might have decided not to indict the defendant" (*People v Jackson*, 143 AD3d 404, 405 [1st Dept 2016], *lv denied* 28 NY3d 1146 [2017] [internal quotation marks omitted]; *see Thompson*, 22 NY3d at 699). The demanding test for dismissal of the indictment based on prosecutorial misconduct was not met here inasmuch as the People did not engage in an overall pattern of willful and pervasive misconduct; instead, the failure to present defendant's request for witnesses to the grand jury constituted an isolated instance of misconduct involving, at worst, the erroneous handling of an evidentiary matter, which "do[es] not merit invalidation of the indictment" (*Thompson*, 22 NY3d at 699). Further, we agree with the People that the court erroneously concluded that a partially inaccurate statement by one of the prosecutors regarding the indictment status of one of the witnesses constituted pervasive misconduct warranting dismissal of the indictment.

The People also contend that they were not required to introduce to the grand jury the new statements of the requested witnesses because, contrary to the court's implicit determination, the new statements did not constitute the type of exculpatory evidence requiring presentation. We agree. "[T]he People maintain broad discretion in presenting their case to the [g]rand [j]ury and need not seek evidence favorable to the defendant or present all of their evidence tending to exculpate the accused" (*People v Mitchell*, 82 NY2d 509, 515 [1993]; *see Lancaster*, 69 NY2d at 25-26).

Here, "the allegedly exculpatory evidence neither implicated a complete legal defense nor was of such quality as to create the potential to eliminate a 'needless or unfounded prosecution' " (*People v Ramjit*, 203 AD2d 488, 490 [2d Dept 1994], *lv denied* 84 NY2d 831 [1994]). Rather, as the People correctly contend, the new statements of the witnesses recanting their original sworn statements to the police "merely relate[] to credibility, a collateral issue that generally does not materially influence a [g]rand [j]ury

investigation" (*People v Dillard*, 214 AD2d 1028, 1028 [4th Dept 1995]; *see People v Williams*, 298 AD2d 535, 535 [2d Dept 2002], *lv denied* 99 NY2d 566 [2002]; *People v Morris*, 204 AD2d 973, 974 [4th Dept 1994], *lv denied* 83 NY2d 1005 [1994]; *see generally People v Carr*, 99 AD3d 1173, 1176 [4th Dept 2012], *lv denied* 20 NY3d 1010 [2013]). We thus conclude that, contrary to the court's implicit determination, dismissal of the indictment on the ground that the People failed to present the witnesses' new statements to the grand jury was not warranted inasmuch as the People were not obligated to present that evidence (*see People v Hemphill*, 35 NY3d 1035, 1036 [2020], *cert granted* — US — [Apr. 19, 2021]; *Dillard*, 214 AD2d at 1028).

The People further contend that the court erred in dismissing count two of the indictment on the separate ground that the evidence was legally insufficient to support the underlying charge of unlawful manufacture of methamphetamine in the third degree. We agree. In deciding a motion to dismiss a count of an indictment for legally insufficient evidence, a "reviewing court's inquiry is limited to 'whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crime[],' and whether 'the [g]rand [j]ury could rationally have drawn the guilty inference' . . . That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry 'as long as the [g]rand [j]ury could rationally have drawn the guilty inference' " (*People v Bello*, 92 NY2d 523, 526 [1998]; *see People v Hoffert*, 125 AD3d 1386, 1387 [4th Dept 2015], *lv denied* 25 NY3d 990 [2015]).

Here, the grand jury charged defendant with unlawful manufacture of methamphetamine in the second degree (Penal Law § 220.74 [2]) on the ground that, having previously been convicted within the preceding five years of a qualifying methamphetamine offense, defendant committed unlawful manufacture of methamphetamine in the third degree (§ 220.73). In relevant part, "[a] person is guilty of unlawful manufacture of methamphetamine in the third degree when he or she possesses at the same time and location, with intent to use, or knowing that another intends to use each such product to unlawfully manufacture, prepare or produce methamphetamine . . . [t]wo or more items of laboratory equipment and two or more precursors, chemical reagents or solvents in any combination" (§ 220.73 [1]). The court properly determined that the evidence was legally sufficient to establish the element of possession based on defendant's presence in the vehicle and application of the automobile presumption. The court nonetheless further determined that the record was devoid of any competent evidence that defendant intended to use, or knew that another intended to use, the products to unlawfully manufacture, prepare, or produce methamphetamine. That was error.

"It is well settled that a defendant may be presumed to intend the natural and probable consequences of his actions . . . , and that the element of intent may be inferred from the totality of defendant's conduct" (*People v Manigault*, 145 AD3d 1428, 1429 [4th Dept 2016], *lv denied* 29 NY3d 950 [2017]; *see People v Tai*, 273 AD2d 150, 150 [1st Dept 2000]). The competent evidence before the grand jury established

that defendant was located with three other passengers in a vehicle that contained numerous pieces of laboratory equipment, precursors, reagents, and solvents that were used in the manufacture of methamphetamine. Those products, which were found throughout the vehicle, included an active one-pot plastic green bottle, Sudafed medication packaging, salt, ice packs containing ammonium nitrate, a measuring spoon, napkins, electrical tape, a pipe cutter, a heating device, and tubing. The evidence also established that the vehicle contained powder residue and liquid that tested positive for methamphetamine. The grand jury thus had before it evidence that defendant had joined and remained with three other people inside a mobile methamphetamine lab. As the People correctly contend, the grand jury could have rationally inferred from those facts that defendant intended to use, or at least knew that the other occupants intended to use, these various products found throughout the vehicle to manufacture or produce methamphetamine (*see People v Stone*, 179 AD3d 1287, 1289-1290 [3d Dept 2020]). We thus conclude that the court erred in dismissing count two of the indictment on the separate ground of legal insufficiency.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

142

KA 18-02283

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

JA'KHARI MERIDY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered September 12, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Opinion by CENTRA, J.P.:

On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that he was not convicted of an armed felony offense and that he should be adjudicated a youthful offender. Defendant's contention requires us to resolve whether possession of a loaded firearm is possession of a deadly weapon, as that phrase is used within the definition of armed felony. While ordinary citizens would say that is so (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 271 [c]), under New York's statutory scheme, that is not always the case. Nevertheless, we reject defendant's contention that possession of a loaded firearm is never an armed felony and conclude that, under the circumstances of this case, defendant was convicted of an armed felony offense. Accordingly, we conclude that the judgment should be affirmed.

Defendant's conviction stems from an incident that occurred one evening when two police officers heard gunshots while on patrol and looked to their right, where they observed three males running away from a gas station. As they ran, each male had an arm extended holding a handgun that was pointed in the direction of the gas station. One officer heard more gunshots and observed muzzle flash on at least one of the firearms. The three males then entered a vehicle

that was parked with the engine running; a fourth male was in the driver's seat. The police blocked the vehicle and arrested the driver and the three passengers, one of whom was defendant. Three loaded firearms were recovered from the vehicle, and ballistics reports showed that all three firearms were operable.

Preliminarily, we agree with defendant, and the People correctly concede, that defendant did not waive his right to appeal (*see People v Williams*, 177 AD3d 1403, 1403-1404 [4th Dept 2019], *lv denied* 34 NY3d 1164 [2020]; *cf. People v Latimore*, 179 AD3d 1551, 1551-1552 [4th Dept 2020], *lv denied* 35 NY3d 971 [2020]).

Every person charged with a crime alleged to have been committed when the person was at least 16 years old and less than 19 years old or a person charged with being a juvenile offender is eligible for youthful offender treatment unless, inter alia, the conviction to be replaced by a youthful offender finding is for "an armed felony as defined in [CPL 1.20 (41)]" (CPL 720.10 [2] [a] [ii]; *see* CPL 720.10 [1]). Defendant, relying on *People v Ochoa* (182 AD3d 410 [1st Dept 2020], *lv denied* 36 NY3d 930 [2020]), contends that he is eligible for youthful offender status because he was not convicted of an armed felony. We reject that contention.

We have repeatedly held that criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) is an armed felony offense (*see e.g. People v Jones*, 166 AD3d 1479, 1480 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]; *People v Lindsey*, 166 AD3d 1565, 1565 [4th Dept 2018], *lv denied* 32 NY3d 1206 [2019]; *People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]; *People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]; *People v Smith*, 118 AD3d 1492, 1493-1494 [4th Dept 2014], *lv denied* 25 NY3d 953 [2015]; *People v Amir W.*, 107 AD3d 1639, 1640 [4th Dept 2013]). The Court of Appeals has also so held (*see People v Middlebrooks*, 25 NY3d 516, 522 [2015] ["undisputed" that defendant Lowe was convicted of an armed felony]), as has the Second Department (*see e.g. People v Cooper*, 159 AD3d 979, 980 [2d Dept 2018]; *People v Alston*, 145 AD3d 737, 737 [2d Dept 2016]) and the Third Department (*see People v Jones*, 182 AD3d 698, 698-699 [3d Dept 2020]; *People v Williams*, 155 AD3d 1260, 1260-1261 [3d Dept 2017], *lv denied* 30 NY3d 1121 [2018]).

Although we agree with defendant that it does not appear that a defendant has ever argued to this Court that criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) is *not* an armed felony, we reject defendant's contention that *all* convictions of criminal possession of a weapon in the second degree under section 265.03 (3) are not armed felony offenses. Only *some* convictions, and in all likelihood very few convictions, of criminal possession of a weapon in the second degree under section 265.03 (3) are not armed felony offenses.

An "armed felony" is defined in CPL 1.20 (41) as

"any violent felony offense defined in section 70.02 of the

> penal law that includes as an element either: (a) possession, being armed with or causing serious physical injury by means of a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious physical injury may be discharged; or (b) display of what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm."

Criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) is defined in section 70.02 (1) (b) as a class C violent felony offense and includes as an element the possession of a "loaded firearm." Thus, we must determine whether possession of a loaded firearm is possession of a deadly weapon, as that phrase is used in the definition of armed felony.

A "loaded firearm" is defined as "any firearm loaded with ammunition *or any firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm*" (Penal Law § 265.00 [15] [emphasis added]). Thus, a person may be guilty of criminal possession of a weapon in the second degree under section 265.03 (3) without possessing a weapon that is actually loaded, so long as the person is carrying the ammunition. As stated above, a "deadly weapon" as used within the definition of armed felony is a "loaded weapon from which a shot, readily capable of producing death or other serious physical injury may be discharged" (CPL 1.20 [41] [a]). The Penal Law § 10.00 (12) definition of a "deadly weapon" is the same, except that it also includes things such as various knives. With respect to a gun, in order to be a "deadly weapon," it must be both operable and actually loaded with live ammunition (*see People v Shaffer*, 66 NY2d 663, 664 [1985]; *People v Wilson*, 252 AD2d 241, 246 [4th Dept 1998] [explaining that "the concept of 'loaded' in Penal Law § 10.00 (12) is narrower than the concept of 'loaded' in Penal Law § 265.00 (15)"]). Stated another way, the definition of a deadly weapon when there is a gun involved means a gun that is loaded and capable of being fired, whereas the definition of a loaded firearm is an operable gun with *either* live ammunition in the gun *or* held on the person (*see People v Tucker*, 55 NY2d 1, 8 [1981], *rearg denied* 55 NY2d 1039 [1982]). Therefore, in a situation where a defendant has an operable gun that is unloaded but he or she is carrying the ammunition, there is possession of a "loaded firearm," but there is no possession of a "deadly weapon."

In *Ochoa*, the Court held that the defendant's conviction of criminal possession of a weapon in the second degree for possessing a loaded firearm was not an armed felony (182 AD3d at 410). The Court explained that "[s]ince a 'loaded firearm' is . . . not always a 'deadly weapon,' the crime to which defendant pleaded guilty did not 'include[] as an element . . . possession . . . of a deadly weapon' (CPL 1.20 [41] [a]), and the court should not have found that defendant's conviction rendered him presumptively ineligible" for youthful offender treatment (*id.* at 411).

We disagree with the reasoning in *Ochoa* only to the extent that

it held that *all* convictions of criminal possession of a weapon in the second degree for possessing a loaded firearm are not armed felonies. It is apparent that where a defendant possesses a firearm that is actually loaded with ammunition and is capable of being fired, he or she possesses a deadly weapon and is guilty of an armed felony offense. We conclude that it is appropriate to look at the particular facts of each case to determine whether the defendant is guilty of an armed felony. For example, a person is guilty of robbery in the first degree under Penal Law § 160.15 (2) when he or she commits a robbery while armed with a deadly weapon, which, as noted, includes a switchblade knife or a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged (§ 10.00 [12]). To determine if the defendant committed an armed felony, courts look to the definition of deadly weapon as that phrase is used in the definition of armed felony, which excludes knives. Thus, where a defendant is convicted of robbery in the first degree for the use of a knife, that is not an "armed felony" (*see People v Griffin*, 114 AD2d 756, 757 [1st Dept 1985], *lv denied* 67 NY2d 762 [1986]; *People v Scarpetta*, 114 AD2d 766, 767 [1st Dept 1985]). Where, however, the robbery is committed with a loaded, operable firearm, it is an "armed felony" (*see People v Jiminez*, 165 AD2d 692, 692-693 [1st Dept 1990], *lv denied* 76 NY2d 987 [1990]). In *Jiminez*, the Court held that "[s]ince defendant pleaded guilty to committing first degree robbery while armed with a pistol he was properly sentenced as an armed felony offender" (*id.* at 693), despite the fact that a first-degree robbery conviction is not *always* an armed felony. Just as courts look to the definition of deadly weapon as that phrase is used in the definition of armed felony to determine that knives are excluded therefrom, so too should courts look to whether the firearm fits within that definition, i.e., a firearm that is actually loaded and capable of being fired.

Here, the record establishes that defendant possessed a weapon that was loaded with ammunition and operable, and defendant does not contend otherwise. Indeed, defendant admitted in a letter to the court that he was in possession of a "fully loaded" firearm the evening of the incident. Thus, under the circumstances of this case, defendant was convicted of an armed felony offense.

A youth convicted of an armed felony offense may still be an eligible youth for youthful offender treatment "if the court determines that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution" (CPL 720.10 [3]). We conclude that County Court did not abuse its discretion in concluding that neither factor exists here (*see People v Dukes*, 156 AD3d 1443, 1443 [4th Dept 2017], *lv denied* 31 NY3d 983 [2018]; *People v Agee*, 140 AD3d 1704, 1704 [4th Dept 2016], *lv denied* 28 NY3d 925 [2016]). With regard to defendant's participation in the crime, he was one of the three participants who were seen pointing guns in the direction of the gas station. Shots were fired from at least one of those guns and struck the intended

target's vehicle, resulting in multiple bullet holes on the passenger side of the vehicle, a shattered back windshield, and a flattened tire. While there was some question whether defendant's gun jammed, he at least tried to fire shots from the loaded weapon he was carrying. His participation in the offense was therefore not minor, even if the incident was orchestrated by the codefendants.

With regard to mitigating circumstances,

> " 'traditional sentencing factors, such as the criminal's age, background and criminal history, are not appropriate to the mitigating circumstances analysis . . . Rather, the court must rely on factors related to the defendant's conduct in committing the crime, such as a lack of injury to others or evidence that the defendant did not display a weapon during the crime' . . . , or other factors that are directly related to the crime of which defendant was convicted" (*Jones*, 166 AD3d at 1480).

Here, neither the intended target nor any bystander was struck by the bullets that were fired by defendant and the codefendants, but that was merely fortuitous. As the court recognized, this was an attempted execution.

Further, even assuming, arguendo, that there were sufficient mitigating circumstances here, based on our review of the relevant factors to consider in determining whether to afford defendant youthful offender treatment (*see People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]; *People v Shrubsall*, 167 AD2d 929, 930 [4th Dept 1990]), we conclude that the court's refusal to adjudicate defendant a youthful offender was not an abuse of discretion, and we decline to exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see Agee*, 140 AD3d at 1704-1705).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

143

KA 15-01642

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VANDON JONES, DEFENDANT-APPELLANT.

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered August 26, 2015. The judgment convicted defendant upon a jury verdict of sex trafficking (two counts), attempted sex trafficking (four counts), promoting prostitution in the third degree, and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of sex trafficking (Penal Law § 230.34 [1] [a]), four counts of attempted sex trafficking (§§ 110.00, 230.34 [1] [a] [two counts]; [4], [5] [c]), and one count each of promoting prostitution in the third degree (§ 230.25 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Although defendant contends that his conviction is not supported by legally sufficient evidence, his general motion to dismiss at the close of the People's case did not preserve for our review any of his specific challenges to the sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]) and, in any event, defendant did not renew that motion after presenting proof (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). Nevertheless, 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]).

Contrary to defendant's contention, there is no causation element to sex trafficking (*see* Penal Law § 230.34 [1] [a]; [4], [5] [c]). The factors listed in section 230.34 do not proscribe a certain result. Rather, they proscribe aggravating conduct by a defendant

that elevates the severity of the underlying crime of promoting prostitution (*see People v Coleman*, 74 NY2d 381, 385 [1989]; *see also People v Miller*, 87 NY2d 211, 216 [1995]; *United States v Maynes*, 880 F3d 110, 114 [4th Cir 2018]; *United States v Alvarez*, 601 Fed Appx 16, 17-18 [2d Cir 2015], *cert denied* 575 US 1020 [2015]). Viewing the evidence in light of the elements of the sex trafficking and attempted sex trafficking counts 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 on those counts (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Despite his admission of guilt at trial of promoting prostitution in the third degree by running a business or enterprise involving prostitution activity by two or more prostitutes (Penal Law § 230.25 [1]), defendant now contends that the verdict on that count as well as the count related to criminal possession of a controlled substance in the third degree is against the weight of the evidence. We reject that contention (*see generally Danielson*, 9 NY3d at 349; *Bleakley*, 69 NY2d at 495). "The jury was entitled to credit the testimony of the People's witnesses . . . over the testimony of defendant's witnesses, including that of defendant [himself]," and we perceive no reason to disturb those credibility determinations (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]).

Contrary to defendant's further contention, the grand jury proceedings were not defective and, as a result, dismissal of the indictment is not warranted. "[D]ismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*People v Fisher*, 101 AD3d 1786, 1786 [4th Dept 2012], *lv denied* 20 NY3d 1098 [2013] [internal quotation marks omitted]; *see generally People v Huston*, 88 NY2d 400, 409 [1996]). No such conduct occurred in this case.

We reject defendant's contentions that County Court erred in precluding defendant from calling one witness whose proffered testimony was deemed irrelevant and in permitting certain *Molineux* evidence. It is well settled that a party may not "call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility" (*People v Pavao*, 59 NY2d 282, 288-289 [1983]; *see People v Snow*, 185 AD3d 1400, 1402 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]). Moreover, the court did not err in allowing the People to submit evidence related to conduct concerning other women "to establish defendant's modus operandi and common scheme of using physical abuse to instill fear and obedience in the prostitutes who worked for him" (*People v Bonner*, 94 AD3d 1500, 1501 [4th Dept 2012], *lv denied* 19 NY3d 1101 [2012], *reconsideration denied* 20 NY3d 1059 [2013]; *see People v Grant*, 104 AD2d 674, 674-675 [3d Dept 1984]), and the court's instructions with regard to the proper use of such information were appropriate. We have reviewed defendant's remaining challenges to the evidence admitted at trial and conclude that they lack merit.

Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Even assuming, arguendo, that defendant preserved for our review his further contention that he was denied a fair trial by prosecutorial misconduct, we conclude that the alleged errors by the prosecutor, either alone or cumulatively, were not so egregious as to deny defendant a fair trial (*see People v Logan*, 178 AD3d 1386, 1388 [4th Dept 2019], *lv denied* 35 NY3d 1028 [2020]; *People v Fick*, 167 AD3d 1484, 1485-1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

145

KA 19-01654

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JULIAN MURRAY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered May 15, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the third degree and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). Defendant contends that County Court erred in refusing to suppress evidence seized by parole officers during a search of his residence because the search was based on a tip from an anonymous source that was not corroborated, and neither the source's basis of knowledge nor his or her reliability was established. At the suppression hearing, defendant's parole officer (officer) testified that, during the search of defendant's residence, parole officers found a shotgun in a closet wrapped in a t-shirt and a plastic bag and underneath some clothes. The officer testified that the parole officers searched defendant's residence based on a call the officer received that defendant may be in possession of a firearm. The officer testified that the call came from the Department of Probation, although he could not recall who the probation officer was that made the call. He testified that he probably made an entry in the computer about that call. The court directed the People to make a printout of that entry, the People thereafter provided that document to defense counsel, and the officer was recalled to the stand for further cross-examination. Defense counsel did not ask the officer any additional questions about the tip received from the Department of Probation other than questions about

the timing of the call and the subsequent search.

We conclude that defendant's contention is not preserved for our review inasmuch as he failed to raise it before the suppression court (*see People v Cruz*, 137 AD3d 1158, 1159 [2d Dept 2016], *lv denied* 28 NY3d 970 [2016]; *People v Fulton*, 133 AD3d 1194, 1195 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016], *reconsideration denied* 27 NY3d 997 [2016]; *People v Rolle*, 72 AD3d 1393, 1395 [3d Dept 2010], *lv denied* 16 NY3d 745 [2011]; *see also People v Lanaux*, 156 AD3d 1459, 1460 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018]). Contrary to defendant's contention, he did not preserve that issue for our review through either that part of his omnibus motion seeking to suppress the evidence or his posthearing memorandum. A question of law with respect to a ruling of a suppression court is preserved for appeal when "a protest thereto was registered, by the party claiming error, at the time of such ruling . . . or at any subsequent time when the court had an opportunity of effectively changing the same . . . , or if in response to a protest by a party, the court expressly decided the question raised on appeal" (CPL 470.05 [2]; *see People v Parker*, 32 NY3d 49, 57 [2018]; *People v Miranda*, 27 NY3d 931, 932 [2016]). In his omnibus motion, defendant sought, inter alia, suppression of the evidence seized during the search on the ground that the evidence "was taken in violation of . . . defendant's constitutional rights" inasmuch as it was done without "a search warrant or probable cause." Those "broad challenges" are insufficient to preserve defendant's present contention (*Parker*, 32 NY3d at 58). In defendant's posthearing memorandum, he argued that the search was invalid because there was no warrant or consent to search, that the search was not rationally related to the duties of the officer, and that the parole officers were acting as police officers when conducting the search. He did not raise his present contention that the People were required to prove that the information provided to the officer satisfied the *Aguilar-Spinelli* test in order for the search to be lawful, even though he was then aware of the basis for the search (*cf. People v Landy*, 59 NY2d 369, 374 [1983]; *see generally People v John*, 27 NY3d 294, 303 [2016]). Nor did the court expressly decide that issue (*see Parker*, 32 NY3d at 57-58; *Miranda*, 27 NY3d at 932-933). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (CPL 470.15 [3] [c]).

Defendant contends that he received ineffective assistance of counsel based on defense counsel's failure to preserve the suppression issue for our review. On a claim of ineffective assistance of counsel, defendant must "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*People v Honghirun*, 29 NY3d 284, 289 [2017] [internal quotation marks omitted]). In addition, it is well settled that " 'counsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective' " (*id.* at 290, quoting *People v Benevento*, 91 NY2d 708, 712 [1998]). On this record, we conclude that defendant failed to meet his burden of establishing the absence of strategic or other legitimate explanations for defense counsel's conduct (*see generally People v Hymes*, 34 NY3d

1178, 1178-1179 [2020]; *People v Garcia*, 75 NY2d 973, 974 [1990]; *People v Freeman*, 169 AD3d 1513, 1514 [4th Dept 2019], *lv denied* 33 NY3d 976 [2019]). Contrary to defendant's contention, the issue whether the People were required to demonstrate the reliability or credibility of the information obtained from the Department of Probation was not "so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it" (*People v McGee*, 20 NY3d 513, 518 [2013]; *see generally People v Quinones*, 12 NY3d 116, 121-122 [2009], *cert denied* 558 US 821 [2009]). Viewing defense counsel's performance in this case in totality "throughout the proceedings, including at the suppression hearing," we conclude that defendant was afforded meaningful representation (*People v Parson*, 27 NY3d 1107, 1108 [2016]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). "To find otherwise on this record necessitates engaging in the exact form of hindsight review that [the Court of Appeals] has cautioned against in analyzing ineffective assistance of counsel claims" (*Parson*, 27 NY3d at 1108).

All concur except BANNISTER, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. In my view, the warrantless search of defendant's residence by defendant's parole officers in this case was unlawful because the sole reason for the search was essentially an anonymous tip received from an unidentified, unnamed person associated with the "Department of Probation."

Initially, I disagree with my colleagues that defense counsel failed to preserve that issue for our review. Prior to trial, defense counsel filed an omnibus motion seeking, inter alia, to suppress the evidence obtained from the search based on lack of probable cause. Defense counsel further argued that defendant's parole officer acted without authority and that the search was "not merely a parole search." It was the People's burden at the suppression hearing to prove that defendant's parole officer was "reasonably justified" in conducting the warrantless search, which requires consideration of the reason for the search, i.e., here, the tip (*People v McMillan*, 29 NY3d 145, 148 [2017]; *see generally People v Huntley*, 43 NY2d 175, 181 [1977]). Moreover, defense counsel did challenge the parole officer's reason for the search on cross-examination when he questioned the parole officer about the tip. Indeed, the hearing was paused for the parole officer to produce the computer entry of the call log with respect to the tip. However, the call log provided no information beyond that provided in the testimony of the parole officer, who simply stated that a tip came in from "someone" at the Department of Probation. Additionally, in the posthearing memorandum, defense counsel argued that the search was unlawful because it was effected without the requisite authorization. Thus, defense counsel continuously challenged the authority for the parole officer's actions. Moreover, "[t]he mere emphasis of one prong of attack over another or a shift in theory on appeal, will not constitute a failure to preserve" (*People v De Bour*, 40 NY2d 210, 215 [1976]).

With respect to the merits, it is well settled that even parolees have a constitutional right to be free from unreasonable searches and

seizures (*see People v Hale*, 93 NY2d 454, 459 [1999]; *People v Johnson*, 94 AD3d 1529, 1531 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]). Nevertheless, " 'what may be unreasonable with respect to an individual who is not on parole may be reasonable with respect to one who is' " (*Johnson*, 94 AD3d at 1531, quoting *Huntley*, 43 NY2d at 181). A parolee's right to be free from unreasonable searches and seizures is not violated if a parole officer's search of the parolee's person or property "is rationally and reasonably related to the performance of his [or her] duty as a parole officer" (*Huntley*, 43 NY2d at 179; *see People v Sapp*, 147 AD3d 1532, 1533 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017]; *People v Farmer*, 136 AD3d 1410, 1410 [4th Dept 2016], *lv denied* 28 NY3d 1027 [2016]).

Over forty years ago, the Court of Appeals in *People v Jackson* (46 NY2d 171, 175-176 [1978]) determined that a probation officer's search of a defendant and his vehicle was unlawful because it was based on only an anonymous accusation. The Court concluded that such information could not reasonably justify the officer's warrantless search (*id.*; *cf. McMillan*, 29 NY3d at 149). While courts have upheld searches of a parolee's residence where a parole officer "received information from law enforcement sources that defendant might be engaged in activity in violation of parole conditions . . . [or] received information from a confidential informant," the information provided by the source was found to be reliable or was corroborated in some way (*People v Bermudez*, 49 Misc 3d 381, 389 [Monroe County Ct 2015] [internal quotation marks omitted]; *see People v Johnson*, 63 NY2d 888, 890 [1984], *rearg denied* 64 NY2d 647 [1984]; *People v Wade*, 172 AD3d 1644, 1645 [3d Dept 2019], *lv denied* 33 NY3d 1109 [2019]; *People v Porter*, 101 AD3d 44, 45, 47-48 [3d Dept 2012], *lv denied* 20 NY3d 1064 [2013]).

Here, defendant's parole officer testified that the sole reason for searching defendant's residence was the anonymous tip from an unknown person at the Department of Probation, about whom the officer could not provide any information at the suppression hearing. Moreover, there was no corroboration of the information provided by the anonymous source. Thus, I conclude that there is no support in the record for County Court's conclusion that the warrantless search of defendant's residence was lawful and reasonable.

I would therefore reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress physical evidence, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

149

CA 20-00689

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

NATIONSTAR MORTGAGE, LLC, PLAINTIFF-RESPONDENT,

V ORDER

GEORGE KARADIMAS AND KATHERINE KARADIMAS,
DEFENDANTS-APPELLANTS.

THE LAW OFFICE OF TED A. BARRACO, PITTSFORD (TED A. BARRACO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KNUCKLES, KOMOSINSKI & MANFRO, LLP, FISHKILL (KATHERINE BONNET OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), dated September 13, 2019. The order denied defendants' motion to, inter alia, vacate a default judgment of foreclosure and sale.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 28, 2021,

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

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

155

CA 20-00507

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF THE APPLICATION OF
TOM SCHLEE, UNIT CHIEF OF CENTRAL NEW YORK
PSYCHIATRIC CENTER, FIVE POINTS SATELLITE UNIT, PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

FOR AN ORDER AUTHORIZING THE INVOLUNTARY
TREATMENT OF CLARENCE E., RESPONDENT-APPELLANT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered June 12, 2019. The order granted the petition to administer antipsychotic medications to respondent over his objection.

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

Memorandum: Petitioner commenced this proceeding seeking authorization to administer antipsychotic medications to respondent over his objection pursuant to the parens patriae power of the State of New York (*see Matter of Sawyer [R.G.]*, 68 AD3d 1734, 1734-1735 [4th Dept 2009]; *see generally Rivers v Katz*, 67 NY2d 485, 496-498 [1986], *rearg denied* 68 NY2d 808 [1986]). We conclude that Supreme Court properly granted the petition. Contrary to respondent's contention, petitioner met his burden of establishing by clear and convincing evidence that respondent lacks "the capacity to make a reasoned decision with respect to [the] proposed treatment" (*Rivers*, 67 NY2d at 497). Petitioner's evidence demonstrated that respondent suffered from schizoaffective disorder, bipolar type and that respondent was delusional and lacked insight regarding his illness (*see Matter of William S.*, 31 AD3d 567, 568 [2d Dept 2006]; *Matter of Mausner v William E.*, 264 AD2d 485, 486 [2d Dept 1999]). Indeed, petitioner established that respondent did not believe that he needed medication for his mental illness, which highlighted his inability to fully appreciate his diagnosis and its effect on him and those around him (*see Sawyer*, 68 AD3d at 1734; *Matter of Paris M. v Creedmoor Psychiatric Ctr.*, 30 AD3d 425, 426 [2d Dept 2006]; *Matter of McConnell*, 147 AD2d 881, 882 [3d Dept 1989], *appeal dismissed and lv denied* 74 NY2d 759 [1989]). Although respondent testified on his own behalf that he would accept properly administered medication, he also

testified that his "mental health problem" did not require treatment by medication. We perceive no basis to disturb the court's determination to the contrary given petitioner's evidence and the discrepancies in respondent's testimony (*see William S.*, 31 AD3d at 568).

Contrary to respondent's further contention, petitioner also established by clear and convincing evidence that the proposed two-year treatment plan was "narrowly tailored to give substantive effect to [respondent's] liberty interest" (*Rivers*, 67 NY2d at 497; *see Sawyer*, 68 AD3d at 1735). Respondent's treating and reviewing physicians each determined that respondent's prognosis for improvement without changing his course of treatment was minimal. Additionally, both evaluation reports prepared by the physicians in support of the petition identified the proposed medications for respondent's treatment; the purported benefits thereof, including the expectation that respondent's delusions would abate; and any reasonably foreseeable adverse side effects. The reports also included a plan for monitoring respondent for adverse side effects through, inter alia, regular blood work and organ function tests.

Respondent further contends that he was denied effective assistance of counsel based on, inter alia, counsel's failure to successfully advocate for a second adjournment and to convince the court that an independent examination of respondent was warranted. We reject that contention because, even assuming, arguendo, that respondent has the right to meaningful assistance of counsel during proceedings such as these, he failed to "demonstrate the absence of strategic or other legitimate explanations" for counsel's alleged deficiencies (*People v Caban*, 5 NY3d 143, 154 [2005]), and we conclude that his attorney provided meaningful representation (*see Matter of State of New York v Leslie L.*, 174 AD3d 1326, 1327 [4th Dept 2019], *lv denied* 34 NY3d 903 [2019]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, we reject respondent's remaining due process contentions inasmuch as the court did not abuse its discretion in denying his request for an independent psychiatric examination (*see generally Matter of Kings Park Psychiatric Ctr. [Gerald L.]*, 204 AD2d 724, 724 [2d Dept 1994]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

161

KA 19-00078

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAYLOR T. BOJE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered November 28, 2018. The judgment convicted defendant upon his plea of guilty of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]).

By failing to move to withdraw the plea or to vacate the judgment, defendant failed to preserve for our review his contention that his plea was not voluntarily, knowingly, or intelligently entered (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Hill*, 128 AD3d 1479, 1480 [4th Dept 2015], *lv denied* 26 NY3d 930 [2015]; *People v Williams*, 124 AD3d 1285, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]). Furthermore, this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *Hill*, 128 AD3d at 1480).

We further conclude that defendant was afforded due process with respect to the imposition and subsequent revocation of interim probation, and that County Court properly determined that defendant violated the conditions of his interim probation. Under the terms of defendant's plea agreement, he was placed on a one-year period of interim probation, which, if successfully completed, would be followed by a one-year term of probation and the felony charge to which he

pleaded guilty would be reduced to a misdemeanor. The court explained the conditions of the interim probation to defendant during the plea colloquy and provided him with a written copy of those conditions, which defendant acknowledged and signed. During the period of interim probation, the probation department filed a petition charging defendant with violations of the conditions. After a hearing, the court determined that defendant had violated the conditions of his interim probation and sentenced him to an indeterminate term of incarceration.

Contrary to defendant's contention, "[t]he procedures set forth in CPL 410.70 do not apply where, as here, there has been no sentence of probation" (*People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008]). Instead, because interim probation is imposed prior to sentencing, the presentence procedures set forth in CPL 400.10 apply (*see id.*). Here, the "hearing conducted by the court was sufficient pursuant to CPL 400.10 (3) to enable the court to 'assure itself that the information upon which it bas[ed] the sentence [was] reliable and accurate' " (*id.*, quoting *People v Outley*, 80 NY2d 702, 712 [1993]; *see People v Wissert*, 85 AD3d 1633, 1634 [4th Dept 2011], *lv denied* 17 NY3d 956 [2011]; *People v Saucier*, 69 AD3d 1125, 1126 [3d Dept 2010]). Although defendant now contends that the court improperly relied on hearsay in making its determination, he failed to preserve that contention for our review inasmuch as he did not object on that ground when the court gave him an opportunity to do so (*see People v Koons*, 187 AD3d 1638, 1639 [4th Dept 2020]; *People v Dissottle*, 68 AD3d 1542, 1544 [3d Dept 2009], *lv denied* 14 NY3d 799 [2010]).

We agree with defendant, however, that the court erred in setting the expiration date for the order of protection without "taking into account [the] jail time credit to which defendant is entitled" (*People v Mingo*, 38 AD3d 1270, 1271 [4th Dept 2007] [internal quotation marks omitted]; *see People v Coleman*, 145 AD3d 1641, 1642 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]; *People v Adams*, 66 AD3d 1355, 1356 [4th Dept 2009], *lv denied* 13 NY3d 858 [2009]). Although defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317 [2004]), we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We therefore modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify in the order of protection an expiration date in accordance with CPL 530.12 (5).

We conclude that the sentence is not unduly harsh or severe. Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of criminal contempt in the first degree under Penal Law § 215.51 (b) (iv), and it must therefore be amended to reflect that defendant was actually charged and convicted under section 215.51 (b) (v) (*see People v Bumpars*, 178 AD3d

1379, 1381 [4th Dept 2019], *lv denied* 36 NY3d 1055 [2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

187

KA 20-00419

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER CREMEANS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY 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 4, 2019. 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 ([SORA] Correction Law § 168 *et seq.*), defendant, who relocated to New York State having been previously convicted in New Hampshire upon his plea of guilty of a sex offense against two child victims, appeals from an order determining that he is a level two risk and a sexually violent offender. We affirm.

Defendant contends that Supreme Court erred in designating him a sexually violent offender, as recommended by the Board of Examiners of Sex Offenders (Board), on the basis that his New Hampshire conviction of aggravated felonious sexual assault included all the essential elements of the New York offense of course of sexual conduct against a child in the first degree. We reject that contention. A sexually violent offender is a sex offender who has been convicted of a sexually violent offense as defined under SORA (*see* Correction Law § 168-a [7] [b]). As relevant here, a sexually violent offense includes "a conviction of an offense in any other jurisdiction which includes all of the essential elements" of certain enumerated felony sex offenses (§ 168-a [3] [b]), such as course of sexual conduct against a child in the first degree in violation of Penal Law § 130.75 (*see* Correction Law § 168-a [3] [a] [i]). The essential elements test "requires that the Board compare the elements of the foreign offense with the analogous New York offense to identify points of overlap . . . In circumstances where the offenses overlap but the foreign

offense also criminalizes conduct not covered under the New York offense, the Board must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense" (*Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 753 [2007]; *see People v Perez*, 35 NY3d 85, 92-94 [2020], *rearg denied* 35 NY3d 986 [2020]; *People v Bullock*, 125 AD3d 1, 3 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]).

Here, a comparison of the elements of defendant's New Hampshire conviction of aggravated felonious sexual assault (NH Rev Stat Ann § 632-A:2 [III]; *see* §§ 632-A:1 [I-c], [IV], [V] [a] [3], [5]; 632-A:2 [I] [*l*]; 632-A:3 [III] [a] [1]) and the New York offense of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a], [b]; *see* § 130.00 [2] [a], [b]; [3]) "reflects considerable but not exact overlap" (*Perez*, 35 NY3d at 96). Inasmuch as "the offenses overlap but the New [Hampshire] offense also criminalizes conduct that may not be covered under the New York offense, we may 'review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense' " (*id.* at 96-97, quoting *North*, 8 NY3d at 753).

Upon conducting that review, we conclude that defendant's conduct underlying the New Hampshire conviction of aggravated felonious sexual assault is, in fact, within the scope of the New York offense of course of sexual conduct against a child in the first degree. It is undisputed that both victims were less than 11 years old at the time of the underlying conduct (*see* Penal Law § 130.75 [1] [a]). In addition, the statements of the older victim and defendant in the case summary and defendant's admission, upon which the court properly relied as relevant "reliable hearsay evidence submitted by either party" (Correction Law § 168-k [2]; *see Perez*, 35 NY3d at 95), constitute clear and convincing evidence (*see generally* § 168-k [2]; *Bullock*, 125 AD3d at 3) that the underlying conduct occurred over a period greater than three months and, indeed, occurred over several years (*see* Penal Law § 130.75 [1] [a]). Next, contrary to defendant's contention, the statements in the case summary constitute clear and convincing evidence of defendant's acts of sexual conduct, including at least one act of oral sexual conduct as alleged in the New Hampshire indictments, inasmuch as the older victim stated that defendant made her perform oral sex on him and defendant admitted that he engaged in acts of oral sex with the younger victim (*see id.*). Despite defendant's representations to the contrary, he did not challenge the veracity of the statements in the case summary or deny that he had engaged in oral sexual conduct with the victims (*see People v Potts*, 179 AD3d 1536, 1537 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]; *People v Hubel*, 70 AD3d 1492, 1493 [4th Dept 2010]; *cf. People v Maund*, 181 AD3d 1331, 1331 [4th Dept 2020]; *see generally People v Diaz*, 34 NY3d 1179, 1181 [2020]). "Where, as here, 'the defendant does not dispute the facts contained in the case summary, the case summary alone is sufficient to support the court's determination' " (*Potts*, 179 AD3d at 1537). Based on the foregoing, we conclude that defendant's New Hampshire conviction of aggravated

felonious sexual assault is tantamount under the essential elements test to the New York offense of course of sexual conduct against a child in the first degree, and the court therefore properly designated defendant a sexually violent offender (*see* Correction Law §§ 168-a [3], [7] [b]; 168-k [2]).

Defendant further contends that the court erred in determining that he is a level two risk. Contrary to defendant's assertion, the court did not err in assessing 25 points under risk factor 2, for sexual contact with the victims, inasmuch as the statements in the case summary constitute clear and convincing evidence that defendant engaged in oral sexual conduct with the victims (*see People v Jewell*, 119 AD3d 1446, 1448 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]; *Hubel*, 70 AD3d at 1493). Contrary to defendant's additional assertion, the court properly assessed 20 points under risk factor 4, for continuing course of sexual misconduct, inasmuch as "[t]he reliable hearsay evidence presented by the People [constituted clear and convincing evidence] that defendant engaged in two or more acts of sexual contact with the victim[s], at least one of which was an act of oral sexual contact, which were separated in time by at least 24 hours" (*Jewell*, 119 AD3d at 1448; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]; *People v Davis*, 145 AD3d 1625, 1626 [4th Dept 2016], *lv dismissed* 29 NY3d 976 [2017]).

Finally, even assuming, arguendo, that defendant surmounted the first two steps of the downward departure analysis (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]), we reject his contention that a downward departure from his presumptive risk level is warranted under the circumstances of this case. Upon weighing the mitigating circumstances against the aggravating circumstances—most prominently "the nature and duration of the sexual abuse, including the victim[s'] young age[s] when the abuse began and defendant's exploitation of his [familial] relationship of trust with the victim[s]" (*People v Botindari*, 107 AD3d 1607, 1608 [4th Dept 2013]; *see People v Montes*, 134 AD3d 1083, 1083-1084 [2d Dept 2015], *lv denied* 27 NY3d 904 [2016]; *People v May*, 77 AD3d 1388, 1388 [4th Dept 2010])—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 Sincerbeaux*, 27 NY3d 683, 690-691 [2016]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

191

KA 17-01715

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES E. HALL, II, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, SYRACUSE, D.J. & J.A. CIRANDO, PLLC (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered February 17, 2017. The judgment convicted defendant upon a jury verdict of course of sexual conduct against a child in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Lewis County Court for the filing of a new second felony offender statement and resentencing.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and endangering the welfare of a child (§ 260.10 [1]). Defendant was convicted following a retrial after we reversed his previous judgment of conviction based on an error by County Court (Merrell, J.) in denying defendant's request to remove his shackles during the trial without making findings on the record concerning the necessity for such restraints (*People v Hall*, 142 AD3d 1295, 1296 [4th Dept 2016], *lv denied* 28 NY3d 1145 [2017]).

Defendant failed to preserve for our review his contention that he was deprived of due process by the People eliciting certain testimony from two witnesses to bolster the testimony of the victim (*see People v Paul*, 171 AD3d 1555, 1558 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019], *reconsideration denied* 34 NY3d 983 [2019]; *People v Marks*, 182 AD2d 1122, 1122-1123 [4th Dept 1992]). In any event, the testimony of the police investigator did not constitute bolstering testimony (*see generally People v Spicola*, 16 NY3d 441, 452 [2011], *cert denied* 565 US 942 [2011]). The investigator simply explained why certain investigative techniques, such as trying to obtain DNA evidence, were not used in this case. In addition, the testimony of the victim's aunt that the victim made certain "troubling comments" to

her was properly admitted to explain the investigative process and complete the narrative of events leading to defendant's arrest (*see People v Hymes*, 174 AD3d 1295, 1299 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]; *People v Ludwig*, 24 NY3d 221, 231 [2014]). Defendant never requested a limiting instruction with respect to the testimony of the victim's aunt and thus failed to preserve for our review his contention that the court (King, J.) should have given one (*see People v Nicholson*, 26 NY3d 813, 830 [2016]; *People v Standsblack*, 162 AD3d 1523, 1527 [4th Dept 2018], *lv denied* 32 NY3d 1008 [2018]).

We reject defendant's further contention that defense counsel's failure to object to the testimony of those two witnesses and failure to request a limiting instruction constituted ineffective assistance of counsel. Defendant failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged failures (*see Hymes*, 34 NY3d at 1179). The testimony of the witnesses did not constitute improper bolstering testimony, and therefore any objection thereto would have had little or no chance of success (*see People v Thomas*, 176 AD3d 1639, 1641 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]). Further, defense counsel may have decided to forego any request for a limiting instruction with respect to the aunt's testimony because such an instruction may have only highlighted her testimony for the jury (*see generally id.*).

We reject defendant's contention that he was prejudiced by the court's delay in ruling on his trial order of dismissal motion until after the verdict was rendered (*see People v Jarrett*, 118 AD2d 657, 658 [2d Dept 1986], *lv denied* 67 NY2d 944 [1986]; *see generally* CPL 290.10 [1]; *People v Marin*, 102 AD2d 14, 15 [2d Dept 1984], *affd* 65 NY2d 741 [1985]). We agree with defendant, however, that he was improperly sentenced as a second felony offender. As relevant here, a person is a second felony offender when he or she "stands convicted of a felony . . . , after having previously been subjected to one or more predicate felony convictions" (Penal Law § 70.06 [1] [a]). The sentence upon the predicate felony conviction "must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted" (§ 70.06 [1] [b] [iv]). In calculating that ten-year period, however, "any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten[-]year period shall be extended by a period or periods equal to the time served under such incarceration" (§ 70.06 [1] [b] [v]).

Here, the sentence for the predicate felony was imposed more than 10 years before defendant committed the instant offense, and thus the predicate felony may be considered a predicate felony conviction only in accordance with the tolling provision of section 70.06 (1) (b) (v) based upon defendant's subsequent periods of incarceration. When the tolling provision of Penal Law § 70.06 (1) (b) (v) is implicated, the second felony offender statement filed by the prosecutor "shall set forth the date of commencement and the date of termination as well as the state or local incarcerating agency for each period of incarceration to be used for tolling of the ten year limitation" (CPL

400.21 [2]).

In this case, the People filed a second felony offender statement setting forth the predicate felony and the date of conviction, but they did not set forth the dates when or the locations where defendant was incarcerated. At sentencing, the prosecutor asserted that defendant's time in custody for the predicate felony exceeded 27½ months, but it does not appear that the People gave to defendant or the court any document setting forth that information. While defendant admitted the prior conviction, he objected to the calculation of the tolling period. Thus, the court erred in adjudicating defendant a second felony offender without first giving him reasonable notice and an opportunity to be heard as to the "length and location of the prior sentence he served" (*People v Bouyea*, 64 NY2d 1140, 1142 [1985]; *see People v Spencer*, 165 AD3d 706, 707 [2d Dept 2018]; *see also People v Watkins*, 185 AD3d 1521, 1522 [4th Dept 2020]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing, to be preceded by the filing of a new second felony offender statement (*see Watkins*, 185 AD3d at 1522). In light of our determination, we do not address defendant's remaining contentions.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

204.1

CA 20-00037

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

HABIBA ABDELALL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., AND NIAGARA FRONTIER TRANSPORTATION AUTHORITY, DEFENDANTS-APPELLANTS.

RUSSO & TONER, LLP, NEW YORK CITY (JOSH H. KARDISCH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CONNORS LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 13, 2019. The judgment, among other things, adjudged that defendants were liable for plaintiff's injuries.

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

Memorandum: Defendants appeal from a judgment entered upon a jury verdict that, inter alia, found that they were liable for injuries sustained by plaintiff when she was struck by an open panel on one of defendants' passing buses. The panel protruded approximately 30 inches from the side of the bus at an obtuse angle, and it struck plaintiff while she was standing on the side of the road.

Contrary to defendants' contention, Supreme Court properly allowed plaintiff's expert to testify. It is well established that " 'opinion evidence must be based on facts in the record or personally known to the witness' " (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984]; *see Tornatore v Cohen*, 162 AD3d 1503, 1504-1505 [4th Dept 2018]). Here, the expert's opinions were not "speculative or devoid of factual support in the record," but instead were properly "based on photographs and testimony of the witnesses" (*Pember v Carlson*, 45 AD3d 1092, 1094 [3d Dept 2007]; *see also Morreale v Froelich*, 125 AD3d 1280, 1281 [4th Dept 2015]). Defendants failed to preserve their challenge to the expert's use of a latch and key for demonstration purposes (*see generally* CPLR 5501 [a] [3]; *Shoemaker v State of New York*, 247 AD2d 898, 898 [4th Dept 1998]).

Defendants further contend that the court erred in charging the jury with respect to the doctrine of res ipsa loquitur because plaintiff failed to establish that the latch securing the panel was " 'within the exclusive control' " of defendants (*James v Wormuth*, 21 NY3d 540, 546 [2013], quoting *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]). We reject that contention. "[E]xclusivity of control is 'a relative term, not an absolute', because the permissible inference of negligence under the res ipsa loquitur doctrine is grounded on the remoteness of any probability that the negligent act was caused by someone other than the defendant" (*Wen-Yu Chang v Woolworth Co.*, 196 AD2d 708, 708 [1st Dept 1993]). Here, the evidence supporting exclusivity of control afforded a rational basis for concluding that " 'it is more likely than not' " that plaintiff's injuries were caused by defendants' negligence (*Kambat*, 89 NY2d at 494; *see Backus v Kaleida Health*, 91 AD3d 1284, 1286 [4th Dept 2012]). Specifically, the trial testimony established that defendants' maintenance workers manipulated the panel the day before the accident in order to perform routine maintenance, and there was no testimony that anyone else, such as a vandal, tampered with the latch or panel between that maintenance work and the accident (*see Nesbit v New York City Tr. Auth.*, 170 AD2d 92, 98-99 [1st Dept 1991]; *cf. Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 228 [1986]).

Contrary to defendants' contention, the court properly refused to charge the jury with respect to the emergency doctrine. Here, the bus driver was not aware that she was operating the bus with the panel open, and thus the emergency doctrine does not apply (*see Starkman v City of Long Beach*, 106 AD3d 1076, 1078 [2d Dept 2013]).

Contrary to defendants' next contention, the court properly denied their motion for a directed verdict. Viewing the evidence in the light most favorable to plaintiff and affording her every available inference (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]), we conclude that the parties' conflicting evidence presented a question of fact for the jury to resolve (*see Defisher v PPZ Supermarkets, Inc.*, 186 AD3d 1062, 1062-1063 [4th Dept 2020]). To the extent that defendants contend that the verdict is against the weight of the evidence, we likewise reject that contention (*see id.* at 1063-1064; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]).

Defendants failed to preserve their challenge to the instructions that the court provided to the jury after the jury returned its initial, inconsistent verdict (*see* CPLR 4111 [c]), both because they failed to object to the instructions before the jury resumed deliberations and because the objection that defendants' attorney eventually did make failed to bring the court's attention to the grounds raised on appeal (*see generally Byrd v Genesee Hosp.*, 110 AD2d 1051, 1052 [4th Dept 1985]).

We have reviewed defendants' remaining contention and conclude that it does not require reversal or modification of the judgment.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

237

CAF 20-00355

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF DEANGELO B.-K. AND JAMELLE B.-K.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TIA K., RESPONDENT,
AND GREGGORY L., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered January 3, 2020 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent Greggory L. to vacate a prior order finding that he had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals in appeal No. 1 from an order of Family Court denying that part of his motion seeking to vacate a prior order of fact-finding and disposition, entered upon his consent, determining, inter alia, that the father neglected two of his wife's children. In appeal No. 2, the father appeals from an order of the same court denying that part of his motion seeking to vacate a prior order of fact-finding and disposition, also entered upon his consent, determining, inter alia, that he neglected his two biological children. In each appeal, the father contends that the court erred in denying the motion inasmuch as he was not adequately warned of the potential consequences of his consent to the neglect findings as required by Family Court Act § 1051 (f). The father failed to assert that ground in support of his motion to vacate the prior orders, and the issue thus is not properly before us (*see Matter of Nicole KK.*, 46 AD3d 1267, 1268 [3d Dept 2007]). We decline to reach that issue in the interest of justice. We have reviewed the father's remaining

contentions and conclude that they are without merit.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

238

CAF 20-00356

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF GAKAI L. AND GREGGORY L.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TIA K., RESPONDENT,
AND GREGGORY L., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered January 3, 2020 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent Greggory L. to vacate a prior order finding that he had neglected the subject children.

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

Same memorandum as in *Matter of DeAngelo B.-K. (Greggory L.)* ([appeal No. 1] — AD3d — [May 7, 2021] [4th Dept 2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

303

KA 20-01369

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BAJHAT IBRAHIM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered February 11, 2020. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree (two counts) and criminally using drug paraphernalia in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and one count of criminally using drug paraphernalia in the second degree (§ 220.50 [3]). The case arose from an incident in which a New York State Trooper stopped a vehicle in which defendant was a passenger. The Trooper searched the vehicle and discovered scales covered in a white, powdery substance. Defendant began walking away from the scene, and the Trooper ordered him to return to the area by the vehicle. Around that time, a second Trooper arrived at the traffic stop. Defendant refused orders to remove his hands from his pockets. When the Troopers tried to remove defendant's hands from his pockets, a scuffle ensued and a bag containing over half an ounce of cocaine fell to the ground.

Defendant contends that County Court erred in refusing to suppress the cocaine. More particularly, defendant contends that the Trooper unlawfully stopped the vehicle and lacked the reasonable suspicion necessary to order defendant to return to the area by the vehicle when he tried to walk away. We reject those contentions. When reviewing a suppression ruling following a hearing, the credibility determinations of the hearing court are entitled to great deference (*see People v Jemison*, 158 AD3d 1310, 1310 [4th Dept 2018],

lv denied 31 NY3d 1083 [2018]; *People v Holley*, 126 AD3d 1468, 1469 [4th Dept 2015], *lv denied* 27 NY3d 965 [2016]). The Trooper testified at the suppression hearing that he stopped the vehicle after he observed it traveling 10 miles per hour over the speed limit, thereby establishing a lawful stop based on probable cause that the driver had committed a traffic violation (*see People v Hinshaw*, 35 NY3d 427, 430 [2020]). Because the vehicle was lawfully stopped, the Trooper was justified in ordering the driver and defendant out of the vehicle as a safety precaution (*see People v Robinson*, 74 NY2d 773, 774-775 [1989], *cert denied* 493 US 966 [1989]). The driver thereafter gave the Trooper unsolicited consent to search the vehicle. While searching the vehicle, the Trooper found a set of scales covered in a white, powdery substance, thus providing the Trooper with reasonable suspicion that defendant was involved in the commission of a crime (*cf. People v Greene*, 135 AD2d 449, 451 [1st Dept 1987], *lv denied* 70 NY2d 1006 [1988]; *see generally People v De Bour*, 40 NY2d 210, 223 [1976]).

Contrary to defendant's further contention, the conviction is based on legally sufficient evidence. We conclude that there is a valid line of reasoning and permissible inferences that could lead a rational jury to find the elements of the crimes proved beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 349 [2007]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), and affording great deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by the court's questioning of the People's expert witness inasmuch as he failed to make a timely objection to the court's allegedly improper line of questioning (*see People v Charleston*, 56 NY2d 886, 887 [1982]; *People v Pham*, 178 AD3d 1438, 1438 [4th Dept 2019], *lv denied* 35 NY3d 943 [2020]). In any event, the contention lacks merit. The court was " 'entitled to question [the] witness[ ] to clarify testimony and to facilitate the progress of the trial and to elicit relevant and important facts' " (*Pham*, 178 AD3d at 1438), and we conclude that the court "did not improperly 'take[] on either the function or appearance of an advocate' " (*id.*, quoting *People v Arnold*, 98 NY2d 63, 67 [2002]). Contrary to defendant's related contention, we conclude that defense counsel was not ineffective for failing to object to the court's questions or for any other reason raised by defendant (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's contention, the court properly denied his postverdict motion pursuant to CPL 330.30 seeking a new trial on the ground of newly discovered evidence. Defendant failed to prove that the purported newly discovered evidence "will probably change the result if a new trial is granted" (*People v Lundy*, 178 AD3d 1389, 1391 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]; *see People v Smith*, 108

AD3d 1075, 1076 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013]).

We agree with defendant that the uniform sentence and commitment sheet incorrectly indicates that he is a second felony offender rather than a second felony drug offender, and therefore it must be modified to correct the error (*see People v Jackson*, 108 AD3d 1079, 1081 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]).

Finally, the sentence is not unduly harsh or severe.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

315

CA 20-00220

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

KEITH MARIANI AND JULIE MARIANI,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

GUARDIAN FENCES OF WNY, INC., ET AL., DEFENDANTS,
WEST-HERR DODGE LLC, AND WEST-HERR AUTOMOTIVE
GROUP, INC., DEFENDANTS-APPELLANTS-RESPONDENTS.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order and partial judgment (one paper) of the Supreme Court, Erie County (Mark A. Montour, J.), entered January 22, 2020. The order and partial judgment, among other things, granted in part and denied in part the motion of defendants West-Herr Dodge LLC and West-Herr Automotive Group, Inc., for, inter alia, summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order and partial judgment so appealed from is unanimously modified on the law by denying that part of the motion of defendants West-Herr Dodge LLC and West-Herr Automotive Group, Inc. with respect to the strict products liability cause of action against them insofar as it is predicated on the theory of defective design and reinstating that cause of action to that extent, and as modified the order and partial judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Keith Mariani (plaintiff) when a truck owned by his employer backed over him. The truck was purchased by plaintiff's employer from West-Herr Dodge LLC and West-Herr Automotive Group, Inc. (defendants) and did not have a backup alarm. As relevant here, plaintiffs asserted causes of action for negligence and strict products liability against defendants, and defendants moved for, inter alia, summary judgment dismissing the complaint against them. Defendants now appeal and plaintiffs cross-appeal from an order and partial judgment that, among other things, granted in part defendants' motion and dismissed the strict products liability cause of action against defendants.

Plaintiffs contend on their cross appeal that Supreme Court erred in granting the motion with respect to the strict products liability cause of action insofar as it is predicated on the theory of defective design. We agree, and we therefore modify the order and partial judgment accordingly. We note that plaintiffs abandoned any challenge to the granting of the motion with respect to that cause of action insofar as it is predicated on a theory of a manufacturing defect or failure to warn because they did not raise any such contention in their brief (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Where, as here, a plaintiff buyer claims that a product without an optional safety feature is defectively designed because the feature was not included as a standard feature, the product is not defective if "(1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product" (*Scarangella v Thomas Built Buses*, 93 NY2d 655, 661 [1999] [emphasis omitted]). Here, defendants submitted the deposition testimony of plaintiff's employer, who testified that, at the time he bought the truck that was involved in the accident, he "didn't know" that a backup alarm was available as an option, thereby raising an issue of fact whether he was actually aware of its availability (*see Campbell v International Truck & Engine Corp.*, 32 AD3d 1184, 1185 [4th Dept 2006]). Because defendants failed to satisfy their initial burden with respect to the first part of the *Scarangella* test, we need not consider the second or third parts (*see Passante v Agway Consumer Prods., Inc.*, 12 NY3d 372, 381-382 [2009]).

Although defendants also moved for summary judgment on the ground that the truck met all federal, state, and industry safety standards, we conclude that defendants failed to meet their initial burden of establishing entitlement to judgment as a matter of law on that ground inasmuch as they failed to submit evidence demonstrating that the truck was reasonably safe (*cf. Beechler v Kill Bros. Co.*, 170 AD3d 1606, 1607-1608 [4th Dept 2019], *lv denied in part and dismissed in part* 34 NY3d 973 [2019]; *Kiersznowski v Gregory B. Shankman, M.D., P.C.*, 67 AD3d 1366, 1367 [4th Dept 2009]; *see generally Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]). Because defendants failed to meet their initial burden, we need not consider the sufficiency of plaintiffs' opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In light of that determination, we reject defendants' contention on their appeal that the court erred in denying their motion with respect to the negligence cause of action against them. As defendants correctly concede, " 'there is almost no difference between a prima facie case in negligence and one in strict [products] liability' " (*Beechler*, 170 AD3d at 1608; *see Adams v Genie Indus., Inc.*, 14 NY3d 535, 543 [2010]). Defendants' contention that plaintiff was the sole

proximate cause of his injuries is not properly before us because defendants did not raise it before the motion court (*see Ciesinski*, 202 AD2d at 985).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

318

KA 18-01975

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GRANT PRICE, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

MARK S. SINKIEWICZ, ACTING DISTRICT ATTORNEY, WATERLOO (MELISSA K. SWARTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Richard M. Healy, A.J.), rendered August 27, 2018. The judgment convicted defendant, upon a plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [1]), arising from allegations that defendant and his brother engaged in sexual misconduct with the victim. Defendant contends that his waiver of indictment was jurisdictionally defective on the ground that County Court (Bender, J.), while acting in its capacity as the local criminal court, violated CPL 195.10 by failing to properly hold defendant for action of a grand jury. Although we agree with defendant that this particular contention need not be preserved for our review (*see People v Boston*, 75 NY2d 585, 589 n [1990]; *cf. People v Thomas*, 34 NY3d 545, 568 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), is not forfeited by his guilty plea (*see People v Anderson*, 149 AD3d 766, 766-767 [2d Dept 2017]), and would not be precluded by a valid waiver of the right to appeal (*see People v Waid*, 26 AD3d 734, 734-735 [4th Dept 2006], *lv denied* 6 NY3d 839 [2006]), we nevertheless conclude that it lacks merit.

CPL 195.10 (1) provides that "[a] defendant may waive indictment and consent to be prosecuted by superior court information when," among other requirements, "a local criminal court has held the defendant for the action of a grand jury" (CPL 195.10 [1] [a]). "Being so 'held' for the action of a [g]rand [j]ury involves the filing of a felony complaint on which defendant has been arraigned and a finding after a preliminary hearing (unless waived by defendant) that reasonable cause exists to believe that defendant committed a felony" (*People v Barber*, 280 AD2d 691, 692 [3d Dept 2001], *lv denied*

96 NY2d 825 [2001]; *see People v D'Amico*, 76 NY2d 877, 879 [1990]).

Here, despite the absence of an order issued by the court, the record establishes that defendant was properly held for the action of a grand jury inasmuch as defendant acknowledged that he received the felony complaint upon which he was arraigned and waived his right to a preliminary hearing (*see People v Gassner*, — AD3d —, —, 2021 NY Slip Op 02192, *1 [3d Dept 2021]; *Anderson*, 149 AD3d at 767), and the court immediately transferred over the case from its capacity as the local criminal court to its capacity as County Court (*see People v Fox*, 158 AD3d 591, 591 [1st Dept 2018], *lv denied* 31 NY3d 1081 [2018]; *People v Cicio*, 157 AD3d 651, 651 [1st Dept 2018], *lv denied* 31 NY3d 982 [2018]; *People v Davenport*, 106 AD3d 1197, 1197 [3d Dept 2013], *lv denied* 21 NY3d 1073 [2013]). We also note that defendant signed in open court the waiver of indictment in which he consented to being prosecuted by superior court information (SCI), and the court's order approving the waiver stated that it complied with the provisions of CPL 195.10 (*see Gassner*, — AD3d at —, 2021 NY Slip Op 02192, *1; *People v Simmons*, 110 AD3d 1371, 1372 [3d Dept 2013]; *Barber*, 280 AD2d at 693). We thus reject defendant's contention that the waiver of indictment was jurisdictionally defective.

Contrary to defendant's contention, his further challenge to the SCI was forfeited by his guilty plea (*see generally Thomas*, 34 NY3d at 569) and, in any event, is not preserved for our review inasmuch as "[a] purported error or insufficiency in the facts of an indictment or information to which a plea is taken does not constitute a nonwaivable jurisdictional defect and must be raised in the trial court" (*People v Milton*, 21 NY3d 133, 137 n [2013]; *see generally People v Iannone*, 45 NY2d 589, 600 [1978]).

Defendant next contends that County Court (Healy, A.J.) abused its discretion in denying his motion to withdraw his guilty plea following a hearing. Although defendant's contention would survive even a valid waiver of the right to appeal (*see Thomas*, 34 NY3d at 558; *People v Carr*, 147 AD3d 1506, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]), we nonetheless conclude that it lacks merit for the reasons that follow.

Defendant asserts in particular that his plea was coerced because the availability of the plea bargain for his brother was linked to defendant's acceptance of the plea, and because he was pressured into accepting that bargain by his former attorney. It is well established that, "so long as the plea agreement is voluntarily, knowingly and intelligently made, the fact that it is linked to the prosecutor's acceptance of a plea bargain favorable to a third person does not, by itself, make [a] defendant's plea illegal" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). "[W]hile a connected plea entailing benefit to a third person can place pressure on a defendant, the 'inclusion of a third-party benefit in a plea bargain is simply one factor for a [trial] court to weigh in making the overall determination whether the plea is voluntarily entered' " (*id.* at 545; *see People v Schrecengost*, 273 AD2d 937, 938 [4th Dept 2000], *lv denied* 95 NY2d 938 [2000]).

Here, defendant's claim that he acquiesced to the plea only so that the bargain would be available to his brother is undermined by the hearing testimony of his brother. Moreover, the hearing testimony of the former attorneys for defendant and his brother belies defendant's claim that he was coerced and had insufficient time to discuss the linked plea bargain during a meeting prior to the plea proceeding, and we see no basis to disturb the court's determination to credit the testimony of the former attorneys over that of defendant (*see People v Henderson*, 169 AD3d 1521, 1522 [4th Dept 2019], *lv denied* 33 NY3d 977 [2019]; *People v Stephens*, 6 AD3d 1123, 1124 [4th Dept 2004], *lv denied* 3 NY3d 663 [2004], *reconsideration denied* 3 NY3d 682 [2004]; *see generally People v Santos*, 244 AD2d 897, 897 [4th Dept 1997]). With respect to the advice provided during the meeting, "the fact '[t]hat [former defense] counsel made defendant aware of his sentencing exposure cannot be a basis for finding coercion' " (*People v Humber*, 35 AD3d 1209, 1209 [4th Dept 2006], *lv denied* 8 NY3d 923 [2007]; *see People v Days*, 150 AD3d 1622, 1624 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]). Likewise, "[former] defense counsel's advice that [defendant] was unlikely to prevail at trial and that he would likely receive a harsher sentence if convicted after trial . . . does not constitute coercion" (*People v Griffin*, 120 AD3d 1569, 1570 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014]; *see People v Schluter*, 136 AD3d 1363, 1364 [4th Dept 2016], *lv denied* 27 NY3d 1138 [2016]). Additionally, as defendant correctly concedes, the court and former defense counsel were not required to mention Sex Offender Registration Act registration as a possible collateral consequence of the plea (*see People v Gravino*, 14 NY3d 546, 550 [2010]; *People v Clark*, 261 AD2d 97, 100 [3d Dept 2000], *lv denied* 95 NY2d 833 [2000]). Although "[i]t does not necessarily follow . . . that [such] nondisclosure is always irrelevant to the question of whether a court should exercise its discretion to grant a motion to withdraw a plea," defendant here failed to "show that he pleaded guilty in ignorance of a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have made a different decision had that consequence been disclosed" (*Gravino*, 14 NY3d at 559; *see generally People v Harnett*, 16 NY3d 200, 207 [2011]). Upon weighing the totality of the circumstances, we conclude that the record establishes that defendant's plea was entered voluntarily, knowingly and intelligently (*see Fiumefreddo*, 82 NY2d at 545-547; *Schrecengost*, 273 AD2d at 938; *Santos*, 244 AD2d at 897).

We reject defendant's related assertion that the court erred in denying his motion to withdraw his guilty plea on the ground of ineffective assistance of counsel. "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]) and, upon our review of the record, we conclude that defendant was afforded such representation here (*see Fiumefreddo*, 82 NY2d at 548; *People v Frierson*, 21 AD3d 1211, 1212 [3d Dept 2005],

lv denied 6 NY3d 753 [2005]).

Mark W. Bennett

Entered: May 7, 2021

Clerk of the Court

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

325

OP 20-00556

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF MONTGOMERY BLAIR SIBLEY,
PETITIONER,

V MEMORANDUM AND ORDER

CHAUNCEY JOSEPH WATCHES, RESPONDENT.

MONTGOMERY BLAIR SIBLEY, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to review a determination of respondent. The determination denied the application of petitioner for a pistol license.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination that enjoined petitioner from reapplying for a pistol license until he is readmitted to the New York State bar, and as modified the determination is confirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination denying his pistol license application. Contrary to petitioner's contention, the alleged procedural errors that he raises in the petition did not deprive him of his right to due process during the pistol license application review process. Initially, we reject his contention that respondent should have complied with the State Administrative Procedure Act (SAPA) in determining petitioner's application. We note that SAPA applies only to agencies of the state government and not to local officials such as respondent here (*see* State Administrative Procedure Act § 102 [1]; *Matter of Tefft v Hutchinson*, 93 AD3d 1332, 1333 [4th Dept 2012]). Indeed, we further note that the relevant statutes governing review of pistol license applications contemplate that local officials—rather than state officials—are to review pistol license applications (*see* Penal Law §§ 265.00 [10]; 400.00 [3] [a]).

We further conclude that petitioner was not denied due process when respondent communicated with petitioner's employer and the Sheriff's Office because those communications were necessary for

respondent to comply with his responsibility under Penal Law § 400.00 (1) to investigate whether "all statements in a proper application for a license are true" before issuing a license. Respondent needed to communicate with petitioner's employer to investigate petitioner's claim in his application that he needed a pistol for his job. Additionally, we note that the statute requires that "there shall be an investigation of all statements required in the application by the duly constituted police authorities of the locality where such application is made," and that the Sheriff's Office was required to communicate with respondent and "report the results [of its investigation] to the licensing officer" (§ 400.00 [4]). Thus, we reject petitioner's contention that those communications constituted improper ex parte communications that required respondent to disqualify himself from considering the application.

We also reject petitioner's contention that he was denied due process because respondent failed to disclose the substance of his conversation with petitioner's employer. That contention is belied by the record. At the hearing, respondent informed petitioner about the substance of that conversation—i.e., that petitioner's employer said that having a pistol would be helpful, but was not necessary, for petitioner's work. There is no violation of due process where, as here, petitioner was given notice of the information respondent obtained from the employer, and was given the chance to address that information at the hearing (*see generally Matter of Curts v Randall*, 110 AD3d 1452, 1452 [4th Dept 2013]; *Matter of La Grange v Bruhn*, 276 AD2d 974, 975 [3d Dept 2000]). Indeed, we note that petitioner introduced evidence at the hearing to support his position that he needed a pistol to do his job.

We further reject petitioner's contention that the failure to hold a hearing before respondent made his initial determination to deny the application violated petitioner's right to due process. Under Penal Law § 400.00 (4-a), a "licensing officer must either deny the application for reasons specifically and concisely stated in writing or grant the application and issue the license applied for. If the licensing officer denies the application, [t]he petitioner must be given the specific reasons for the denial . . . and be given an opportunity to respond to the objections to [his] application" (*Matter of Parker v Randall*, 120 AD3d 946, 947 [4th Dept 2014] [internal quotation marks omitted]; *see Matter of Savitch v Lange*, 114 AD2d 372, 373 [2d Dept 1985]). Here, respondent complied with due process and Penal Law § 400.00 (4-a) because, in his initial determination, respondent provided petitioner with a specific reason for the denial of the application and allowed petitioner to request a hearing to address respondent's concerns. There is no requirement under Penal Law § 400.00 that respondent conduct an evidentiary hearing prior to making a determination, provided, inter alia, that petitioner has an adequate opportunity to respond to that determination (*see generally Matter of Chomyn v Boller*, 137 AD3d 1705, 1706 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016]).

We also reject petitioner's contention that he lacked notice of

the issues to be considered at the hearing and that respondent did not articulate the reasons for his denial of the application (*see generally Matter of Cuda v Dwyer*, 107 AD3d 1409, 1409 [4th Dept 2013]; *Matter of Vale v Eidens*, 290 AD2d 612, 613 [3d Dept 2002]). The record squarely contradicts that contention. Several months before the hearing, respondent sent petitioner a letter notifying him of multiple areas of concern about petitioner's application. Furthermore, respondent's decision denying the application provided specific reasons for that determination (*see generally Parker*, 120 AD3d at 947).

We further reject petitioner's contention that he was deprived of due process based on the length of time it took to process the application (*see* Penal Law § 400.00 [4-a]). Petitioner submitted his application in July 2018, at which point it was referred to the Sheriff's Office for the investigation required by Penal Law § 400.00 (4). That investigation was not completed until May 2019. Respondent made his initial determination denying the application three weeks later. Although a "police authority" is required to "report the results [of its investigation] to the licensing officer without unnecessary delay" (§ 400.00 [4]), petitioner never sought to compel the Sheriff's Office to speed up the investigation so respondent could process the application, and there is no evidence in the record that respondent unduly delayed his initial determination. Further, most of the delay about which petitioner complains, which occurred between respondent's initial determination in May 2019 and his final determination in March 2020, was caused by petitioner. Indeed, petitioner himself requested several adjournments of the hearing, and ultimately requested that the hearing be held in January 2020. Thus, because respondent is not responsible for the delay in the determination of petitioner's application, he did not deprive petitioner of due process.

With respect to petitioner's challenge to the constitutionality of the pistol licensing application statutes—i.e., Penal Law §§ 400.00 (1) and 265.00 (10)—we note that "[a] declaratory judgment action is the proper vehicle for [such a] challeng[e]" (*Matter of Velez v DiBella*, 77 AD3d 670, 671 [2d Dept 2010]; *see Matter of Nelson v Stander*, 79 AD3d 1645, 1647 [4th Dept 2010]). Petitioner "may not seek declaratory relief in this original proceeding pursuant to CPLR article 78 . . . [because] this Court lacks jurisdiction to consider a declaratory judgment action in the absence of a proper appeal from a court order or judgment" (*Matter of Jefferson v Siegel*, 28 AD3d 1153, 1154 [4th Dept 2006] [internal quotation marks omitted]; *see Nelson*, 79 AD3d at 1647; *Matter of Cram v Town of Geneva*, 182 AD2d 1102, 1102-1103 [4th Dept 1992]). Thus, "petitioner's contention[s] that[, inter alia,] certain aspects of the licensing eligibility requirements of Penal Law § 400.00 (1) unconstitutionally infringe upon his right to bear arms under the Second Amendment" are not properly before us (*Matter of Jackson v Anderson*, 149 AD3d 933, 934 [2d Dept 2017]).

We reject petitioner's contention that respondent's determination denying his application was arbitrary or capricious. "The State has a substantial and legitimate interest and[,] indeed, a grave

responsibility, in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument" (*Matter of Galletta v Crandall*, 107 AD3d 1632, 1632 [4th Dept 2013] [internal quotation marks omitted]). A licensing officer, such as respondent, "has broad discretion to grant or deny a permit under Penal Law § 400.00 (1)" (*Parker*, 120 AD3d at 947), " 'and may do so for any good cause' " (*Galletta*, 107 AD3d at 1632). A licensing officer's factual findings and credibility determinations are entitled to great deference (*see generally Cuda*, 107 AD3d at 1410).

Here, we cannot conclude that respondent abused his discretion or acted irrationally in denying the application on the ground that petitioner lacked good moral character (*see Matter of Zeltins v Cook*, 176 AD3d 1574, 1575 [4th Dept 2019]; *Matter of Moreno v Cacace*, 61 AD3d 977, 978-979 [2d Dept 2009]). Specifically, respondent's determination is amply supported by evidence in the record establishing petitioner's significant history of pursuing vexatious and frivolous litigation, which often resulted in the imposition of sanctions, and his willful failure to pay child support arrears, which resulted in him being held in civil contempt in Florida and incarcerated for 78 days. Respondent also properly considered that petitioner's behavior resulted in his suspension from the Florida Bar (*see Florida Bar v Sibley*, 979 So 2d 221, 221 [Fla 2008], *reh denied* 995 So 2d 346 [Fla 2008], *cert denied* 555 US 830 [2008]), and the reciprocal suspension of his law license in New York (*Matter of Sibley*, 61 AD3d 85, 87 [4th Dept 2009], *appeal dismissed* 12 NY3d 849 [2009], *reconsideration denied* 12 NY3d 911 [2009], *cert denied* 558 US 808 [2009]), and several other jurisdictions (*see e.g. Matter of Discipline of Sibley*, 559 US 1002, 1002 [2010]; *Matter of Sibley*, 564 F3d 1335, 1337 [DC Cir 2009], *cert dismissed* 558 US 943 [2009]; *Matter of Sibley*, 990 A2d 483, 486 [DC 2010], *cert dismissed* 562 US 806 [2010]). Further, respondent properly considered evidence that petitioner lacked remorse for his frivolous conduct, showed contempt for the judicial system, and failed to comprehend the nature of his conduct in court (*see generally Zeltins*, 176 AD3d at 1575).

Although respondent did not err in denying the application, we nonetheless also conclude that respondent was without authority to enjoin petitioner from reapplying for a pistol licence until he is readmitted to the New York State bar. Respondent did not impose that injunction in his capacity as a County Court judge, but rather while acting as a licensing officer (Penal Law § 265.00 [10]) in a quasi-judicial capacity (*see Matter of Goldstein v Schwartz*, 185 AD3d 929, 930 [2d Dept 2020]). Thus, the issuance of an injunction was "beyond the scope of [respondent's] powers to either deny or grant the application" (*id.*; *see* Penal Law § 400.00 [4-a]). We therefore modify the determination accordingly.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

329

CA 19-02155

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

KIMBERLY STRIBING, SHAYLEE STRIBING, AMBER THIERRIN, JASMINE WIEPERT, CHANELLE ORTEZ AND TREVER STRIBING, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WENDEL & LOECHER, INC., JOHN R. LOECHER AND KALEIDA HEALTH, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WENDEL & LOECHER, INC., AND JOHN R. LOECHER.

ROACH BROWN MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANT-RESPONDENT KALEIDA HEALTH.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered November 8, 2019. The order, among other things, denied plaintiffs' motion to set aside a jury verdict.

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

Same memorandum as in *Stribing v Wendel & Loecher, Inc.* ([appeal No. 2] — AD3d — [May 7, 2021] [4th Dept 2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

330

CA 19-02327

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

KIMBERLY STRIBING, SHAYLEE STRIBING, AMBER THIERRIN, JASMINE WIEPERT, CHANELLE ORTEZ, AND TREVER STRIBING, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WENDEL & LOECHER, INC., JOHN R. LOECHER, DEFENDANTS-RESPONDENTS, AND KALEIDA HEALTH, DEFENDANT. (APPEAL NO. 2.)

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered December 5, 2019. The judgment dismissed the plaintiffs' complaint against defendants Wendel & Loecher, Inc. and John R. Loecher.

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

Memorandum: Plaintiffs commenced this action alleging, among other things, that defendants mishandled the body of plaintiffs' decedent by transferring and taking the remains from a hospital owned and operated by defendant Kaleida Health (Kaleida) to a funeral home owned and operated by defendants Wendel & Loecher, Inc. and John R. Loecher (Loecher defendants), and thereafter embalming the body, which rendered the remains useless for purposes of organ donation or medical research, in violation of the wishes of plaintiffs and the decedent. In appeal No. 1, plaintiffs appeal from an order denying their posttrial motion pursuant to CPLR 4404 to set aside the jury verdict finding that defendants did not mishandle the decedent's remains. In appeal No. 2, plaintiffs appeal from a subsequently entered judgment dismissing the complaint against the Loecher defendants on the basis of the verdict. In appeal No. 3, plaintiffs appeal from an order, inter alia, dismissing the complaint against Kaleida. In appeal No. 4, plaintiffs appeal from a subsequently entered judgment, inter alia, dismissing the complaint against Kaleida on the basis of the verdict.

We note at the outset that the appeal from the order in appeal

No. 1 must be dismissed inasmuch as the order in that appeal is subsumed in the final judgments in appeal Nos. 2 and 4 (*see Woodhouse v Bombardier Motor Corp. of Am.*, 5 AD3d 1029, 1029-1030 [4th Dept 2004]; *see also* CPLR 5501 [a] [1], [2]; *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 137 [4th Dept 2007]). In addition, inasmuch as the order in appeal No. 3 is also subsumed in the final judgment in appeal No. 4, we dismiss plaintiffs' appeal from the order in appeal No. 3 (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]). We now affirm the judgments in appeal Nos. 2 and 4.

Plaintiffs contend in appeal No. 4 that Supreme Court erred in denying their motion pursuant to CPLR 4401 for a directed verdict against Kaleida because, based on the evidence presented at trial, there was no rational process by which the jury could find that Kaleida did not mishandle the decedent's remains. Kaleida contends as an alternative ground for affirmance that the court should have granted its motion for a directed verdict because the facts established at trial did not fall within a cognizable cause of action and, in any event, the court properly denied plaintiffs' motion. Even assuming, arguendo, that Kaleida's alternative ground for affirmance lacks merit, we nonetheless agree with Kaleida that the court properly denied plaintiffs' motion.

It is well settled that " 'a directed verdict is appropriate where the . . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party . . . In determining whether to grant a motion for a directed verdict pursuant to CPLR 4401, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant' " (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1287-1288 [4th Dept 2014]; *see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Here, there was a rational process by which the jury could find that Kaleida did not mishandle the decedent's remains. Viewing the evidence in the light most favorable to Kaleida and affording Kaleida every inference that may properly be drawn from the evidence, we conclude that the jury could rationally find that Kaleida justifiably released the decedent's remains to the Loecher defendants for embalming and burial preparation, and thus did not mishandle the remains, because the organization that provided organ and tissue procurement services had failed to place a proper hold on the decedent's remains pursuant to the established protocol at that time.

Contrary to plaintiffs' contention in appeal Nos. 2 and 4, we conclude that the court properly denied their posttrial motion pursuant to CPLR 4404 (a) seeking to set aside the verdict in favor of both Kaleida and the Loecher defendants as against the weight of the evidence. It is well settled that a verdict may be set aside as against the weight of the evidence only if "the evidence so preponderate[d] in favor of the [plaintiffs] that [the verdict] could not have been reached on any fair interpretation of the evidence"

(*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]), and that is not the case here.

Contrary to plaintiffs' further contention in appeal Nos. 2 and 4, we conclude that any error by the court in allowing defendants to assert the good faith exception to liability under Public Health Law § 4306 (3) (a) as a defense and instructing the jury thereon is harmless in this case (*see* CPLR 2002; *see generally Thomas v Samuels*, 60 AD3d 1187, 1188 [3d Dept 2009]; *Mosher v Murell*, 295 AD2d 729, 731 [3d Dept 2002], *lv denied* 98 NY2d 613 [2002]). We have considered plaintiffs' remaining contentions and conclude that none warrant reversal or modification of the judgments in appeal Nos. 2 and 4.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

331

CA 20-01399

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

KIMBERLY STRIBING, SHAYLEE STRIBING, AMBER THIERRIN, JASMINE WIEPERT, CHANELLE ORTEZ, AND TREVER STRIBING, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WENDEL & LOECHER, INC., ET AL., DEFENDANTS, AND KALEIDA HEALTH, DEFENDANT-RESPONDENT. (APPEAL NO. 3.)

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ROACH BROWN MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered December 6, 2019. The order, among other things, dismissed plaintiffs' complaint against defendant Kaleida Health.

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

Same memorandum as in *Stribing v Wendel & Loecher, Inc.* ([appeal No. 2] — AD3d — [May 7, 2021] [4th Dept 2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

332

CA 20-01402

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

KIMBERLY STRIBING, SHAYLEE STRIBING, AMBER THIERRIN, JASMINE WIEPERT, CHANELLE ORTEZ, AND TREVER STRIBING, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WENDEL & LOECHER, INC., ET AL., DEFENDANTS, AND KALEIDA HEALTH, DEFENDANT-RESPONDENT. (APPEAL NO. 4.)

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ROACH BROWN MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered December 12, 2019. The judgment, among other things, dismissed plaintiffs' complaint against defendant Kaleida Health.

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

Same memorandum as in *Stribing v Wendel & Loecher, Inc.* ([appeal No. 2] — AD3d — [May 7, 2021] [4th Dept 2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

333

OP 20-00776

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF MONTGOMERY BLAIR SIBLEY,
PETITIONER,

V MEMORANDUM AND ORDER

STEUBEN COUNTY PISTOL PERMIT CLERK, STEUBEN COUNTY SHERIFF'S OFFICE, LICENSING OFFICER CHAUNCEY J. WATCHES AND JOSEPH J. HAURYSKI, CHAIRMAN, STEUBEN COUNTY LEGISLATURE,
RESPONDENTS.

MONTGOMERY BLAIR SIBLEY, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT LICENSING OFFICER CHAUNCEY J. WATCHES.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to compel respondents to disclose certain records, and to disqualify respondent Licensing Officer Chauncey J. Watches from adjudicating petitioner's pistol license application.

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

Memorandum: Petitioner commenced this original CPLR article 78 proceeding seeking an order directing respondents to produce, inter alia, documents under the Freedom of Information Law ([FOIL] Public Officers Law article 6) with respect to all pistol license applications and files from Steuben County for the years 2016 to 2019, and to disqualify respondent Chauncey J. Watches, as licensing officer, from considering and adjudicating petitioner's pistol license application. On September 17, 2020, we, inter alia, granted the motion of respondents Steuben County Pistol Permit Clerk, Steuben County Sheriff's Office and Joseph J. Hauryski as Chairman, Steuben County Legislature, to dismiss the petition as against them on the ground of res judicata (*Matter of Sibley v Steuben County Pistol Permit Clerk*, 2020 NY Slip Op 72120[U] [4th Dept 2020]). Watches is the only respondent who remains in this proceeding.

We agree with Watches that the proceeding should be dismissed in its entirety. It is well settled that "[a] CPLR article 78 proceeding may not be used to seek review of issues that could have been raised

on direct appeal" (*Matter of Estate of Rappaport v Riordan*, 66 AD3d 1018, 1018 [2d Dept 2009]; *see Matter of Wisniewski v Michalski*, 114 AD3d 1188, 1188-1189 [4th Dept 2014]; *Matter of Aarismaa v Bender*, 108 AD3d 1203, 1204 [4th Dept 2013]). Such a petition should be dismissed even where, as here, the petitioner is challenging "the denial of a . . . request that a judge recuse himself or herself from presiding over a matter" (*Matter of Concord Assoc., L.P. v LaBuda*, 121 AD3d 1270, 1271 [3d Dept 2014]).

Here, petitioner's contentions are primarily challenges to an order and judgment of Supreme Court that resolved a different CPLR article 78 proceeding related to petitioner's FOIL requests with respect to respondents. Petitioner's remedy was to appeal from the order and judgment denying his petition regarding those FOIL requests, not to commence a separate original proceeding as a means of collaterally attacking the order and judgment (*see generally Matter of Art-Tex Petroleum v New York State Dept. of Audit & Control*, 93 NY2d 830, 832 [1999]; *Aarismaa*, 108 AD3d at 1204).

Moreover, to the extent that, separate from the article 78 proceeding regarding the FOIL requests, petitioner seeks to have us disqualify Watches from considering petitioner's pistol license application, we conclude that petitioner's contention is moot because Watches has issued a final determination of that application (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

350

CAF 19-02017

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF BALLE S., BAYLEE S.,
BROOKLYN S., AND LAYLA S.
---------- MEMORANDUM AND ORDER
ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND
FAMILY SERVICES, PETITIONER-RESPONDENT;

TRISTIAN S., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (DAVID L. CHAPLIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

HEATHER L. YOUNGMAN, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered September 30, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition determining, inter alia, that he neglected his oldest child and derivatively neglected his three younger children. We affirm.

To establish neglect, the petitioner must establish, by a preponderance of the evidence, " 'first, that [the] child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision and guardianship' " (*Matter of Jayla A. [Chelsea K.–Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1012 [f] [i]). Although a parent may use reasonable force to discipline his or her child and to promote the child's welfare (*see Matter of Damone H., Jr. [Damone H., Sr.]* [appeal No. 2], 156 AD3d 1437, 1438 [4th Dept 2017]), the infliction of excessive corporal punishment constitutes neglect (*see* Family Ct Act

§ 1012 [f] [i] [B]). A single incident of excessive corporal punishment can be sufficient to support a finding of neglect (*see Matter of Steven L.*, 28 AD3d 1093, 1093 [4th Dept 2006], *lv denied* 7 NY3d 706 [2006]).

We conclude that there is a sound and substantial basis in the record for Family Court's determination that the father neglected the oldest child by inflicting excessive corporal punishment on her (*see generally* Family Ct Act § 1012 [f] [i] [B]). The evidence at the fact-finding hearing included the father's own admission to a caseworker that he had "whooped [the oldest child's] ass" and struck her repeatedly with a phone charger cord and a rubber tube to inflict harm on her after she ran away (*see Matter of Rashawn J. [Veronica H.-B.]*, 159 AD3d 1436, 1436-1437 [4th Dept 2018]; *Matter of Padmine M. [Sandra M.]*, 84 AD3d 806, 807 [2d Dept 2011]; *cf. Damone H., Jr.*, 156 AD3d at 1438). Further, out-of-court statements made by the three younger children to a caseworker established that the incident was part of a pattern of excessive corporal punishment because those children stated that the father regularly disciplined them by, inter alia, hitting them (*see Matter of Tiara G. [Cheryl R.]*, 102 AD3d 611, 611-612 [1st Dept 2013], *lv denied* 21 NY3d 855 [2013]).

Contrary to the father's contention, petitioner established that, as a result of the incident where the father struck the oldest child with the phone charger cord and rubber tube and previous instances of corporal punishment, the oldest child's mental, or emotional condition was impaired, inasmuch as she had marks on her body, was in great pain, and was afraid of the father (*see Matter of Ricardo M.J. [Kiomara A.]*, 143 AD3d 503, 503 [1st Dept 2016]; *Matter of Kim HH.*, 239 AD2d 717, 719 [3d Dept 1997]; *see generally Jayla A.*, 151 AD3d at 1792). The fact that the oldest child's injuries did not require medical attention does not preclude a finding of neglect based on the infliction of excessive corporal punishment (*see Matter of Tyson T. [Latoyer T.]*, 146 AD3d 669, 670 [1st Dept 2017]).

We further conclude that there is a sound and substantial basis in the record for the court's determination that the father derivatively neglected the three younger children (*see* Family Ct Act § 1046 [b] [i]; *see generally Nicholson*, 3 NY3d 357 at 368, 371; *Matter of Makayla L.P. [David S.]*, 92 AD3d 1248, 1249-1250 [4th Dept 2012], *lv dismissed* 19 NY3d 886 [2012]). "Although evidence of . . . neglect of one child does not, standing alone, establish a prima facie case of derivative neglect against a parent, [a] finding of derivative neglect may be made where the evidence with respect to the child found to be . . . neglected demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the parent's] care" (*Matter of Sean P. [Sean P.]*, 162 AD3d 1520, 1520 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018] [internal quotation marks omitted]).

Here, the father's use of excessive corporal punishment on the oldest child, visibly demonstrated by the photographs of her injuries, showed that he had a fundamental defect in his understanding of his

duties as a parent and an impaired level of parental judgment sufficient to support a determination that the younger children had been derivatively neglected (*see Matter of Corey J. [Corey J.]*, 157 AD3d 449, 450 [1st Dept 2018]; *Matter of Isabella D. [David D.]*, 145 AD3d 1003, 1005 [2d Dept 2016]; *Matter of Joseph C. [Anthony C.]*, 88 AD3d 478, 479 [1st Dept 2011]). Further, two of the three younger children confirmed that they had been subject to similar, albeit less severe, corporal punishment by the father. Thus, petitioner established that the three younger children were "in imminent danger of being impaired by the imposition of excessive corporal punishment" in the future (*Matter of Anthony C.*, 201 AD2d 342, 343 [1st Dept 1994]).

Contrary to the father's contention, although the three younger children were not present during the incident involving the oldest child, they need not have witnessed the incident of excessive corporal punishment to sustain a finding of derivative neglect (*see generally Matter of Keith H. [Logann M.K.]*, 113 AD3d 555, 555 [1st Dept 2014], *lv denied* 23 NY3d 902 [2014]). Rather, "[t]o sustain a finding of derivative neglect, the prior neglect finding must be so proximate in time to the derivative proceeding so as to enable the factfinder to reasonably conclude that the condition still exists" (*Sean P.*, 162 AD3d at 1520 [internal quotation marks omitted]). Because the finding of derivative neglect with respect to the three younger children was made at the same time as the finding of neglect with respect to the oldest child, we conclude that the requirement is satisfied (*see id.*).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

351

CAF 19-01596

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF NATALEE F.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERIC F., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH M. MARZOCCHI OF COUNSEL), FOR PETITIONER-RESPONDENT.

MICHAEL R. O'NEILL, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered August 16, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. Contrary to respondent's contention, petitioner established by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen respondent's relationship with the child during his period of incarceration (*see Matter of Nykira H. [Chellsie B.-M.]*, 181 AD3d 1163, 1163-1164 [4th Dept 2020]; *Matter of Jarrett P. [Jeremy P.]*, 173 AD3d 1692, 1694 [4th Dept 2019], *lv denied* 34 NY3d 902 [2019]; *Matter of Callie H. [Taleena W.]*, 170 AD3d 1612, 1613 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020]). Among other things, while respondent was incarcerated, petitioner attempted to facilitate communication between respondent and the child by providing respondent with avenues to communicate with the child without violating the order of protection that was in effect. Petitioner also sent respondent monthly letters to provide him with updates on the child, encouraged him to plan for the child's future by engaging in recommended treatment and services, notified him of service plan review meetings, and investigated the potential placement resources that respondent

suggested for the child. Contrary to respondent's contention, the fact that the potential placement resources suggested by respondent failed to respond to communications from petitioner does not mean that petitioner failed to make the requisite diligent efforts (*see generally Matter of Britiny U. [Tara S.]*, 124 AD3d 964, 966 [3d Dept 2015]).

Contrary to respondent's further contention, Family Court properly determined that he failed to plan for the future of the child (*see Jarrett P.*, 173 AD3d at 1695; *Callie H.*, 170 AD3d at 1614; *see generally* Social Services Law § 384-b [7] [a]). Although respondent completed a substance abuse program after the time period at issue in the petition and claimed to have completed anger management training, respondent failed to engage in the other recommended services, including additional sex offender treatment, mental health treatment and conflict resolution, and there is no evidence that he had a "realistic plan to provide an adequate and stable home for the child[ ]" (*Jarrett P.*, 173 AD3d at 1695 [internal quotation marks omitted]).

Finally, respondent did not request a suspended judgment, and thus he failed to preserve for our review his contention that the court abused its discretion in failing to issue one (*see Matter of Jamarion N. [Ernest N.]*, 181 AD3d 1200, 1201-1202 [4th Dept 2020]; *Matter of Hayleigh C. [Ronald S.]*, 172 AD3d 1921, 1922 [4th Dept 2019], *lv denied* 33 NY3d 911 [2019]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

364

KA 19-00204

PRESENT: CENTRA, J.P., TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER C. BROWN, DEFENDANT-APPELLANT.

LAW OFFICES OF TODD D. BENNETT, HERKIMER (ANTHONY R. ARCARO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (MICHAEL T. JOHNSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered January 3, 2019. The judgment convicted defendant upon a jury verdict of course of sexual conduct against a child in the first degree (two counts) and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and endangering the welfare of a child (§ 260.10 [1]). Defendant contends that he received ineffective assistance of counsel based on defense counsel's failure to object to the testimony of the child victims. We reject that contention inasmuch as any objection to that testimony had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Johnson*, 136 AD3d 1338, 1339 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]). County Court did not err in allowing the ten-year-old victim to provide sworn testimony (*see* CPL 60.20 [2]; *People v Mann*, 41 AD3d 977, 980 [3d Dept 2007], *lv denied* 9 NY3d 924 [2007]) and the six-year-old victim to provide unsworn testimony (*see People v Lane*, 160 AD3d 1363, 1364 [4th Dept 2018]). We conclude that defendant's remaining allegations of ineffective assistance of counsel are without merit inasmuch as defendant has not " 'demonstrate[d] the absence of strategic or other legitimate explanations for [defense] counsel's alleged shortcomings' " (*People v Hogan*, 26 NY3d 779, 785 [2016], quoting *People v Benevento*, 91 NY2d 708, 712 [1998]).

Because defendant did not renew his motion for a trial order of dismissal after presenting evidence, he failed to preserve for our review his contention that the evidence is legally insufficient to

support the conviction of two counts of course of sexual conduct against a child (*see People v Carrasquillo*, 71 AD3d 1591, 1591 [4th Dept 2010], *lv denied* 15 NY3d 803 [2010]). In any event, defendant's contention is without merit. A "fair reading of the testimony [of the child victims], in context, establishes that the sexual conduct" occurred over a period of at least three months (*People v Paramore*, 288 AD2d 53, 53 [1st Dept 2001], *lv denied* 97 NY2d 759 [2002]; *see Matter of Anthony R.*, 56 AD3d 326, 327 [1st Dept 2008]). Moreover, we reject defendant's further contention that defense counsel's failure to renew the motion for a trial order of dismissal constituted ineffective assistance (*see People v Washington*, 60 AD3d 1454, 1455 [4th Dept 2009], *lv denied* 12 NY3d 922 [2009]).

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 further reject defendant's contention that the verdict is against the weight of the evidence. " 'Jury resolution of credibility issues, particularly those involving sex-related conduct with a victim of tender years who may have difficulty recalling precise dates and times of the acts, will not be disturbed absent manifest error' " (*People v Arnold*, 107 AD3d 1526, 1528 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013]). We see no basis to disturb the jury's assessment of witness credibility (*see People v Ruiz*, 159 AD3d 1375, 1375 [4th Dept 2018]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

365

KA 19-01899

PRESENT: CENTRA, J.P., TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TASHEEM BROWN, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered July 24, 2019. The judgment convicted defendant upon a jury verdict of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [7]). Defendant and the codefendant, both inmates at a correctional facility, fought with another inmate (victim) and caused injury to him.

Defendant contends that County Court erred in granting the People's request for a jury instruction on accessorial liability because it introduced an alternative theory of liability, i.e., that he acted in concert with the codefendant, that was not charged in the indictment as amplified by the bill of particulars. We reject that contention. "An indictment charging a defendant as a principal is not unlawfully amended by the admission of proof and instruction to the jury that a defendant is additionally charged with acting-in-concert to commit the same crime, nor does it impermissibly broaden a defendant's basis of liability, as there is no legal distinction between liability as a principal or criminal culpability as an accomplice" (*People v Rivera*, 84 NY2d 766, 769 [1995]; *see People v Atkinson*, 185 AD3d 1438, 1439 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]). The court therefore properly instructed the jury on both theories (*see People v Young*, 55 AD3d 1234, 1235 [4th Dept 2008], *lv denied* 11 NY3d 901 [2008]). Contrary to defendant's contention, "the accessorial liability instruction did not introduce any new theory of culpability into the case that was inconsistent with that in the indictment, and thus his indictment as a principal provided him with

fair notice of the charge against him" (*id.*; *see Rivera*, 84 NY2d at 770-771; *Atkinson*, 185 AD3d at 1439).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction because the People did not disprove a justification defense (*see People v Contreras*, 154 AD3d 1320, 1320 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]; *People v Haynes*, 133 AD3d 1238, 1239 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]). In any event, defendant did not present a justification defense, and he neither requested nor received an instruction to the jury on justification (*see People v Simpson*, 173 AD3d 1617, 1617-1618 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]). Contrary to defendant's further contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), and affording them the benefit of every favorable inference (*see People v Bleakley*, 69 NY2d 490, 495 [1987]), we conclude that the evidence is legally sufficient to establish that defendant acted in concert with the codefendant to cause physical injury to the victim (*see People v Tapia*, 151 AD3d 437, 439 [1st Dept 2017], *affd* 33 NY3d 257 [2019], *cert denied* — US —, 140 S Ct 643 [2019]; *People v Pietrocarlo*, 191 AD3d 1263, 1263 [4th Dept 2021]) and that the victim sustained a physical injury. The evidence demonstrated that the victim sustained a one-inch deep laceration to his cheek that required sutures and resulted in a scar (*see People v Williams*, 161 AD3d 1296, 1297-1298 [3d Dept 2018], *lv denied* 32 NY3d 942 [2018]; *People v Moye*, 81 AD3d 408, 408-409 [1st Dept 2011], *lv denied* 16 NY3d 861 [2011]; *see also People v Robinson*, 121 AD3d 1405, 1407 [3d Dept 2014], *lv denied* 24 NY3d 1221 [2015]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's additional contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention that the court erred in sentencing him as a persistent violent felony offender. Defendant had two prior violent felony convictions, in 2005 and 2015. Defendant waived his challenge to the 2005 conviction inasmuch as he was adjudicated a second violent felony offender based on that conviction when he was sentenced in 2015, and he did not show good cause for his failure to challenge the constitutionality of the 2005 conviction at that time (*see* CPL 400.15 [7] [b]; [8]; 400.16 [2]; *People v Worth*, 133 AD3d 1242, 1243 [4th Dept 2015], *lv denied* 27 NY3d 1009 [2016]; *People v Jones*, 289 AD2d 962, 962 [4th Dept 2001], *lv denied* 98 NY2d 652 [2002]). Finally, the sentence is not unduly harsh or severe.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

384

KA 17-00275

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARSENIO J. JOHNSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 14, 2016. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid and does not foreclose his challenge to the severity of the negotiated sentence. The People correctly concede that the waiver of the right to appeal is invalid because Supreme Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of the waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]). Nevertheless, considering that defendant held a gun to the head of a police officer, we perceive no basis in the record to exercise our power to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

394

CAF 19-02323

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF FAITH K.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
CHILD PROTECTIVE UNIT, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CINDY R. AND JAMIE K., RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT CINDY R.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR RESPONDENT-APPELLANT JAMIE K.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA, FOR
PETITIONER-RESPONDENT.

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

Appeals from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered December 16, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject child.

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

Memorandum: In appeal No. 1, respondent mother and respondent father each appeal, as limited by their briefs, from that part of an order of fact-finding and disposition adjudging that they neglected the subject child. In appeal Nos. 2 and 3, respondents each appeal from two permanency orders that continued the subject child's placement with petitioner and adhered to the goal of returning the subject child to respondents. As a preliminary matter, appeal Nos. 2 and 3 must be dismissed inasmuch as the orders in those appeals either have expired by their terms or have been superseded by subsequent orders (*see Matter of Giovanni K.*, 62 AD3d 1242, 1242 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *cf. Matter of Nevaeh L. [Katherine L.]*, 177 AD3d 1400, 1401 [4th Dept 2019]).

With respect to the order in appeal No. 1, we reject the mother's contention that there is no sound and substantial basis in the record to support Family Court's determination that she neglected the subject child. Contrary to the mother's contention, her medical records and the medical records of the subject child were properly admitted in evidence (*see Matter of Zackery S. [Stephanie S.]*, 170 AD3d 1594,

1594-1595 [4th Dept 2019]; *Matter of Skylar F. [David Judah P.]*, 121 AD3d 611, 612 [1st Dept 2014]), and those records established that the mother used cocaine sporadically throughout her pregnancy with the subject child and tested positive for cocaine the day before the subject child was born. Although the mother correctly contends that a parent's positive toxicology report, alone, is insufficient to establish imminent danger to a child (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]), the evidence at the fact-finding hearing, including the mother's prior Family Court records, which were also properly admitted in evidence (*see* Family Ct Act § 1046 [a] [i]), established that the mother's "use of cocaine during her pregnancy, considered in conjunction with her prior, demonstrated inability to adequately care for her [older] children while misusing drugs[,] provided a sufficient basis to conclude, at the least, that [the subject child] was in imminent danger of impairment" (*Denise J.*, 87 NY2d at 80; *see Matter of Oscar Alejandro C.L. [Nicauris L.]*, 161 AD3d 705, 706 [1st Dept 2018]; *cf. Matter of William N. [Kimberly H.]*, 118 AD3d 703, 705 [2d Dept 2014]).

Contrary to the mother's further contention, the court did not find that the subject child was neglected based only on the mother's disability. Rather, it was the mother's disability, *combined with other factors*, that established that the mother had neglected the child (*see Matter of Joseph MM. [Clifford MM.]*, 91 AD3d 1077, 1079 [3d Dept 2012], *lv denied* 18 NY3d 809 [2012]; *see also Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]).

With respect to the father's contention in appeal No. 1, we conclude that his continued use of illicit substances as well as his failure to comply with a service plan instituted in relation to a proceeding involving his older child established that the subject child would be at imminent risk of harm if placed in his care (*see Matter of Baby B.W. [Tracy B.H.]*, 148 AD3d 1786, 1787 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]). "[U]ntil the [father] is able to successfully address and acknowledge the circumstances that led to the removal of the other child[ ], we cannot agree that the return of the subject child to the [father's] custody . . . would not present an imminent risk to the subject child's life or health" (*Matter of Julissia B. [Navasia J.]*, 128 AD3d 690, 691-692 [2d Dept 2015]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

395

CAF 20-00015

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF FAITH K.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
CHILD PROTECTIVE UNIT, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CINDY R. AND JAMIE K., RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT CINDY R.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR RESPONDENT-APPELLANT JAMIE K.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

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

Appeals from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered December 16, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued the placement of the subject child with petitioner.

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

Same memorandum as in *Matter of Faith K.* ([appeal No. 1] — AD3d — [May 7, 2021] [4th Dept 2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

396

CAF 20-00450

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF FAITH K.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
CHILD PROTECTIVE UNIT, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CINDY R. AND JAMIE K., RESPONDENTS-APPELLANTS.
(APPEAL NO. 3.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT CINDY R.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR RESPONDENT-APPELLANT JAMIE K.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (WENDY R. WELCH OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeals from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered February 21, 2020 in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued the placement of the subject child with petitioner.

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

Same memorandum as in *Matter of Faith K.* ([appeal No. 1] — AD3d — [May 7, 2021] [4th Dept 2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

404

TP 20-01019

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF JULIO NOVA, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered August 12, 2020) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78, seeking to annul a determination, following a tier II disciplinary hearing, that he violated certain prison disciplinary rules.

We note at the outset that, because the petition did not raise a substantial evidence issue, Supreme Court erred in transferring the proceeding to this Court (*see Matter of Brown v Prack*, 147 AD3d 1295, 1296 [4th Dept 2017]). In the interest of judicial economy, we nevertheless address petitioner's contention that he was improperly removed from the hearing while it was underway (*see id.*). Although inmates have a fundamental right to be present during their prison disciplinary hearings, "a petitioner may be properly removed from the remainder of a hearing where, upon receiving adequate warning, he or she continues to be unduly disruptive" (*Matter of Rupnarine v Prack*, 118 AD3d 1062, 1063 [3d Dept 2014]; *see Matter of Jackson v Fischer*, 59 AD3d 820, 820-821 [3d Dept 2009]; *see generally Matter of Lashway v Irvin*, 256 AD2d 1169, 1169 [4th Dept 1998]). Here, the record reflects that, among other things, petitioner argued with the Hearing Officer regarding what a video depicted, at times spoke over the

Hearing Officer, accused both the Hearing Officer and "everybody" of being "a racist," began making hostile hand and body gestures, and failed to heed two warnings by the Hearing Officer that petitioner would be removed from the hearing if he did not stop his disruptive behavior. Under these circumstances, we conclude that the Hearing Officer did not act improperly in removing petitioner from the hearing (*see generally Rupnarine*, 118 AD3d at 1063).

We have considered petitioner's remaining contention and conclude that it lacks merit.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

406

KA 19-01737

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON THOMAS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 14, 2019. The judgment convicted defendant, upon a plea of guilty, of attempted murder 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 murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). The People correctly concede that defendant did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Contrary to defendant's contention, however, the sentence is not unduly harsh or severe. In that regard, we note that any psychosis or other mental disturbance that defendant was experiencing during the underlying criminal episode was induced by his voluntary ingestion of illegal drugs. Finally, we are "compelled to emphasize once again" that, contrary to the People's assertion, a criminal defendant need not show extraordinary circumstances or an abuse of discretion by the sentencing court in order to obtain a sentence reduction under CPL 470.15 (6) (b) (*People v Cutaia*, 167 AD3d 1534, 1535 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

407

KA 20-00077

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY Q. RUSSELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), rendered August 28, 2019. The judgment convicted defendant, after a nonjury trial, of criminal contempt in the second degree and harassment 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, after a bench trial, of criminal contempt in the second degree (Penal Law § 215.50 [3]) and harassment in the second degree (§ 240.26 [1]), arising out of an incident in which defendant raised his fist toward his ex-girlfriend in violation of an order of protection requiring him to stay away from her. We affirm.

Defendant's contention that the evidence is legally insufficient to support his conviction is unpreserved because his motion for a trial order of dismissal was not " 'specifically directed' at the error being urged" on appeal (*People v Hawkins*, 11 NY3d 484, 492 [2008]; *see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Sanders*, 171 AD3d 1460, 1461 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]).

We further conclude that, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). On the record before us, the testimony adduced at trial, and any inconsistencies contained therein, merely "presented issues of credibility for the factfinder to resolve" (*People v Williams*, 179 AD3d 1502, 1503 [4th Dept 2020], *lv denied* 35 NY3d 995 [2020]; *see People v Withrow*, 170 AD3d 1578, 1579 [4th Dept 2019], *lv denied* 34 NY3d 940 [2019], *reconsideration denied* 34 NY3d 1020 [2019]), and we see no reason to disturb Supreme Court's credibility determinations

here.

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

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

409

KA 18-02048

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DASHAWN SMITH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME 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 (Thomas E. Moran, J.), rendered December 13, 2016. The judgment convicted defendant, upon a plea of guilty, 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 Supreme Court erred in accepting his plea without further inquiry into whether defendant was aware of a possible defense based on the operability of the gun. Although that contention survives defendant's purported waiver of the right to appeal (*see People v DeJesus*, 144 AD3d 1564, 1565 [4th Dept 2016]), defendant failed to preserve it for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation requirement stated in *People v Lopez* (71 NY2d 662, 666 [1988]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

410

KA 18-01079

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PARISH M. STREETER, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Niagara County Court (Matthew J. Murphy, III, J.), dated March 23, 2018. The order denied defendant's motion pursuant to CPL 440.10 to vacate a judgment of conviction.

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

Memorandum: Defendant appeals, by permission of this Court, from an order denying his motion pursuant to CPL 440.10 to vacate the judgment convicting him after a jury trial of, inter alia, two counts of predatory sexual assault against a child (Penal Law § 130.96). Defendant contends that County Court erred in denying the motion without a hearing. We affirm.

Where, as here, "an ineffective assistance of counsel claim involves . . . 'mixed claims' relating to both record-based and nonrecord-based issues . . . [, such] claim may be brought in a collateral proceeding, *whether or not* the [defendant] could have raised the claim on direct appeal" (*People v Evans*, 16 NY3d 571, 575 n 2 [2011], *cert denied* 565 US 912 [2011]). In such cases, "each alleged shortcoming or failure by defense counsel should not be viewed as a separate ground or issue raised upon the motion," but rather the claim of ineffective assistance of counsel "constitutes a single, unified claim that must be assessed in totality" (*People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018] [internal quotation marks omitted]). In order to establish that he or she is entitled to a hearing on a motion pursuant to CPL article 440, a defendant "must show that the nonrecord facts sought to be established are material and would entitle him [or her] to relief" (*People v Satterfield*, 66 NY2d 796, 799 [1985]).

Here, defendant's claims that defense counsel was ineffective for failing to call various witnesses on his behalf are not supported by sworn allegations of fact (*see People v Ozuna*, 7 NY3d 913, 915 [2006]). Although defendant presented a notarized but unsworn statement from one witness, "there is no indication that the testimony of the uncalled witness would have been anything but cumulative" (*People v Chelley*, 137 AD3d 1720, 1721 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]). Defendant's remaining allegations of shortcomings or failures by counsel do not rise to the level of ineffective assistance of counsel. Thus, assessed in totality, defendant's claim of ineffective assistance of counsel "is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts" (CPL 440.30 [4] [b]), and denial of the motion without a hearing on that issue was not an abuse of discretion (*see People v Jones*, 24 NY3d 623, 630 [2014]; *People v Lostumbo*, 175 AD3d 844, 846 [4th Dept 2019], *lv denied* 34 NY3d 1017 [2019]).

We further reject defendant's contention that the court erred in denying without a hearing his motion with respect to his contention that he was denied due process by the prosecutor's remarks in summation inasmuch as that issue involves matters of record that could have been raised on direct appeal (*see* CPL 440.10 [2] [c]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

411

KA 19-00930

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNTAVIOUS DODSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered November 2, 2018. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). At sentencing, defendant admitted to being a second felony offender based on a prior conviction in the State of Georgia for a cocaine-possession offense, the precise nature of which is unclear from the record. On appeal, defendant contends for the first time that his designation as a second felony offender is illegal because his prior Georgia conviction is not equivalent to a New York felony. Because defendant's contention would survive even a valid waiver of the right to appeal (*see People v Sablan*, 177 AD3d 1024, 1025 [3d Dept 2019], *lv denied* 34 NY3d 1132 [2020]; *People v Lopez*, 164 AD3d 1625, 1625 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]), we need not determine whether he validly waived that right in this case.

On the merits, defendant correctly concedes that his challenge to the legality of his designation as a predicate felon is unpreserved for appellate review, and the illegal-sentence exception to the preservation rule (*see generally People v Samms*, 95 NY2d 52, 57 [2000]) does not apply here because the record does not reveal the precise nature of, or the sentencing range applicable to, defendant's prior conviction in Georgia (*see People v Wingfield*, 181 AD3d 1253, 1254 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], *reconsideration denied* 35 NY3d 1098 [2020]; *Sablan*, 177 AD3d at 1026; *Lopez*, 164 AD3d

at 1625-1626). Contrary to defendant's contention and the People's incorrect concession, the pre-sentence report's lone reference to Georgia Code Annotated § 16-13-30 (a) as the basis of defendant's prior conviction does not clarify the situation because subdivision (a) does not identify a specific crime or authorize any particular sentence. Rather, subdivision (a) of section 16-13-30 merely sets forth a general prohibition on the unlawful purchase and possession of controlled substances in Georgia, and that sections's specific cocaine-possession offenses and the corresponding sentencing parameters are set forth in subdivision (c) (1), (2) and (3). The record in this case does not indicate whether defendant was convicted and sentenced under subdivision (c) (1), (2) or (3), and it is thus impossible to determine whether the prior conviction at issue is equivalent to a New York felony. For the same reason, we could not effectively review defendant's unpreserved challenge to his predicate felon designation as a matter of discretion in the interest of justice.

Finally, we note that defendant has an available avenue of relief, namely, a motion to set aside his sentence pursuant to CPL 440.20 (1) (*see Sablan*, 177 AD3d at 1026; *Lopez*, 164 AD3d at 1626). Such a motion would facilitate the development of an adequate record regarding defendant's Georgia conviction, and that, in turn, would allow the New York courts to intelligently determine whether that conviction qualified as a proper predicate for enhanced sentencing in this case.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

412

KA 18-00918

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN JOHNSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 12, 2018. The judgment convicted defendant upon his plea of guilty of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]). We affirm. Defendant's contention that he did not knowingly, intelligently, or voluntarily plead guilty is not preserved for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Darling*, 125 AD3d 1279, 1279 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015]; *People v Boyd*, 101 AD3d 1683, 1683 [4th Dept 2012]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant's contention that County Court erred in refusing to suppress identification testimony on the ground that the photo array used in the identification procedure was unduly suggestive is unpreserved because he did not raise "the specific grounds upon which he now challenges the procedure" at the suppression hearing (*People v Lago*, 60 AD3d 784, 784 [2d Dept 2009], *lv denied* 13 NY3d 746 [2009]; *see generally* CPL 470.05 [2]; *People v Cruz*, 89 AD3d 1464, 1465 [4th Dept 2011], *lv denied* 18 NY3d 993 [2012]). In any event, the evidence adduced at the hearing established that the various persons depicted in the photo array were sufficiently similar in appearance to defendant that the pretrial identification procedure was not unduly suggestive, inasmuch as "the viewer's attention was not drawn to any one photograph in such a way as to indicate that the police were

urging a particular selection" (*People v Johnson*, 126 AD3d 1326, 1327 [4th Dept 2015], *lv denied* 25 NY3d 1166 [2015]; *see People v Linder*, 114 AD3d 1200, 1201 [4th Dept 2014], *lv denied* 23 NY3d 1022 [2014]). We thus conclude that the court properly determined that the People met their initial burden of establishing that the police conduct with respect to the photo array procedure was reasonable and that defendant failed to meet his ultimate burden of proving that the procedure was unduly suggestive (*see People v Logan*, 178 AD3d 1386, 1387 [4th Dept 2019], *lv denied* 35 NY3d 1028 [2020]; *see generally People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

413

KA 17-00279

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH A. DEVALLE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 6, 2016. The judgment convicted defendant upon a plea of guilty of criminal sale of a controlled substance in the second degree, criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of one count of criminal sale of a controlled substance in the second degree (Penal Law § 220.41 [1]), two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and one count of criminal sale of a controlled substance in the third degree (§ 220.39 [1]). Defendant contends that Supreme Court abused its discretion in denying his request for an adjournment to permit defendant's newly-retained attorney time to prepare for trial. Although granting an adjournment is a matter left to the court's discretion, that discretion is more narrowly construed when the right of a defendant to prepare his or her case is involved (*see People v Matthews*, 148 AD2d 272, 276 [4th Dept 1989], *lv dismissed* 74 NY2d 950 [1989]; *see generally People v Peterkin*, 81 AD3d 1358, 1360 [4th Dept 2011], *lv denied* 17 NY3d 799 [2011]). Nevertheless, a defendant may not use the right to counsel of his or her choice as a means to delay the proceedings (*see People v Arroyave*, 49 NY2d 264, 271 [1980]; *see also People v O'Daniel*, 24 NY3d 134, 138 [2014]). It is thus "incumbent upon the defendant to demonstrate that the requested adjournment has been necessitated by forces beyond his [or her] control and is not simply a dilatory tactic" (*Arroyave*, 49 NY2d at 271-272; *see People v VanDenBosch*, 142 AD2d 988, 988-989 [4th Dept 1988]). Here, the court granted defendant's request, made 12

days before trial was scheduled to commence, to substitute his newly-retained counsel for the public defender who had represented him up to that point, and defense counsel accepted representation with knowledge of the time constraints (*see People v Comfort*, 60 AD3d 1298, 1299 [4th Dept 2009], *lv denied* 12 NY3d 924 [2009]). Further, defendant did not demonstrate that the requested adjournment was necessitated by factors outside his control (*see People v Povio*, 284 AD2d 1011, 1011 [4th Dept 2001], *lv denied* 96 NY2d 923 [2001]). Considering "the reasonableness of the trial court's decision in light of all the existing circumstances" (*Arroyave*, 49 NY2d at 272), we conclude that the court did not abuse its discretion in denying defendant's request for an adjournment (*see Povio*, 284 AD2d at 1011; *cf. VanDenBosch*, 142 AD2d at 989).

Defendant's related contention that his guilty plea was not knowingly, voluntarily, and intelligently entered is not preserved for our review inasmuch as defendant did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Brinson*, 130 AD3d 1493, 1493 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015]; *People v Laney*, 117 AD3d 1481, 1482 [4th Dept 2014]).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

414

CAF 20-00205

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF LIL B. J.-Z.

ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA N.J., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

LORENZO NAPOLITANO, ROCHESTER, FOR RESPONDENT-APPELLANT.

DANA A. GRABER, ALBION, FOR PETITIONER-RESPONDENT.

CHARLES PLOVANICH, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered January 9, 2020 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Lil B. J.-Z. (Jessica N.J.)* ([appeal No. 2] — AD3d — [May 7, 2021] [4th Dept 2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

415

CAF 20-00240

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF LIL B. J.-Z.

ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA N.J., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

LORENZO NAPOLITANO, ROCHESTER, FOR RESPONDENT-APPELLANT.

DANA A. GRABER, ALBION, FOR PETITIONER-RESPONDENT.

CHARLES PLOVANICH, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered February 3, 2020 in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued the subject child's placement with petitioner.

It is hereby ORDERED that said appeal from the order insofar as it concerns the disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent mother appeals from an order entered after a fact-finding hearing that, inter alia, found the subject child to be neglected. In appeal No. 2, the mother appeals from an order of disposition that adjudged the child to be neglected and, among other things, maintained placement of the child with petitioner pending a future permanency hearing.

As an initial matter, the mother's appeal from the order in appeal No. 1 must be dismissed inasmuch as the appeal from the dispositional order in appeal No. 2 brings up for review the propriety of the fact-finding order in appeal No. 1 (*see Matter of Jaime D. [James N.]* [appeal No. 2], 170 AD3d 1524, 1525 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]). Further, the mother's appeal from the order in appeal No. 2 insofar as it concerns the disposition must be dismissed as moot because that part of the order has expired by its terms (*see id.*; *Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1136 [4th Dept 2013]). The mother "may nevertheless challenge the underlying neglect adjudication because it constitutes a permanent stigma to a parent and may, in future proceedings, affect a parent's status" (*Jaime D.*, 170 AD3d at 1525 [internal quotation marks omitted]).

Contrary to the mother's contention, however, we conclude that petitioner met its burden of establishing neglect by a preponderance of the evidence (*see Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018]). "A respondent's mental condition may form the basis of a finding of neglect if it is shown by a preponderance of the evidence that his or her condition resulted in imminent danger to the child[ ]," although "[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[ ]" (*id.* [internal quotation marks omitted]; *see Matter of Matigan G. [Sara E.W.-G.]*, 145 AD3d 1484, 1485-1486 [4th Dept 2016], *lv denied* 29 NY3d 904 [2017]). Here, petitioner met its burden by establishing that the mother's mental health condition resulted in both harm and "imminent danger" to the child during the period alleged in the neglect petition (*Lyndon S.*, 163 AD3d at 1433 [internal quotation marks omitted]).

The mother failed to preserve for our review her further contention that Family Court erred in conducting portions of the fact-finding hearing in her absence (*see Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]). In any event, "a parent's right to be present at every stage of a Family Court Act article 10 proceeding is not absolute" and, "when faced with the unavoidable absence of a parent, a court must balance the respective rights and interests of both the parent and the child in determining whether to proceed" (*Matter of Kenneth C. [Terri C.]*, 145 AD3d 1612, 1613 [4th Dept 2016], *lv denied* 29 NY3d 905 [2017] [internal quotation marks omitted]). Under the circumstances of this case, we conclude that the court did not err in proceeding in the mother's absence and, moreover, that "her attorney fully represented her at the fact-finding . . . hearing[ ], and thus the mother has not demonstrated that she suffered any prejudice arising from her absence" (*id.*).

We have considered the mother's remaining contentions and conclude that they lack a basis in the record.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

419

CAF 20-00357

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF DEANGELO B.-K. AND JAMELLE B.-K.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TIA K., RESPONDENT-APPELLANT,
AND GREGGORY L., RESPONDENT.
(APPEAL NO. 1.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered January 3, 2020 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent Tia K. to vacate a prior order finding that she had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 1 from an order of Family Court denying that part of her motion seeking to vacate a prior order of fact-finding and disposition, entered upon her consent, determining, inter alia, that the mother neglected two of her children. In appeal No. 2, the mother appeals from an order of the same court denying that part of her motion seeking to vacate a prior order of fact-finding and disposition, also entered on her consent, determining, inter alia, that she neglected her other two children. In each appeal, the mother contends that the court erred in denying the motion to the extent that it sought to vacate the prior order inasmuch as she was not adequately warned of the potential consequences of her consent to the neglect findings as required by Family Court Act § 1051 (f). The mother failed to assert that ground in support of her motion to vacate the prior orders, and the issue thus is not properly before us (*see Matter of Nicole KK.*, 46 AD3d 1267, 1268 [3d Dept 2007]). We decline to reach that issue in the interest of justice. We have considered the mother's remaining

contentions in each appeal and conclude that they are without merit.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

420

CAF 20-00358

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF GAKAI L. AND GREGGORY L.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TIA K., RESPONDENT-APPELLANT,
AND GREGGORY L., RESPONDENT.
(APPEAL NO. 2.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered January 3, 2020 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent Tia K. to vacate a prior order finding that she had neglected the subject children.

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

Same memorandum as in *Matter of DeAngelo B.-K. (Tia K.)* ([appeal No. 1] — AD3d — [May 7, 2021] [4th Dept 2021]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

438

CAF 19-01716

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

IN THE MATTER OF JOSE A. RODRIGUEZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MYRNA RODRIGUEZ, RESPONDENT-RESPONDENT.

IN THE MATTER OF MYRNA RODRIGUEZ,
PETITIONER-RESPONDENT,

V

JOSE A. RODRIGUEZ, RESPONDENT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

LAW OFFICE OF PETER VASILION, WILLIAMSVILLE (PETER P. VASILION OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

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

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 19, 2019 in proceedings pursuant to Family Court Act article 6. The order, insofar as appealed from, dismissed the petitions of petitioner-respondent.

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

Memorandum: Petitioner-respondent father appeals from an order that effectively granted the motions of respondent-petitioner mother to dismiss his petitions seeking modification of a prior consent order of custody and visitation, and his other petitions alleging that the mother violated that prior consent order. We affirm.

Contrary to the father’s contention, Family Court did not err in granting the mother’s motions without a hearing. It is well settled that “[o]ne who seeks to modify an existing order of [custody and] visitation is not automatically entitled to a hearing [and] must make

some evidentiary showing sufficient to warrant it" (*Matter of Richard R.G. v Rebecca H.*, 34 AD3d 1312, 1312 [4th Dept 2006], *lv denied* 8 NY3d 804 [2007] [internal quotation marks omitted]; *see Matter of Moreno v Elliott*, 170 AD3d 1610, 1612 [4th Dept 2019]). Here, with respect to his modification petitions, the father failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing (*see Matter of Gworek v Gworek* [appeal No. 1], 158 AD3d 1304, 1304 [4th Dept 2018]; *Matter of Warrior v Beatman*, 70 AD3d 1358, 1359 [4th Dept 2010], *lv denied* 14 NY3d 711 [2010]). With respect to the father's violation petitions, a hearing is required only where the "petitions set forth sufficient allegations 'that, if established at an evidentiary hearing, could support granting the relief sought' " (*Matter of Buck v Buck*, 154 AD3d 1134, 1135 [3d Dept 2017]; *see Matter of Honeyford v Luke*, 186 AD3d 1049, 1052 [4th Dept 2020]), and the father failed to make sufficient allegations here (*see Matter of Fewell v Koons*, 87 AD3d 1405, 1405-1406 [4th Dept 2011]; *cf. generally Buck*, 154 AD3d at 1135).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

443

CA 20-00583

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

JENNIFER SKY, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

CATHOLIC CHARITIES OF BUFFALO, NY, DOING
BUSINESS AS MONSIGNOR CARR INSTITUTE
CHILDREN'S CLINIC, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

JOHN J. DELMONTE, NIAGARA FALLS, FOR PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (NICHOLAS M. HRICZKO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 3, 2020. The order granted in part the motion of defendant Catholic Charities of Buffalo, NY, doing business as Monsignor Carr Institute Children's Clinic, seeking, inter alia, to compel plaintiff Jennifer Sky to provide a speaking authorization.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries Jennifer Sky (plaintiff) allegedly sustained in a slip and fall accident on the premises of Catholic Charities of Buffalo, NY, doing business as Monsignor Carr Institute Children's Clinic (defendant). Supreme Court granted in part the motion of defendant seeking, inter alia, to compel plaintiff to execute a medical authorization compliant with the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d *et seq.*) permitting defendant to interview plaintiff's treating surgeon with respect to medical information relevant to this case (*see generally Arons v Jutkowitz*, 9 NY3d 393, 409, 415 [2007]). Plaintiff appeals, and we affirm.

Contrary to plaintiff's contention, we conclude that the court did not abuse its discretion by directing plaintiff to execute the standardized authorization form as modified and by rejecting most of plaintiff's proposed alterations and an addendum to the authorization form (*see Grieco v Kaleida Health*, 82 AD3d 1671, 1672 [4th Dept 2011]; *see generally Arons*, 9 NY3d at 415-416; *Sims v Reyes*, — AD3d —, — [May

7, 2021] [4th Dept 2021] [decided herewith]). We note that plaintiff's proposed alterations and addendum, to the extent not adopted by the court, are largely redundant to the standardized form, which "clearly states that the [surgeon] to be interviewed is permitted to discuss only the listed medical conditions, that the purpose of the interview is to assist defendant[], that it is not at the request of plaintiff and that, despite plaintiff's authorization, the [surgeon] is free to decline defendant['s] request for an interview" (*Grieco*, 82 AD3d at 1672). Plaintiff failed to preserve for our review her further challenge to the authorization directed by the court inasmuch as she failed to oppose the motion to compel on the ground now raised on appeal (*see U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 33 NY3d 84, 89 [2019]; *Howard Rosengarten, P.C. v Hott*, 49 AD3d 328, 328-329 [1st Dept 2008]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

455

KA 17-00272

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIE JENNINGS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered December 16, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the third degree.

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

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

456

KA 19-01892

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE JENNINGS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), entered September 11, 2019. The order denied defendant's motion pursuant to CPL 440.10 to vacate a judgment of conviction.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Onondaga County, for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals, by permission of this Court, from an order that denied without a hearing his CPL 440.10 motion to vacate the judgment convicting him upon a jury verdict of, inter alia, assault in the first degree (Penal Law § 120.10 [1]). The motion was based on the alleged denial of defendant's constitutional right to effective, conflict-free counsel (*see generally People v Brown*, 33 NY3d 983, 985 [2019]). We agree with defendant that Supreme Court abused its discretion in denying the motion without a hearing. Upon our review of the record, we conclude that a hearing is required to determine whether defendant validly waived the potential conflict of interest (*see* CPL 440.30 [5]; *see generally People v Salcedo*, 68 NY2d 130, 135 [1986]) and, if he did not, whether the potential conflict of interest actually operated on the defense (*see generally People v Sanchez*, 21 NY3d 216, 223 [2013]). We therefore reverse the order and remit the matter to Supreme Court to conduct such a hearing.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

460

CA 20-00380

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

KATHY ANN JONES, PLAINTIFF-APPELLANT,

V ORDER

JOHN P. SULLIVAN, M.D., INDIVIDUALLY AND AS AGENT, OFFICER AND/OR EMPLOYEE OF SLOCUM DICKSON MEDICAL GROUP, PLLC, AND SLOCUM DICKSON MEDICAL GROUP, PLLC, DEFENDANTS-RESPONDENTS.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), AND COZEN O'CONNOR, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (SAMANTHA L. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered February 14, 2020. The judgment dismissed the action upon a jury verdict of no cause of action.

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

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

461

CA 20-01026

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

STANLEY MARACLE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COLIN C. HART DEVELOPMENT COMPANY, INC.,
DEFENDANT-APPELLANT.

WALSH, ROBERTS & GRACE LLP, BUFFALO (JOSEPH H. EMMINGER, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 14, 2020. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant created or had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries that he sustained when he fell to the ground from a second-story balcony outside an apartment that defendant leased to him. Defendant contends that Supreme Court erred in denying its motion for summary judgment dismissing the complaint. We agree in part and conclude that the court erred in denying the motion with respect to the allegation that defendant created or had actual notice of the allegedly dangerous condition. We therefore modify the order accordingly.

Defendant met its initial burden on its motion of establishing that it did not create or have actual or constructive notice of the alleged defect in the second-story balcony (*see Moore v Ortolano*, 78 AD3d 1652, 1652 [4th Dept 2010]; *Anderson v Weinberg*, 70 AD3d 1438, 1439 [4th Dept 2010]). In support of the motion, defendant submitted the deposition of plaintiff, who testified that he lived in the apartment for approximately 15 years prior to the accident and was unaware of a problem with the balcony railing. Defendant also submitted evidence establishing that it had received no complaints with respect to the condition of the railing and that it made no

repairs to the railing prior to the accident.

In opposition to the motion, plaintiff raised an issue of fact whether defendant had constructive notice of the alleged defect in the balcony railing by submitting a letter written by the Village of Springville Code Enforcement Officer and sent to defendant. The letter, dated 10 days before the accident, stated that "the porch" with respect to the subject property was "falling apart" and needed "immediate attention," and asked defendant to schedule a time for the Officer to inspect the property. Although defendant's reply papers included an affidavit from the Code Enforcement Officer explaining that the letter referred to a first-story porch and not the second-story balcony, a person reading the Officer's letter without any clarification would not have known specifically which porch the Officer had observed in disrepair. "The duty of landowners to inspect their property is measured by a standard of reasonableness under the circumstances" (*Pommerenck v Nason*, 79 AD3d 1716, 1717 [4th Dept 2010]; *see Gaffney v Norampac Indus., Inc.*, 109 AD3d 1210, 1211 [4th Dept 2013]), and we conclude that there is an issue of fact whether the information in the letter should have aroused defendant's suspicion so as to trigger such a duty to inspect (*cf. Anderson v Justice*, 96 AD3d 1446, 1447-1448 [4th Dept 2012]; *see generally Catalano v Tanner*, 23 NY3d 976, 977 [2014]).

Plaintiff failed to raise an issue of fact whether defendant either created or had actual notice of the alleged defect (*see Anderson*, 70 AD3d at 1439; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

468

KA 18-01837

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEC W. LINN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN 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 July 3, 2018. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction, following his plea of guilty, of aggravated family offense (Penal Law § 240.75 [1]) and sentencing him to a term of incarceration. Defendant's sole contention is that the sentence is unduly harsh and severe. Because defendant has completed serving that sentence, his appeal is moot (*see People v Pompeo*, 151 AD3d 1949, 1950 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

469

KA 14-00588

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAVEEDA L. COLLINS, DEFENDANT-APPELLANT.

MARY WHITESIDE, NORTH HOLLYWOOD, CALIFORNIA, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered January 6, 2014. The judgment convicted defendant upon a plea of guilty of aggravated unlicensed operation of a motor vehicle in the first degree and driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]) and driving while intoxicated (§ 1192 [3]). Defendant's contention that County Court improperly enhanced her sentence with fines and surcharges is not preserved for our review (*see People v Moore*, 182 AD3d 1032, 1032 [4th Dept 2020]). Defendant's related contention that the court failed to inform her of the fines and surcharges as direct consequences of her plea is also not preserved for our review (*see People v Williams*, 27 NY3d 212, 222 [2016]; *People v Cyganik*, 154 AD3d 1336, 1337 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, contrary to defendant's contention, the record does not establish that the court failed to apprehend the extent of its sentencing discretion (*see People v Morrison*, 78 AD3d 1615, 1616 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]). Prior to accepting defendant's guilty plea at the court appearance in September 2013, the court correctly informed defendant that, if she were not successful in complying with the conditions of interim probation, it had the authority to impose any lawful sentence it deemed appropriate.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

470

KA 19-01635

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KADESHA MAYE, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered April 29, 2019. The judgment convicted defendant, upon a plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of assault in the second degree (Penal Law § 120.05 [2]). We note at the outset that defendant's "release to parole supervision does not render [her] challenge to the severity of [her] sentence moot inasmuch as [she] remains under the control of the Parole Board until [her] sentence has terminated" (*People v Paul*, 139 AD3d 1383, 1384 [4th Dept 2016], *lv denied* 28 NY3d 973 [2016]). Nonetheless, even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Johnson*, 191 AD3d 1379, 1379 [4th Dept 2021]) and thus does not preclude our review of her challenge to the severity of her sentence (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

473

KA 19-00154

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEMAR PERTILLAR, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered October 22, 2018. 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: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant contends that County Court erred in refusing to suppress items recovered from a search of defendant's person as the fruit of an unlawful traffic stop inasmuch as the police lacked probable cause to believe that defendant, the driver of the vehicle, violated the Vehicle and Traffic Law. We reject that contention. We conclude that the record supports the court's determination that the officer had probable cause to believe that the driver committed a violation of Vehicle and Traffic Law § 402 (1) (a) based on the officer's observation that the license plate on the back of the vehicle was attached by only one screw, was "loose and unsecure," and "had a great chance of falling off." The record also supports the court's determination that the officer had probable cause to believe that the vehicle had a partially missing taillight that displayed a white light rather than a "red light" as required by Vehicle and Traffic Law § 375 (2) (a) (3) (*see People v Washington*, 153 AD3d 1663, 1664 [4th Dept 2017], *lv denied* 30 NY3d 1023 [2017]).

Defendant failed to preserve for our review his contention that the officer violated his constitutional right to equal protection (*see generally People v Murphy*, 188 AD3d 1668, 1669-1670 [4th Dept 2020], *lv denied* — NY3d — [Mar. 14, 2021]; *People v Lashley*, 58 AD3d 753, 754

[2d Dept 2009], *lv dismissed* 12 NY3d 759 [2009]). Defendant further contends that his plea was not knowingly, voluntarily, and intelligently entered. Defendant failed to preserve that contention for our review "by moving to withdraw [his] plea[] or to vacate the judgment[] of conviction" (*People v Webster*, 91 AD3d 1275, 1275 [4th Dept 2012], *lv denied* 19 NY3d 978 [2012]), and this is not "that rare case . . . where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, the sentence is not unduly harsh or severe.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

474

KA 17-00132

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY T. POWELL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Dennis M. Kehoe, A.J.), rendered August 9, 2016. The judgment convicted defendant, after a nonjury trial, of 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 a nonjury verdict of two counts of assault in the second degree (Penal Law § 120.05 [3]). Defendant contends that County Court (Kehoe, A.J.) erred in not ordering a competency examination or holding a competency hearing. We reject that contention. An "incapacitated person" is defined in the CPL as a defendant "who as a result of mental disease or defect lacks capacity to understand the proceedings against him [or her] or to assist in his [or her] own defense" (CPL 730.10 [1]). "The key inquiry in determining whether a criminal defendant is fit for trial is 'whether he [or she] has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding—and whether he [or she] has a rational as well as factual understanding of the proceedings against him [or her]' " (*People v Phillips*, 16 NY3d 510, 516 [2011]; *see People v Mendez*, 1 NY3d 15, 19 [2003]).

A court must issue an order of examination "when it is of the opinion that the defendant may be an incapacitated person" (CPL 730.30 [1]). The determination whether to order a competency examination, either sua sponte or upon defense counsel's request, lies within the sound discretion of the court (*see People v Morgan*, 87 NY2d 878, 879-880 [1995]). Here, the court (Doyle, J.) ordered a competency examination pursuant to CPL 730.30 (1) and found defendant was not fit to proceed. After approximately a year and upon the determination of

the superintendent of the institution where defendant was being held that he was no longer an incapacitated person, defendant was returned to court. At that point, a "court may, upon its own motion, conduct a hearing to determine the issue of capacity, and it must conduct a hearing upon motion therefor by the defendant or by the district attorney" (CPL 730.30 [2]; *see* CPL 730.60 [2]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]). "If no motion for a hearing is made, the criminal action against the defendant must proceed" (CPL 730.30 [2]).

Upon defendant's return to court, defense counsel requested another CPL 730.30 examination but did not move for a competency hearing (*see People v Lendof-Gonzalez*, 170 AD3d 1508, 1511 [4th Dept 2019], *affd* 36 NY3d 87 [2020]), and thus a hearing was not required but rather was a matter of discretion for the court (*see* CPL 730.30 [2]; *Tortorici*, 92 NY2d at 766). We conclude that the court (Kehoe, A.J.) did not abuse its discretion in not holding a competency hearing (*see Tortorici*, 92 NY2d at 766; *People v Ubbink*, 100 AD3d 1528, 1529 [4th Dept 2012], *lv denied* 20 NY3d 1066 [2013]; *People v Rios*, 26 AD3d 521, 521 [2d Dept 2006], *lv denied* 6 NY3d 852 [2006]; *see also People v Sulaiman*, 134 AD3d 860, 860 [2d Dept 2015], *lv denied* 26 NY3d 1150 [2016]). We further conclude that the court did not abuse its discretion in declining to order another CPL 730.30 examination upon defense counsel's request (*see Morgan*, 87 NY2d at 879-880; *see also People v Russell*, 74 NY2d 901, 902 [1989]; *Rios*, 26 AD3d at 521). In not holding a hearing and in declining defendant's request for an updated CPL 730.30 examination, the court properly considered its own observations of and interactions with defendant prior to and during the trial (*see Phillips*, 16 NY3d at 517; *Tortorici*, 92 NY2d at 766-767; *Morgan*, 87 NY2d at 880-881).

While the court acknowledged that defendant had mental health problems, "a defendant's history of psychiatric illness does not in itself call into question defendant's competence to stand trial" (*Tortorici*, 92 NY2d at 765; *see Morgan*, 87 NY2d at 881). Nor does defendant's insistence on a trial in the face of overwhelming evidence of his guilt and a favorable plea bargain mean that he was unfit to proceed (*see People v Musaid*, 168 AD3d 526, 527 [1st Dept 2019], *lv denied* 33 NY3d 979 [2019]). Here, despite his mental illness, defendant showed his understanding of the proceedings against him and was able to assist in his own defense (*see* CPL 730.10 [1]; *see generally Phillips*, 16 NY3d at 516).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

475

KA 19-01691

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEIR A. GROSSE RHODE, 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 February 8, 2019. The judgment convicted defendant upon his plea of guilty of assault in the first degree and leaving the scene of an incident resulting in serious physical injury without reporting.

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 assault in the first degree (Penal Law § 120.10 [1]) and leaving the scene of an incident resulting in serious physical injury without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [i]). Defendant contends that his purported monosyllabic responses to County Court's inquiries during the plea colloquy, coupled with concerns about his mental health, demonstrate that his plea was not voluntarily, knowingly, and intelligently entered. Preliminarily, we agree with defendant that, contrary to the People's assertion, an exception to the preservation requirement applies here inasmuch as defendant "could not have brought a CPL 220.60 (3) plea withdrawal motion . . . because the plea and sentence occurred during the same proceeding[, and] he could not have filed a CPL 440.10 motion because the [alleged] error in th[is] case[is] 'clear from the face of the . . . record' " (*People v Tyrell*, 22 NY3d 359, 364 [2013]; *see People v Conceicao*, 26 NY3d 375, 381-382 [2015]; *People v Sougou*, 26 NY3d 1052, 1054 [2015]). We nonetheless conclude that defendant's contention lacks merit. The court "properly relied upon the reports of two mental health professionals who found that defendant was competent" (*People v Moore*, 57 AD3d 1432, 1432-1433 [4th Dept 2008], *lv denied* 12 NY3d 785 [2009]; *see People v Morris*, 183 AD3d 1254, 1255 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]). In addition, "the record of the plea colloquy establishes that defendant

possessed a rational and factual understanding of the proceeding . . . [and] that defendant's guilty plea was knowingly, intelligently and voluntarily entered with the aid of counsel and after the court had fully advised him of the consequences of his plea" (*Moore*, 57 AD3d at 1433 [internal quotation marks omitted]). Contrary to defendant's further contention, "even though some of [his] responses to the court's inquiries were monosyllabic," his plea is not rendered invalid on that basis (*People v Lewis*, 114 AD3d 1310, 1311 [4th Dept 2014], *lv denied* 22 NY3d 1200 [2014]; *see People v Hunt*, 188 AD3d 1648, 1649 [4th Dept 2020], *lv denied* — NY3d — [Mar. 10, 2021]).

Next, as defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Parker*, 189 AD3d 2065, 2065-2066 [4th Dept 2020]; *Hunt*, 188 AD3d at 1648-1649) and thus does not preclude our review of defendant's challenge to the severity of his sentence (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]). We nevertheless conclude that the negotiated sentence is not unduly harsh or severe.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

478

KA 19-00326

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB A. MYERS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, EASTON THOMPSON KASPEREK SHIFFRIN LLP (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered December 18, 2018. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96). He contends that his conviction must be reversed because the admission of testimony that a witness observed defendant engaging in sexual contact with the minor victim impermissibly permitted the jury to convict him based on a theory different from that set forth in the indictment, as limited by the bill of particulars (*see generally People v Graves*, 136 AD3d 1347, 1348-1349 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]). We reject that contention inasmuch as "[t]he language in the indictment and bill of particulars was . . . broad enough to encompass all the sexual contact as testified to by the [witness]" (*People v Hymes*, 174 AD3d 1295, 1297 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]). The indictment charged defendant with committing predatory sexual assault against a child by engaging in "two or more acts of sexual conduct, which included at least one act of oral sexual conduct" with the victim. Although the People's bill of particulars narrowed the specific type of "oral sexual conduct" alleged, it did not limit the People to only such conduct, nor did it preclude the People from presenting evidence of additional acts of "sexual conduct," including the "sexual contact" to which the witness testified (§ 130.00 [2] [a]; [3], [10]; *see People v Colsrud*, 144 AD3d 1639, 1640 [4th Dept 2016], *lv denied* 29 NY3d 1030 [2017]).

We have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court

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

479

CAF 19-02103

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

IN THE MATTER OF FRANCIS D. MENARD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTINA M. ROBERTS, RESPONDENT-RESPONDENT.

SCOTT T. GODKIN, WHITESBORO, FOR PETITIONER-APPELLANT.

JOHN G. KOSLOSKY, UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Paul M. Deep, J.), entered October 7, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified a prior order by allowing respondent to reside in Herkimer County with the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father filed a violation petition and a modification petition. Pursuant to a prior order entered on their consent, the parties had joint legal custody of the subject child, respondent mother had primary residential custody of the child, the father had such visitation as could be agreed upon by the parties, and neither party could relocate the child outside of Oneida County without a court order or the written consent of the other party. The father now appeals from an order that, inter alia, determined that the mother violated the prior order by moving to Herkimer County without a court order or his written consent but that such violation was not willful, and modified the prior order by permitting the mother and child to continue residing in Herkimer County.

The father contends that Family Court should have imposed a punishment for the mother's violation of the prior order (*see* Judiciary Law § 753 [A]). Although we agree with the father that "wilfulness is not an element of civil contempt" (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 35 [2015]), we conclude that the court did not abuse its discretion in failing to impose sanctions for the mother's violation of the prior order (*see Matter of Amrane v Belkhir*, 141 AD3d 1074, 1076-1077 [4th Dept 2016]; *Matter of Kirkpatrick v Kirkpatrick*, 137 AD3d 1695, 1696 [4th Dept 2016]). The mother offered to give residential custody of the child to the father in Oneida County

instead of relocating the child with her to Herkimer County, but the father refused her offer. The mother thereafter obtained the father's verbal consent to move to Herkimer County. Six months after the mother rented an apartment in Herkimer County, the father complained for the first time to the mother of her move and then filed his petition asserting that the mother's move constituted a violation of the prior order.

The father further contends that the court's modification of the prior order lacks a sound and substantial basis in the record. We conclude that the father is not aggrieved by the court's determination that he met his burden of establishing the requisite change of circumstances necessary for the modification of the prior order (*see Matter of Alwardt v Connolly*, 183 AD3d 1252, 1252 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]; *see also Matter of Stanton v Kelso*, 148 AD3d 1809, 1809-1810 [4th Dept 2017]). With respect to the best interests of the child, the court carefully weighed the appropriate factors, and we see no basis for disturbing its determination permitting the mother and child to continue residing in Herkimer County (*see Stanton*, 148 AD3d at 1809-1810).

Entered: May 7, 2021

Mark W. Bennett
Clerk of the Court