SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 3, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED JULY 3, 2024

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_____	1050.2	CA 23 01312	BRUCE D. SMITH V TRIPLE-O MECHANICAL, INC.
_____	69	CAF 23 00194	Mtr of MEKAYLA S.
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_____	245	CA 23 00116	FOAM DEPOT, INC. V COUNTY OF ERIE
_____	265	CA 23 00909	RPOWER, LLC V ANB SYSTEM SUPPLIES, LLC
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_____	270	CA 23 00163	CAYUGA NATION V DUSTIN PARKER
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_____	274	KA 22 01948	PEOPLE V CHARLES ZELLEFROW

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_____	277	KA 21 01062	PEOPLE V MARK DUBLINO
_____	284	CA 23 01453	BL DOE 5 V EDWIN D. FLEMING
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CAF 23-00194

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, AND KEANE, JJ.

IN THE MATTER OF MEKAYLA S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MELANIE H., ALSO KNOWN AS MELANIE S.,
RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

BENJAMIN MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 15, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had abused the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother appeals in appeal No. 1 from an order of fact-finding and disposition that, inter alia, adjudged that she abused her daughter. In appeal No. 2, the mother appeals from an order of fact-finding and disposition that, inter alia, adjudged that she derivatively abused her son. The adjudications arose from allegations that the mother's boyfriend sexually abused the daughter on multiple occasions.

The mother contends in both appeals that Family Court erred in admitting in evidence home surveillance videos depicting the abuse inasmuch as petitioner failed to establish the authenticity of the videos. Under the circumstances of this case, we conclude that the videos were sufficiently authenticated through testimony regarding their source and how they were discovered in conjunction with testimony supporting the conclusion that the videos depicted the area and individuals they purported to depict (*see People v Goldman*, 35 NY3d 582, 595-596 [2020]; *see generally People v Jordan*, 181 AD3d 1248, 1249-1250 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]).

The videos were discovered by the Federal Bureau of Investigation (FBI) during an unrelated investigation in late January 2022 into the trading of child pornography. The FBI executed a search warrant upon

a person (suspect) who was a subject of their investigation. The suspect admitted to an FBI special agent that he had been hacking into security web cameras and that, in 2019, he had hacked into a security camera and observed what he believed was an adult male sexually abusing a teenage girl. Following the suspect's directions, the FBI was able to obtain from the suspect's computer three videos and, from there, details regarding the security camera login information, including an email address. Through the FBI's investigative work, together with the assistance of the New York State Police, it was determined that the videos came from a camera in the house in which the mother resided with the subject children and her boyfriend. The FBI agent explained how he copied the videos from the suspect's computer onto a DVD, and he testified that the videos on the DVD that was admitted in evidence at the fact-finding hearing were true and accurate copies of the videos he viewed on the suspect's computer. He testified that he did not make any observations that led him to believe that the video footage had been tampered with or altered in any way. The videos were date-stamped from May, June, and July 2019.

In the course of the investigation, the State Police obtained a New York State driver's license of the male occupant of the house and also a student school identification card of the teenage girl who lived in the house. The identification cards portrayed the individuals in the videos. A detective with the State Police testified that he showed screenshots from the videos to the mother, who identified the female in one image as her daughter and the male in another as her boyfriend. The mother refused to view the videos.

The mother contends that petitioner failed to authenticate the videos through the testimony of a person who witnessed the events, made the videos, or had sufficient knowledge of the surveillance system to show that it accurately recorded the events. She further contends that petitioner failed to establish that the videos were not fabricated by the suspect. We reject those contentions.

The admissibility of video evidence rests within the sound discretion of the trial court so long as a sufficient foundation for its admissibility has been proffered (*see People v Patterson*, 93 NY2d 80, 84 [1999]). In determining whether a proper foundation has been laid, the accuracy of the object itself is the focus of inquiry (*see People v McGee*, 49 NY2d 48, 59 [1979], *cert denied* 446 US 942 [1980]). "Accuracy or authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it" (*id.*; *see People v Price*, 29 NY3d 472, 476 [2017]). A video "may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the video[ ] accurately represents the subject matter depicted" (*Patterson*, 93 NY2d at 84). A video may also be authenticated, however, by "[t]estimony, expert, or *otherwise* . . . establish[ing] that [the] video[ ] 'truly and accurately represents what was before the camera' " (*id.* [emphasis added]). "[T]he foundation necessary to establish [authenticity] may differ according to the nature of the evidence sought to be admitted" (*Goldman*, 35 NY3d at 595 [internal quotation marks omitted]).

We agree with the court that the videos were sufficiently authenticated and that "any alleged uncertainty went to the weight to be accorded the evidence rather than its admissibility" (*People v Houston*, 181 AD3d 477, 478 [1st Dept 2020], *lv denied* 35 NY3d 1027 [2020] [internal quotation marks omitted]). The video came into police possession through unusual circumstances, and through the investigation, the police were able to corroborate much of what was depicted in the video. The testimony of the FBI agent and the State Police detective authenticated the videos through circumstantial evidence of their "appearance, contents, substance, internal patterns, and other distinctive characteristics" (*People v Franzese*, 154 AD3d 706, 707 [2d Dept 2017], *lv denied* 30 NY3d 1105 [2018]; *see* Guide to NY Evid rule 9.05 [6], Methods of Authentication and Identification, https://nycourts.gov/judges/evidence/9-AUTHENTICITY/9.05_METHODS.pdf [last accessed May 16, 2024]; *see also Jordan*, 181 AD3d at 1249-1250; *see generally Goldman*, 35 NY3d at 595-596). The testimony at the fact-finding hearing established that the videos depicted the living room of the home in which the mother, the subject children, and the boyfriend lived. The State Police detective testified that the mother identified her daughter and boyfriend in screenshots taken from the videos; that he observed cameras in the house, including in the living room; and that he observed that the living room and its furnishings matched what was shown in the videos. As the court noted, the same couch, afghan, end table, and lamp were all visible in the videos and photographs. Other particularly specific items the police recovered from the home were also seen in the videos. In addition, the mother, the children, and the boyfriend were all easily identifiable in the videos. The court determined that the "actions, dialogue, and behavior shown in the videos show no indication of any tampering." In other words, there were "distinctive identifying characteristics" in the videos themselves (*Goldman*, 35 NY3d at 595). There was also the "significant fact" that the mother did not dispute that (*id.*). Rather, the mother confirmed through the screenshots from the videos that the individuals shown were her children and boyfriend. In addition, the FBI agent testified that he primarily investigated child pornography and performed digital forensic work and that he saw no signs of alteration or tampering with the videos. We therefore conclude that petitioner established that the videos "accurately represent[ed] the subject matter depicted" (*id.* [internal quotation marks omitted]), and we further conclude that the court acted within its "founded discretion" (*Patterson*, 93 NY2d at 84) in admitting them in evidence.

Contrary to the mother's further contention in appeal No. 1, the court's finding of abuse is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). Because the mother failed to testify, the court was permitted to "draw the strongest inference that the opposing evidence permit[ed]" (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]; *see Matter of Ariana F.F. [Robert E.F.]*, 202 AD3d 1440, 1442 [4th Dept 2022]; *Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1678 [4th Dept 2021]). Although the mother did not directly participate in the boyfriend's sexual abuse of the daughter, the evidence permitted the

court to infer that the mother knew or should have known about the abuse and did nothing to prevent it (*see Matter of Lynelle W.*, 177 AD2d 1008, 1008 [4th Dept 1991]; *see also Matter of Peter C.*, 278 AD2d 911, 911 [4th Dept 2000]).

The court afforded the videos great weight based on clear evidence of their reliability, including that the room depicted in the videos was the same room that was shown on photographs taken by the police when they searched the home where the mother, her children, and her boyfriend lived. We note that the mother refused to view the videos of the abuse; that she returned to the home with her children even though the State Police asked her not to do so; and that she chose not to refute any of petitioner's evidence.

Contrary to the mother's contention in appeal No. 2, we conclude that the facts surrounding the abuse of the daughter were "so closely connected with the care of" the son so as to justify the finding of derivative abuse (*Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012] [internal quotation marks omitted]; *see Matter of Alyssa C.M.*, 17 AD3d 1023, 1024 [4th Dept 2005], *lv denied* 5 NY3d 706 [2005]).

Contrary to the mother's further contention in appeal No. 2, the dispositional provisions of the court's order, including those requiring her to engage in domestic violence counseling, attend a sexual abuse prevention program, and admit that the sexual abuse had occurred, were "consistent with the best interests of [her son] after consideration of all relevant facts and circumstances, and [were] supported by a sound and substantial basis in the record" (*Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497 [4th Dept 2015], *lv dismissed in part & denied in part* 26 NY3d 941 [2015] [internal quotation marks omitted]; *see generally Matter of Derrick C.*, 52 AD3d 1325, 1326-1327 [4th Dept 2008], *lv denied* 11 NY3d 705 [2008]).

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent and, for the reasons set forth below, I would reverse the order and dismiss the petition in each appeal.

As noted by the majority, the digital video files at issue in this case were obtained in 2022 by the Federal Bureau of Investigation (FBI) from an individual (suspect) who was under investigation for possession of child pornography. Following further investigation, law enforcement came to believe that the files contained home surveillance video recorded in May, June, and July 2019 inside respondent mother's home, where the mother lived together with her boyfriend and the children who are the subject of these proceedings.

The majority concludes that "the videos were sufficiently authenticated through testimony [at the fact-finding hearing] regarding their source and how they were discovered in conjunction with testimony supporting the conclusion that the videos depicted the area and individuals they purported to depict." I disagree with that conclusion and instead conclude that the facts of this case are

materially indistinguishable from those in *People v Patterson* (93 NY2d 80, 84 [1999]).

In *Patterson*, the trial court admitted in evidence a surveillance video that purported to show a crime that took place inside a shop. There was no authentication testimony from the parties who witnessed the events or from the shop owner who maintained the surveillance system; instead, the trial court relied on testimony from police officers who identified one of the individuals shown on the video and confirmed that the video accurately depicted the "physical layout" of the area where the purported crime had taken place (*People v Patterson*, 242 AD2d 740, 741 [2d Dept 1997], *revd* 93 NY2d 80 [1999]). The trial court further relied on evidence of chain of custody, specifically that officers "obtained the videotape directly from [the shop owner] approximately two weeks after the crime and kept it in their possession, unaltered, until the trial" (*id.*). Although the Court of Appeals reversed the conviction on other grounds, it nevertheless addressed the "inadequate basis for admissibility" of the video, noting that "the trial record . . . lack[ed] authentication to justify" admission of the video due to the "foundational vacuum" and failure to provide a full chain of custody (*Patterson*, 93 NY2d at 85).

Here, as in *Patterson*, there was no testimony from a party who witnessed the events depicted in the videos or from a person who controlled or maintained the system that made the recording. Instead, as in *Patterson*, petitioner offered testimony as to the identity of the subjects of the video and testimony verifying the location where the video took place. Moreover, the chain of custody evidence offered here was significantly weaker than what was offered in *Patterson* inasmuch as petitioner did not submit any testimony from the suspect who purportedly recorded the videos in 2019, only from the FBI agent who transferred the videos from the suspect's computer more than two years later. The agent testified that he had experience "perform[ing] digital forensic work," but did not elaborate on how that experience trained him to identify alterations to videos. Although he further testified "that, based on his technical experience and expertise, the video showed no signs of being manipulated or altered," he provided no explanation or basis for this belief. "[G]iven the inability of the witness to testify regarding" the accuracy or possible editing of the videos, as well as "his lack of personal knowledge as to the creation of the proffered [videos] and how [they] came into the possession of the" suspect, I conclude that the agent's testimony did not, on its own, provide a sufficient basis for their authentication (*Torres v Hickman*, 162 AD3d 821, 823 [2d Dept 2018]).

Although the Court of Appeals in *People v Goldman* (35 NY3d 582 [2020]) applied a less stringent authenticity standard with respect to the admission of a music video file uploaded to YouTube, the Court noted that the video "was introduced for its relevance to defendant's motive related to territorial gang activity—which is not an element of the offense—rather than specifically offered for its truth" (*id.* at 595). Here, inasmuch as the daughter denied that the abuse took place and inasmuch as the boyfriend did not testify at the fact-finding hearing, the videos are the only evidence that would support a finding

of abuse.

Because petitioner failed to provide a sufficient legal foundation establishing that the videos "accurately represent[ed] the subject matter depicted" (*id.*; *see Patterson*, 93 NY2d at 85), I conclude that the videos should not have been admitted. Without the videos, there is no evidence to sustain the petitions, and I would therefore dismiss them.

Even assuming arguendo that the videos were properly admitted, I further disagree with the majority that petitioner established by a preponderance of the evidence that the mother abused the daughter, and I conclude that petitioner also failed to establish that the mother derivatively abused the son. The court determined that the mother abused the daughter because the mother "knew or should have known" that the boyfriend was sexually abusing the daughter, "but did nothing, allowing the abuse to continue." I acknowledge this Court's precedent in some cases that both abuse and neglect may be shown where a parent knew or should have known of abuse and failed to stop it (*see Matter of Cory S. [Terry W.]*, 70 AD3d 1321, 1322 [4th Dept 2010]; *see also Matter of Lynell W.*, 177 AD2d 1008, 1008 [4th Dept 1991]). To the extent that those cases stand for the proposition that a finding of *neglect* may be made against such a parent, that proposition meets the standard set forth in the statute inasmuch as a parent who knew or should have known that a child was being abused but failed to intervene may be found to have failed "to exercise a minimum degree of care" and to have acted "unreasonably" under the circumstances (Family Ct Act § 1012 [f] [i] [B]; *see generally Matter of Angelina M. [Marilyn O.]*, 224 AD3d 1223, 1223-1224 [4th Dept 2024], *lv denied* — NY3d — [2024]; *Matter of Boryana D. [Victoria D.]*, 157 AD3d 1011, 1012 [3d Dept 2018]; *Matter of Dayanara V. [Carlos V.]*, 101 AD3d 411, 412 [1st Dept 2012]). However, to the extent that those cases stand for the proposition that a finding of *abuse* may be sustained on an identical basis, or indeed on any basis less than actual knowledge, I respectfully conclude that they were wrongly decided and should no longer be followed (*see Dayanara V.*, 101 AD3d at 412; *Matter of Jose Y. [Georgina Y.]*, 177 AD2d 580, 581 [2d Dept 1991]; *see generally* Family Ct Act § 1012 [e] [iii] [A]).

Here, even taking into account the adverse inference against the mother, I conclude that "the record does not support a finding of actual knowledge that would constitute abuse" of the daughter (*Jose Y.*, 177 AD2d at 581). Inasmuch as there is no evidence that the mother had actual knowledge of the abuse of the daughter and, moreover, no evidence that the son was abused or was aware of any abuse, I further conclude that the derivative abuse finding as to the son was not supported by the record (*see Matter of T.S. [K.A.]*, 200 AD3d 569, 570 [1st Dept 2021], *lv denied* 38 NY3d 904 [2022]; *see generally Matter of Cleophus M.B. [Erika B.]*, 90 AD3d 1512, 1512 [4th Dept 2011]).

Finally, even if there had been a proper determination of derivative abuse, I conclude that the dispositional provisions of the order in appeal No. 2 did not reflect a resolution consistent with the

son's best interests under the unusual circumstances of this case (*see generally Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497 [4th Dept 2015], *lv dismissed in part & denied in part* 26 NY3d 941 [2015]). After the children were removed, the mother found employment and moved into new housing without the boyfriend. She also completed a parenting class and attended all visits with the children. The sexual abuse alleged in the petitions did not involve the son, who denied knowledge of any inappropriate behavior in the house. Further, because the daughter consistently maintained that no abuse had taken place, the court's requirement that the mother admit that the sexual abuse had occurred was, in effect, a requirement that the mother reject the word of her daughter and instead rely solely on the disputed video evidence. Taking the unusual provenance of the videos into account, and weighing the damage that might be done to the son through the mother's failure to admit that another child had been sexually abused against the damage that might be done through a foster-care or group-home placement, I submit that return to the mother is in the child's best interests. For all of those reasons, I would reverse the order and dismiss the petition in each appeal.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-00195

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, AND KEANE, JJ.

IN THE MATTER OF GABRIEL H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MELANIE H., ALSO KNOWN AS MELANIE S.,
RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

BENJAMIN MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 15, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had derivatively abused the subject child.

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

Same memorandum as in *Matter of Mekayla S. (Melanie H.)* ([appeal No. 1] – AD3d – [July 3, 2024] [4th Dept 2024]).

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the same dissenting memorandum as in *Matter of Mekayla S. (Melanie H.)* ([appeal No. 1] — AD3d — [July 3, 2024] [4th Dept 2024]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-01244

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

CADARRELL D. CLARK, DEFENDANT-APPELLANT.

MARY M. WHITESIDE, NORTH HOLLYWOOD, CALIFORNIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Sam L. Valleriani, J.), rendered February 2, 2018. The judgment convicted defendant upon a jury verdict of robbery in the first degree (two counts) and robbery in the second degree (two counts).

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

Opinion by GREENWOOD, J.:

On appeal from a judgment convicting him upon a jury verdict of two counts of robbery in the first degree (Penal Law § 160.15 [4]) and two counts of robbery in the second degree (§ 160.10 [1]) arising from a daylight gunpoint robbery initiated by two perpetrators against two victims sitting in a parked vehicle, defendant contends that the verdict is against the weight of the evidence. For the following reasons, we reject defendant's contention as well as the additional contentions he raises on appeal.

I. Facts

On October 17, 2016, between 3:30 and 4:00 p.m., two men approached a vehicle parked behind a laundromat. One man (first perpetrator) approached the driver's side of the vehicle where a man was sitting in the driver's seat (first victim), while a man with a gun (second perpetrator) approached the passenger's side where a woman was sitting in the passenger seat (second victim). The second victim was the key witness at the trial.

The first victim testified that the first and second perpetrators approached them and demanded "everything [they] had." The first victim was unable to recall what the perpetrators were wearing, other

than that the second perpetrator was wearing a hoodie. He testified that one of the perpetrators pointed a handgun at them. The first victim handed over a cell phone, jewelry, and keys. He was unable to identify the perpetrators. The second victim, on the other hand, was able to describe and identify the perpetrators. She testified that she was sitting in the front passenger seat of the vehicle when the second perpetrator, who was holding a gun, came around the building and approached her side of the vehicle. He was wearing a black sweater or jacket with the hood up and jeans, and he was pointing a black handgun at her. He repeatedly demanded that she give him "everything," and she gave him her money, a phone, and keys. She testified that the first perpetrator approached the driver's side of the vehicle and that he was wearing a red sweater with what looked like little polka dots. He also repeatedly demanded that the victims empty everything and give it to them, and he urged the man with the gun to "just shoot 'em." The second victim testified that if the second perpetrator did not want what she was offering to him, he told her to put it on the floor; this included her food, napkins, and some papers that were in the vehicle. She explained that she "just wanted to make him happy" and was thus offering him everything she had.

At trial, the second victim was shown a photograph of codefendant and identified him as the first perpetrator, i.e., the man in the red sweater. She was also shown a still photo from video surveillance footage of the front of the laundromat and identified the two men in the photo as the men who robbed them. She testified that she had seen both men prior to the robbery circling the laundromat as she was doing her laundry. Three days after the robbery, the second victim met with an investigator and identified defendant from a six-person photo array as the second perpetrator. The investigator testified that the second victim picked defendant out almost immediately. After the second victim identified defendant, the investigator began writing up the deposition. At that point, the second victim asked to see more photos to "make sure [she] was [a] hundred percent correct" in her identification.

The investigator transported the second victim to the police station, where he assembled additional photo arrays and showed them to her; he also acquiesced to her request to view the first photo array at the same time. The second victim picked out a different photo of defendant, which was actually an older photograph of him. Eight months later, the second victim was asked to view a lineup. She again positively identified defendant and testified that it took her 10 seconds to do so. Finally, the second victim identified defendant at trial. In response to a question from defense counsel on cross-examination, she testified that she "never had doubt" about her identification of defendant.

Three days after the robbery, the police executed a search warrant at codefendant's residence, located about a mile from the scene of the robbery. There, they recovered keys that the first victim identified as his, and they recovered a distinctive red sweater that the second victim identified as the one worn by the first perpetrator during the robbery. The People also presented testimony

that defendant and codefendant were brothers and that defendant had been seen at codefendant's residence on occasion.

II. Weight of the Evidence

In determining whether a verdict is against the weight of the evidence, we must first determine whether, "based on all the credible evidence[,] a different finding would not have been unreasonable" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). If so, "then [we] must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*id.*, quoting *People ex rel. MacCracken v Miller*, 291 NY 55, 62 [1943]). Weight of the evidence review is not an "open invitation" for an appellate court to substitute its judgment for that of the jury (*People v Cahill*, 2 NY3d 14, 58 [2003] [internal quotation marks omitted]). Rather, in reviewing the evidence, we "must give '[g]reat deference' to the jury's verdict . . . precisely because '[t]he memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by those who see and hear than by those who simply read the printed narrative' " (*People v Romero*, 7 NY3d 633, 645 [2006]). Stated another way, it is the "fact-finder[ ]" that has the "opportunity to view the witnesses, hear the testimony and observe demeanor" (*Bleakley*, 69 NY2d at 495), and "those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" (*People v Lane*, 7 NY3d 888, 890 [2006]).

Contrary to the conclusion of the dissent, the facts of this case do not warrant the substitution of our credibility determinations for those made by the jury (*see generally People v Delamota*, 18 NY3d 107, 116-117 [2011]). We conclude that the second victim's identification of defendant was not "incredible and unbelievable, that is, impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Wallace*, 306 AD2d 802, 802-803 [4th Dept 2003] [internal quotation marks omitted]). The issues of her identification of defendant and her credibility "were properly considered by the jury and there is no basis for disturbing its determinations" (*People v Gonzalez*, 208 AD3d 981, 982 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022] [internal quotation marks omitted]; *see People v Brown*, 204 AD3d 1390, 1393 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]; *see generally Bleakley*, 69 NY2d at 495). We note that the second victim "never wavered in her testimony regarding the events or her identification of defendant" (*People v Freeman*, 206 AD3d 1694, 1696 [4th Dept 2022] [internal quotation marks omitted]).

The dissent concludes that the verdict is against the weight of the evidence because this was a cross-racial identification by the second victim, her memory was flawed and tainted by police suggestivity, and her identification was the only evidence against defendant.

Initially, contrary to the repeated statements of the dissent, the second victim's identification of defendant was *not* the only evidence implicating him. As noted earlier, defendant was the *brother* of codefendant, who was conclusively linked to the robbery. The second victim identified *both* defendant and codefendant as the perpetrators, so this is not a situation in which a victim mistakenly identifies a relative of the actual perpetrator. While the dissent gives no weight to the fact that codefendant and defendant were brothers, the jury could certainly infer that the second victim's identification of defendant as the second perpetrator was not merely an unfortunate coincidence for defendant.

Regarding the second victim's identification of defendant, all of the reasons raised by the dissent as to why it believes her identification was unreliable were addressed forcefully by defense counsel during cross-examination of the witnesses, including extensive questioning of the second victim regarding her ability to observe the second perpetrator while under the stress of the event and extensive questioning of the investigator regarding police procedures and policies for conducting photo arrays. Defense counsel repeated those points in summation, including the point that the jury should take into account that this was a cross-racial identification. The jury thus had before it all the arguments as to why the second victim's identification of defendant might be incorrect, yet it still found her identification of him credible, for good reason. She identified defendant on *four* separate occasions.

We disagree with the dissent's characterization of the second victim's identifications of defendant from the two photo arrays as wavering and uncertain. She quickly identified defendant in the first photo array and simply wanted to see additional arrays to be certain of her identification. Although she identified a different photograph of defendant in the second photo array procedure, she was still identifying defendant as the second perpetrator. We note that the two photographs of defendant have obvious similarities, but there are differences too, including an age difference and the fact that defendant has slightly longer hair and is squinting a bit in one of the photographs.

We further disagree with the dissent that police suggestivity tainted the second victim's identification of defendant. We note that the dissent's reliance on amendments to CPL 60.25 is misplaced. CPL 60.25 allows the admission of a pretrial identification made by a witness as evidence in chief only where the witness at trial has a lack of present recollection of the defendant as the perpetrator (*see People v Patterson*, 93 NY2d 80, 82 [1999]; *People v Bryant*, 211 AD3d 848, 849-850 [2d Dept 2022], *lv denied* 39 NY3d 1077 [2023]; *People v Ott*, 200 AD3d 1642, 1645 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022], *cert denied* — US —, 143 S Ct 403 [2022]). That statute does not apply here inasmuch as the second victim was able to positively identify defendant at trial as the second perpetrator. Instead, the testimony regarding the two photo array identification procedures was introduced after defense counsel opened the door to that testimony by asking the second victim whether she told the investigator that she

was second-guessing her identification of defendant as the second perpetrator (*see People v Jones*, 147 AD3d 1551, 1552 [4th Dept 2017], *lv denied* 29 NY3d 999 [2017], *reconsideration denied* 29 NY3d 1082 [2017]; *People v Williams*, 142 AD3d 1360, 1361 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016]). In any event, as the dissent recognizes, at the time the photo arrays were conducted, they were not required to be made pursuant to a " 'blind or blinded procedure' " (CPL 60.25 [1] [c]; *see People v Shabazz*, 211 AD3d 1093, 1099 n 1 [3d Dept 2022], *lv denied* 39 NY3d 1113 [2023]).

Regarding the second photo array procedure, "[i]t is well settled that '[m]ultiple pretrial identification procedures are not inherently suggestive' " (*People v Morgan*, 96 AD3d 1418, 1419 [4th Dept 2012], *lv denied* 20 NY3d 987 [2012]; *see People v Wilson*, 120 AD3d 1531, 1532 [4th Dept 2014], *affd* 28 NY3d 67 [2016], *rearg denied* 28 NY3d 1158 [2017]). Here, as noted, a different photograph of defendant was used in the second photo array (*see People v Dickerson*, 66 AD3d 1371, 1372 [4th Dept 2009], *lv denied* 13 NY3d 859 [2009]). Further, we disagree with the dissent that any possible taint from the photo arrays also tainted the lineup identification conducted months later (*see Morgan*, 96 AD3d at 1419-1420). Indeed, "the potential for irreparable misidentification is not manifest when the eyewitness views an array containing a photograph of the defendant and subsequently views the defendant in person during a lineup" (*id.* [internal quotation marks omitted]), particularly here, where the lineup was not conducted until eight months later.

With respect to the second victim's memory of the incident, any discrepancies in her description of the perpetrators' clothing was minor and could be attributed to the stress of the event, but that does not lead us to conclude that the verdict is against the weight of the evidence (*see generally Romero*, 7 NY3d at 645-646). Although video surveillance footage showed the second perpetrator wearing a ball cap, he could have removed that prior to the robbery or pulled his hoodie over it. The second victim also testified that it looked like the second perpetrator had a shaved head under his hoodie, whereas an officer testified at trial that he saw defendant five days after the robbery and he looked like he did at the trial, i.e., without a shaved head. Nevertheless, we note that the photographs of defendant in the first photo array and from the lineup show that he had closely-cropped hair and a high forehead, and when wearing a hoodie, the front part of his head could appear bald or shaven.

We disagree with the dissent that this case is similar to *People v Miller* (191 AD3d 111, 115 [4th Dept 2020]), in which this Court reversed a conviction on the weight of the evidence where the only evidence linking the defendant to the crime was the eyewitness identification of him by the victim. We found several factors that called into question the reliability of the identification (*see id.* at 116) but, importantly, we also found "considerable objective evidence supporting defendant's innocence" (*id.*). That is simply not the case here. The video evidence showing codefendant wearing a red hoodie and dark pants, rather than the red hoodie and red pants described by the second victim, and showing the second perpetrator wearing a ball cap

when the second victim never testified that the second perpetrator was wearing a cap, is not nearly of the same magnitude as the objective evidence supporting the defendant's innocence in *Miller*.

"Sitting as the thirteenth juror . . . [and] weigh[ing] the evidence in light of the elements of the crime[s] as charged to the other jurors" (*People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495; *People v Davis*, 115 AD3d 1167, 1168-1169 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014]).

III. Jury Charge

Defendant failed to preserve for our review his contention that County Court's charge to the jury regarding cross-racial identifications was inadequate (*see Gonzalez*, 208 AD3d at 982; *People v Wisniewski*, 191 AD3d 1435, 1437 [4th Dept 2021], *lv denied* 36 NY3d 1125 [2021]). In any event, we conclude that defendant's contention is without merit and note that the court instructed the jury using the model instruction on one-witness identifications and cross-racial identifications (*see generally People v J.L.*, 36 NY3d 112, 122-123 [2020]; *People v Heiserman*, 127 AD3d 1422, 1424-1425 [3d Dept 2015]).

Contrary to defendant's further contention, the court did not abuse its discretion in denying defendant's request for a jury instruction on the photo array procedures used by an investigator (*see generally People v Inniss*, 83 NY2d 653, 659 [1994]; *People v Carmona*, 168 AD3d 499, 500 [1st Dept 2019], *lv denied* 33 NY3d 1029 [2019]). The charge as given conveyed the relevant legal principles regarding witness identifications, and through defense counsel's extensive cross-examination of the investigator on the issue and his summation to the jury, the jury was aware of the need to carefully scrutinize the second victim's identification of defendant (*see generally Inniss*, 83 NY2d at 659; *People v Linares*, 167 AD3d 1067, 1070-1071 [3d Dept 2018], *lv denied* 33 NY3d 950 [2019]).

IV. Sentence

We reject defendant's contention that, in sentencing him, the court improperly penalized him for exercising his right to a jury trial. " 'The imposition of a more severe sentence after trial than that offered to defendant pursuant to a plea offer that [defendant] rejected, without more, does not support the contention of defendant that he was penalized for exercising his right to go to trial' " (*People v Brown*, 67 AD3d 1427, 1427 [4th Dept 2009], *lv denied* 14 NY3d 839 [2010]; *see People v Konovalchuk*, 148 AD3d 1514, 1515 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]). We conclude that the record contains no evidence that the sentence was the product of retaliation or vindictiveness against defendant (*see People v Gorton*, 195 AD3d 1428, 1430 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *Konovalchuk*, 148 AD3d at 1515). The sentence is not unduly harsh or

severe.

V. Conclusion

Accordingly, we affirm the judgment.

All concur except NOWAK, J., who dissents and votes to reverse in accordance with the following memorandum: "I don't know if I got the right guy." Seated in a police cruiser at 9:40 p.m. on an October night three days after the robbery, the only witness to identify defendant began to question whether "she picked out the correct person" and second guess whether defendant was involved in the robbery. She thus requested to see additional arrays for three individuals—half of the men—shown in the initial array.

The investigator conducting the photo arrays drove the witness (referred to by the majority as the "second victim") to the police station and prepared three additional photo arrays by placing each potential suspect in a separate array. The investigator then permitted the witness to flip the three new arrays, along with the initial array on which she had circled defendant's photograph, and view the four arrays together, in express violation of Rochester Police Department rules. During that second viewing of photo arrays, the witness purported to "change her mind," disavow her initial identification, and identify someone who she believed to be a different person entirely. However, the investigator corrected her, saying, "that just happens to be the same person you picked out in the first array."

Approximately eight months after the robbery, the witness viewed a police lineup and identified defendant in mere "seconds." At trial, the witness was shown a still photo taken from surveillance video at the laundromat and identified defendant during her live testimony. Neither the still photo nor the surveillance video from the laundromat were entered in evidence, and they are not part of the record on appeal.

Despite her repeated uncertainty during the first and second photo arrays, the witness told the jury that she "never had doubt" whether defendant was the perpetrator who brandished the gun.

Defendant was convicted of two counts of robbery in the first degree (Penal Law § 160.15 [4]) and two counts of robbery in the second degree (§ 160.10 [1]). Because the lone evidence of defendant's guilt was the witness' cross-racial identification, the product of her flawed memory tainted by police suggestivity, I respectfully dissent.

Where, as here, a defendant contends that the verdict is against the weight of the evidence, this Court is obligated to review the factual findings of the jury (*see People v Danielson*, 9 NY3d 342, 348 [2007]; *see generally* CPL 470.15 [5]) and, if an acquittal would not have been unreasonable, we "must, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative

strength of conflicting inferences that may be drawn from the testimony" (*People v Bleakley*, 69 NY2d 490, 495 [1987] [internal quotation marks omitted]; *see People v Miller*, 191 AD3d 111, 115 [4th Dept 2020]). The "Court of Appeals has stressed the importance of the role of the Appellate Division in serving, 'in effect, as a second jury,' to 'affirmatively review the record; independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if the court is not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt' " (*People v Carter*, 158 AD3d 1105, 1112 [4th Dept 2018], quoting *People v Delamota*, 18 NY3d 107, 116-117 [2011]; *see People v Oberlander*, 94 AD3d 1459, 1459 [4th Dept 2012]).

Inasmuch as "the only evidence linking defendant to the crime was the eyewitness identification by the [witness]," I agree with the majority that an acquittal would not have been unreasonable (*Miller*, 191 AD3d at 115). Upon my review of the weight of the evidence, I note several factors that call into question the reliability of the witness' identification of defendant as one of the robbers. First, the stress of a robbery and the presence of a gun increase the likelihood of misidentification (*see id.* at 116). Here, the witness—who admitted that her attention was on the gun and that her life "flashe[d] before [her] eyes"—was so nervous during the robbery that she attempted to assuage the robbers by giving them the food she was eating and the napkins in her lap.

It is perhaps unsurprising, then, that the witness was not able to accurately perceive and recall the events of the robbery just after it occurred. Indeed, in the statement she gave mere minutes after the robbery, she asserted that one man wore a black sweatshirt with the hood up and no hat and that the other man wore red sweat pants. Those details, however, were contradicted by surveillance video from a nearby CVS store that showed the perpetrators as they left the scene. Moreover, she described the man in black as having a shaved head, but when police encountered defendant some five days after the robbery, he was not bald and his head was not shaven.

The inconsistencies between the witness' contemporaneous account and the objective evidence only highlight the impermissibly suggestive police procedures in this case. The codefendant, who was defendant's brother, was identified by three separate individuals at the laundromat hours after the robbery. Thus, three days later, police effected a search at the one-bedroom apartment where defendant's mother and brother both resided. Later that night, one of the investigators who participated in the search prepared the initial photo array containing defendant's photograph and presented it to the witness in his police cruiser. The investigator administering the array knew that defendant was a suspect and was aware of defendant's location in the array at the time he presented it to the witness and, thus, this was not a blind array as contemplated by CPL 60.25 (1) (c).

CPL 60.25 was amended effective July 1, 2017, to require

"preclusion of testimony regarding the identification procedure as evidence in chief" where the identification was the result of a non-blind procedure (CPL 60.25 [1] [c]), a tacit, if not express, recognition by the legislature that non-blinded arrays are so suggestive as to require preclusion as evidence in chief as a matter of course. The amendment was effective at the time of trial (and at the time of the *Wade* hearing), but not when the photo array was conducted.

Upon viewing the inherently suggestive initial array, the witness identified defendant, but shortly thereafter began to question if "she picked out the correct person" saying, "I don't remember—I don't know if I got the right guy." The witness thus requested additional arrays for three of the six individuals, and the same investigator compiled additional non-blind arrays by placing each individual in a separate array with five other people.

The second identification procedure compounded the suggestive nature of the initial array in three crucial ways. First, the arrays were inherently suggestive, inasmuch as the investigator who prepared them knew the location and identity of the suspect at the time he presented the arrays to the witness (*see* CPL 60.25 [1] [c]). Second, by allowing the witness to have the photo of defendant—which she previously circled—in front of her while viewing the subsequent arrays, the investigator essentially turned the procedure into a subconscious matching game in express violation of Rochester Police Department rules and regulations; regulations presumably promulgated to prevent misidentification. Most critically, however, the investigator gave the witness false sense of security in her identification by confirming that she had identified the same person twice, despite the fact that she purported to disavow her initial identification, "change her mind," and identify a different suspect. When the witness expressed uncertainty as to her identification, the investigator's improper conduct removed all doubt.

The fact that the witness later identified defendant in "[l]ess than 30 seconds" during a subsequent lineup does little to cure the improperly suggestive police conduct in this case; rather, it shows the extent to which the improperly suggestive police conduct tainted the witness' subsequent identifications. Contrary to the majority's suggestion, defendant does not argue, and I do not conclude, that multiple pretrial identification procedures are, in and of themselves, inherently suggestive (*see People v Morgan*, 96 AD3d 1418, 1419 [4th Dept 2012], *lv denied* 20 NY3d 987 [2012]). Rather, the specific facts and circumstances of the identifications *here* were unduly suggestive (*see generally People v Marshall*, 26 NY3d 495, 504 [2015]). Here, the witness was repeatedly uncertain about her identification—so much so that she could rule out only 50% of the men shown in the initial array—and became convinced of her identification only after viewing two suggestive photo arrays punctuated by the administering investigator's commentary, where he all but patted her on the back and told her she got the right man.

The relative ease with which the witness identified defendant in

"seconds" during the subsequent lineup, and at trial where she testified that she "never had doubt" as to defendant's identity, stands in stark contrast to her earlier wavering and uncertain identifications which took place just three days after the robbery but lasted several hours. "It is inescapable that '[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification' " (*Marshall*, 26 NY3d at 503, citing *United States v Wade*, 388 US 218, 228 [1967]). In fact, "[r]egardless of how the initial misidentification comes about, the witness thereafter is apt to retain in . . . memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification" (*Simmons v United States*, 390 US 377, 383-384 [1968]).

To that end, studies have shown that even in the absence of suggestive police procedures, witnesses tend to grow more confident over time; however, confidence does not make an identification more accurate (*see People v Perdue*, 41 NY3d 245, 258 [2023, Rivera, J., dissenting]). Indeed, one study found that, "out of 190 DNA exonerations involving a misidentification, 40% involved a witness who did not initially identify the innocent suspect but by the time of trial were completely certain of their identification" (*id.* at 259 [Rivera, J., dissenting]).

The peril of relying on the witness' identification here is underscored by the fact that police did not recover any stolen items in a manner that directly implicated defendant (*see People v Coffie*, 192 AD3d 1641, 1642 [4th Dept 2021], *lv denied* 37 NY3d 963 [2021]; *Miller*, 191 AD3d at 116). The search of the one-bedroom apartment where defendant's mother and codefendant brother resided did not produce the weapon or any other physical evidence tying defendant—as opposed to his brother—to the crime. The majority reasons that codefendant's possession of stolen property implicated defendant merely because the two men were related and defendant visited his mother and codefendant at their apartment. Taken to its logical conclusion, any person related to a criminal defendant is also implicated in that defendant's criminal activity merely by visiting with them.

It is of no small moment that the witness was white and thus the identification was cross-racial, compounding its unreliability (*see generally People v Boone*, 30 NY3d 521, 534-536 [2017]), particularly in light of the inaccuracy of the witness' memory when compared to the surveillance video, the impermissibly suggestive identification procedures, and the absence of any tangible link between the stolen property and defendant. Indeed, "[m]istaken eyewitness identifications are 'the single greatest cause of wrongful convictions in this country' " (*id.* at 527), and the "likelihood of misidentification is higher when an identification is cross-racial" inasmuch as "people have significantly greater difficulty accurately identifying members of other races than members of their own race" (*id.* at 528). As set forth above, during the initial photo array, the

witness requested to see additional photographs of three of the six individuals—all black men who look nothing alike—because she was uncertain as to her identification. During a subsequent photo array, the witness circled a different photograph of defendant. As the majority notes, "the two photographs of defendant [from the initial and second array] have obvious similarities;" nonetheless, the witness believed that she was identifying a different person entirely.

Unlike the majority, I find no solace in the jury's credibility determination, given the "risk that a jury may credit a tainted identification" (*Perdue*, 41 NY3d at 250). Indeed, " 'there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says "That's the one!" ' " (*Watkins v Sowders*, 449 US 341, 352 [1981, Brennan, J., dissenting]).

Defendant does not argue on appeal that Supreme Court erred in refusing to suppress the witness' pretrial identifications. Nor does he argue that the suggestive nature of the photo arrays tainted the subsequent identification procedures so as to require preclusion of the witness' in-court identification (*see Marshall*, 26 NY3d at 504). Had defendant challenged the court's *Wade* ruling on appeal, we could have evaluated those contentions (*see id.*; *see generally Perdue*, 41 NY3d at 252-253). Nonetheless, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), I conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495). I would therefore reverse the judgment and dismiss the indictment (*see* CPL 470.20 [5]; *People v Marchant*, 152 AD3d 1243, 1244 [4th Dept 2017]).

"We can and must do better to protect the integrity of the criminal legal system and to protect defendants by avoiding the risk of convictions of the innocent based on misidentifications" (*Perdue*, 41 NY3d at 254 [Rivera, J., dissenting]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

187.1

CAF 23-00849

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

IN THE MATTER OF MEKAYLA S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIEL K., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

NICHOLAS T. TEXIDO, WEST SENECA, FOR RESPONDENT-APPELLANT.

BENJAMIN MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 15, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent abused the subject child.

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

Same memorandum as in *Matter of Gabriel H. (Daniel K.)* ([appeal No. 1] — AD3d — [July 3, 2024] [4th Dept 2024]).

All concur except CURRAN and OGDEN, JJ., who dissent and vote to reverse in accordance with the same dissenting memorandum as in *Matter of Gabriel H. (Daniel K.)* ([appeal No. 1] — AD3d — [July 3, 2024] [4th Dept 2024]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

187

CAF 23-01211

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

IN THE MATTER OF GABRIEL H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIEL K., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

NICHOLAS T. TEXIDO, WEST SENECA, FOR RESPONDENT-APPELLANT.

BENJAMIN MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 15, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent derivatively abused the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent appeals in appeal No. 2 from an order of fact-finding and disposition that, inter alia, determined that he abused the daughter of his girlfriend (mother) and, in appeal No. 1, he appeals from an order of fact-finding and disposition that, inter alia, determined that he derivatively abused the mother's son. The evidence against respondent at the fact-finding hearing consisted chiefly of videos depicting him sexually abusing the daughter in the living room of a house, and respondent contends with respect to both appeals that Family Court improperly admitted those videos in evidence. Although we disagree with petitioner that respondent failed to preserve that contention for our review, we nevertheless reject respondent's contention.

The videos were discovered by the Federal Bureau of Investigation (FBI) during an unrelated investigation in late January 2022 into the trading of child pornography. The FBI executed a search warrant upon a person (suspect) who was a subject of their investigation. The suspect admitted to an FBI special agent that he had been hacking into security web cameras and that, in 2019, he had hacked into a security camera where he observed what he believed was an adult male sexually abusing a teenage girl. The FBI obtained from the suspect's computer

three videos and details of the security camera login information, including an email address. Through the FBI's investigative work, together with the assistance of the New York State Police, it was determined that the videos came from a camera in a house where respondent resided with the mother and the children who are the subject of these proceedings. The FBI agent explained how he copied the videos from the suspect's computer onto a DVD, and he testified that the videos on the DVD that was admitted in evidence at the fact-finding hearing were true and accurate copies of the videos he viewed on the suspect's computer. He testified that he did not make any observations that led him to believe that the video footage had been tampered with or altered in any way. The videos were date-stamped from May, June, and July 2019. A detective with the State Police testified that he showed screenshots of the videos to the mother, who identified the female in one image as her daughter and the male in another as respondent, her live-in boyfriend. Upon entering the mother's residence, the detective observed cameras in the house, including in the living room, and he testified that the living room and its furnishings matched what was shown in the videos.

Respondent contends that petitioner failed to authenticate the videos through the testimony of a person who witnessed the events, the maker of the videos, or someone with sufficient knowledge of the surveillance system to show that it accurately recorded the events. Respondent further contends that petitioner failed to establish that the videos were not fabricated by the suspect. It is well settled that the admissibility of video evidence rests within the sound discretion of the trial court so long as a sufficient foundation for its admissibility has been proffered (*see People v Patterson*, 93 NY2d 80, 84 [1999]). "[A]uthenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it" (*People v McGee*, 49 NY2d 48, 59 [1979], *cert denied* 446 US 942 [1980]; *see People v Price*, 29 NY3d 472, 476 [2017]). A video "may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the video[ ] accurately represents the subject matter depicted" (*Patterson*, 93 NY2d at 84). It may also be authenticated, however, by "[t]estimony, expert or otherwise . . . [to] establish that a video[ ] 'truly and accurately represents what was before the camera' " (*id.*). "[T]he foundation necessary to establish [authenticity] may differ according to the nature of the evidence sought to be admitted" (*People v Goldman*, 35 NY3d 582, 595 [2020] [internal quotation marks omitted]).

We agree with the court that the videos were sufficiently authenticated and that "any alleged uncertainty went to the weight to be accorded the evidence rather than its admissibility" (*People v Houston*, 181 AD3d 477, 478 [1st Dept 2020], *lv denied* 35 NY3d 1027 [2020] [internal quotation marks omitted]). The testimony of the special agent and detective authenticated the videos through circumstantial evidence of their "appearance, contents, substance, internal patterns, and other distinctive characteristics" (*People v Franzese*, 154 AD3d 706, 707 [2d Dept 2017], *lv denied* 30 NY3d 1105 [2018]; *see* Guide to NY Evid rule 9.05 [6], Methods of Authentication

and Identification; *see also People v Jordan*, 181 AD3d 1248, 1249-1250 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]; *see generally Goldman*, 35 NY3d at 595-596). The testimony at the hearing established that the videos depicted a living room of the home where the mother, her children, and respondent lived. The detective testified that the mother identified her daughter and respondent in screenshots taken from the videos; that he observed cameras in the house, including in the living room; and that he observed that the living room and its furnishings matched what was shown in the videos. In other words, there were "distinctive identifying characteristics" in the videos themselves (*Goldman*, 35 NY3d at 595). There was also the "significant fact" that respondent "did not dispute that he was the individual who appeared in the video[s]" (*id.*). In addition, the special agent testified that he primarily investigated child pornography and performed digital forensic work, and he saw no signs of alteration or tampering with the videos. We therefore conclude that petitioner established that the videos "accurately represent[ed] the subject matter depicted" (*id.* [internal quotation marks omitted]), and we conclude that the court acted within its "founded discretion" (*Patterson*, 93 NY2d at 84) in admitting them in evidence.

Contrary to respondent's further contention in appeal No. 2, there is a sound and substantial basis in the record supporting the court's determination that he abused the daughter (*see Matter of Skyler D. [Joseph D.]*, 185 AD3d 1515, 1516 [4th Dept 2020]; *see generally Matter of Philip M.*, 82 NY2d 238, 243-244 [1993]). Respondent does not dispute that the acts shown on the videos constitute sex offenses (*see* Family Ct Act § 1012 [e] [iii]), but he contends that the videos should be given little to no weight because they could be "deepfakes." The court afforded the videos great weight based on clear evidence of their reliability, including that the room depicted in the videos was the same room that was shown on photographs taken by the police when they searched the home where respondent, the mother, and her children lived. As the court noted, the same couch, afghan, end table, and lamp were all visible in the videos and photographs. Other items the police recovered from the home were also seen in the videos. In addition, respondent, the mother, and the children were all easily identifiable in the videos, and we agree with the court's determination that the "actions, dialog, and behavior shown in the videos show no indication of any tampering." There were no visible cuts or edits, or jumps in the time stamps on the videos.

We reject respondent's further contention in appeal No. 1 that the finding of derivative abuse with respect to the son is not supported by a preponderance of the evidence (*see Skyler D.*, 185 AD3d at 1517). The abuse of the daughter occurred in the living room of the house, which is easily accessible to anyone in the house. The son was depicted in one video just 15 minutes before respondent abused the daughter. We conclude that the court properly determined that the son is an abused child "inasmuch as the abuse of [the daughter] 'is so closely connected with the care of [the son] as to indicate that [the son] is equally at risk' " (*Matter of Alyssa C.M.*, 17 AD3d 1023, 1024 [4th Dept 2005], *lv denied* 5 NY3d 706 [2005]; *see Matter of Markeith G. [Deon W.]*, 152 AD3d 424, 425 [1st Dept 2017]; *see generally Matter*

of Marino S., 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]).

Respondent's contention in appeal No. 2 regarding the order of protection issued against him in favor of the daughter is moot inasmuch as that order has been vacated. Respondent's further contention in appeal No. 1 that the court erred in including a certain provision with respect to the order of protection issued against him in favor of the son is not preserved for our review (*see Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1438 [4th Dept 2011]). We decline to address that contention in the interest of justice (*see id.*).

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

All concur except CURRAN and OGDEN, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent and would reverse the orders and dismiss the petitions at the center of these two appeals because we conclude, contrary to the majority, that Family Court erred in admitting in evidence home surveillance videos depicting respondent sexually abusing the daughter of his girlfriend (mother). The videos formed the primary basis for the determinations that respondent abused the daughter and derivatively abused the mother's son. A joint fact-finding hearing was held with respect to the petitions against respondent and the mother, who herself was ultimately found—based on the same essential evidence—to have abused the daughter and derivatively abused the son because she knew or should have known about respondent's sexual abuse but did nothing to stop it. The mother separately appealed from the orders of fact-finding and disposition determining that she abused the daughter and derivatively abused the son, and this Court affirmed the orders in those appeals (*Matter of Mekayla S. [Melanie H.]* [appeal No. 1], — AD3d —, — [July 3, 2024] [4th Dept 2024]; *Matter of Gabriel H. [Melanie H.]* [appeal No. 2], — AD3d —, — [July 3, 2024] [4th Dept 2024] [decided herewith]).

Here, in concluding that the court erred in admitting in evidence the videos with respect to respondent's appeals, we agree with and adopt the rationale contained in the dissent of Presiding Justice Whalen in the mother's appeals concluding that, during the joint fact-finding hearing, petitioner did not sufficiently authenticate the videos inasmuch as there was no testimony, expert or otherwise establishing that the videos truly and accurately represented what was before the camera (*see Mekayla S.*, — AD3d at — [Whalen, P.J., dissenting]; *see People v Patterson*, 93 NY2d 80, 84 [1999]; *Torres v Hickman*, 162 AD3d 821, 823 [2d Dept 2018]). That rationale applies with equal force here, in respondent's appeals, inasmuch as the abuse and derivative abuse determinations with respect to both the mother's appeals and respondent's appeals were based on identical evidence. Specifically, as noted in the dissent in the mother's appeals, petitioner did not offer any testimony from any person who witnessed the events depicted in the videos or who had controlled or maintained

the system that recorded the videos. Instead, petitioner relied largely on the testimony of an agent of the Federal Bureau of Investigation (FBI) who—more than two years after the videos were recorded—transferred the videos from the computer of an individual who was a subject of an FBI investigation (suspect). The suspect had obtained the videos by hacking into a security camera at the house respondent shared with the mother and the subject children. We agree with the dissent in the mother's appeals that the FBI agent's testimony was insufficient, by itself, to authenticate the videos because he did not have any personal knowledge of the creation of the videos or how they were obtained by the suspect, nor did his testimony establish how his experience "perform[ing] digital forensic work" might have "trained him to identify alterations to [the] videos" or provide any basis for his belief that the videos had not been edited or altered (*Mekayla S.*, — AD3d at — [Whalen, P.J., dissenting]).

In light of our conclusion that petitioner did not provide a sufficient legal foundation (*see Patterson*, 93 NY2d at 85), we conclude that the videos should not have been admitted in evidence. Without the videos, there is no evidence to sustain the petitions and, consequently, we would reverse the order in each appeal and dismiss the petitions.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 19-00294

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERROL POTTINGER, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, 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 Monroe County Court (Victoria M. Argento, J.), dated December 27, 2018. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant upon a jury verdict of assault in the first degree (two counts), robbery in the first degree (two counts) and robbery in the second degree.

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

Memorandum: Defendant appeals from an order denying his CPL 440.10 motion to vacate a judgment convicting him, following a jury trial, of, inter alia, two counts each of assault in the first degree (Penal Law § 120.10 [1], [4]) and robbery in the first degree (§ 160.15 [1], [2]). We affirmed the judgment of conviction (*People v Pottinger*, 71 AD3d 1492 [4th Dept 2010], *lv denied* 15 NY3d 755 [2010]). On defendant's appeal from the initial order with respect to his CPL 440.10 motion, we reversed and remitted the matter for a hearing (*People v Pottinger*, 156 AD3d 1379 [4th Dept 2017]). Following the hearing, County Court again denied the motion, and we now affirm.

Contrary to defendant's contention, the court did not err in refusing to substitute new assigned counsel on the motion. The determination whether to substitute counsel lies within the discretion and responsibility of the motion court, which is required to consider a substitution "only where a defendant makes a seemingly serious request[ ]" (*People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]; *see People v Sides*, 75 NY2d 822, 824 [1990]). We conclude that the court properly determined that defendant's request for a new attorney was not serious. Defendant's

vague assertions did not indicate that there was a serious possibility of good cause for substitution (*see People v MacLean*, 48 AD3d 1215, 1217 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008], *reconsideration denied* 11 NY3d 790 [2008]; *People v Benson*, 265 AD2d 814, 814-815 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999], *cert denied* 529 US 1076 [2000]; *cf. Sides*, 75 NY2d at 824-825; *People v Gibson*, 126 AD3d 1300, 1302-1303 [4th Dept 2015]).

We further conclude that the court did not err in denying defendant's request for an adjournment of the hearing to secure testimony from an alleged alibi witness. The determination whether to grant an adjournment is a matter of discretion for the motion court (*see generally People v Singleton*, 41 NY2d 402, 405 [1977]). When seeking an adjournment to procure a witness, it is incumbent on a defendant "to show that the witness's testimony would be material, noncumulative and favorable to the defense" (*People v Softic*, 17 AD3d 1075, 1076 [4th Dept 2005], *lv denied* 5 NY3d 794 [2005]). Defendant has failed to meet his burden inasmuch as the testimony of that witness would have been cumulative to the testimony of defendant's trial attorney (*see id.*).

Finally, we reject defendant's contention that he was denied effective assistance of counsel at trial. " 'To prevail on a claim of ineffective assistance of counsel, it is incumbent on [the] defendant to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" (*People v Cleveland*, 217 AD3d 1346, 1349 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023], *lv denied* 41 NY3d 942 [2024], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). Here, defendant failed to demonstrate the absence of a legitimate explanation for his trial counsel's failure to pursue an alibi defense (*see People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Conway*, 148 AD3d 1739, 1744 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

201

KA 19-01386

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KADEEM HARRIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered June 4, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree, and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed on count 2 to a determinate term of 14 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Defendant contends that County Court erred in denying his challenge for cause to a prospective juror. With respect to defendant's specific contention that the prospective juror should have been removed for cause because she did not unequivocally state that her deliberations would not be affected by sympathy, we conclude that such a contention is not preserved for our review (*see People v Smith*, 200 AD3d 1689, 1691 [4th Dept 2021], *lv denied* 38 NY3d 954 [2022]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant's preserved contention with respect to that prospective juror, i.e., that the prospective juror should have been excused for cause based upon her statement that she was "worried about pictures" and that a photograph of "[a] dead body" would "bother" her, is without merit. "A determination of whether jurors lack the ability to

be impartial turns on whether, based on the totality of the voir dire record, it is evident that a preference for one side over the other would impact their decision-making" (*People v Maffei*, 35 NY3d 264, 270 [2020]). Here, we conclude that the juror's statements did not "raise a serious doubt regarding [her] ability to be impartial" (*People v Santiago*, 218 AD3d 1270, 1271 [4th Dept 2023] [internal quotation marks omitted]; *see generally People v Bludson*, 97 NY2d 644, 645-646 [2001]) and therefore it was not an abuse of discretion for the court to deny defendant's challenge for cause (*see People v Turner*, 221 AD3d 1590, 1591 [4th Dept 2023], *lv denied* — NY3d — [2024]; *People v Fowler-Graham*, 124 AD3d 1403, 1403 [4th Dept 2015], *lv denied* 25 NY3d 1072 [2015]; *cf. People v Linnan*, 23 AD3d 1013, 1014 [4th Dept 2005]).

Defendant further contends that the court violated his rights to confront the People's witnesses, to present a defense, and to due process by improperly limiting his cross-examination of a prosecution witness. Defendant's contentions are not preserved for our review inasmuch as he never objected on the grounds he now raises on appeal (*see People v Lane*, 7 NY3d 888, 889 [2006]; *People v Jones*, 193 AD3d 1410, 1412 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *see generally People v David*, 41 NY3d 90, 95-96 [2023]). We decline to exercise our power to review those contentions 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 crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that the sentence is unduly harsh and severe. Defendant was sentenced to consecutive terms of incarceration of 21 years to life on the murder count and 23 years determinate on the attempted murder count, for an aggregate term of incarceration of 44 years to life. His codefendant received an aggregate term of incarceration of 25 years to life. Although defendant's lengthier aggregate sentence is appropriate inasmuch as he was the shooter, we conclude as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]) that the sentence should be reduced to an aggregate term of 35 years of incarceration. We therefore modify the judgment by reducing the sentence imposed on the attempted murder count to a determinate term of 14 years' imprisonment, to be followed by the five years of postrelease supervision imposed by the court, which thereby produces an aggregate term of imprisonment of 35 years.

Entered: July 3, 2024 Ann Dillon Flynn
Clerk of the Court

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

225

CA 23-00489

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

IN THE MATTER OF DOUGLAS W. BLACK,
PETITIONER-APPELLANT,

V ORDER

BLACK AND CALABRESE INTERIOR RESOURCE
COMPANY, LLC, AND DOUGLAS CALABRESE,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

REFERMAT & DANIEL PLLC, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered September 16, 2022. The order, inter alia, judicially dissolved respondent Black and Calabrese Interior Resource Company, LLC.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

226

CA 23-00490

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

IN THE MATTER OF DOUGLAS W. BLACK,
PETITIONER-APPELLANT,

V ORDER

BLACK AND CALABRESE INTERIOR RESOURCE
COMPANY, LLC, AND DOUGLAS CALABRESE,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

REFERMAN & DANIEL PLLC, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered November 22, 2022. The order, inter alia, awarded petitioner $137,172.44 against respondent Black and Calabrese Interior Resource Company, LLC.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

227

CA 23-00491

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

IN THE MATTER OF DOUGLAS W. BLACK,
PETITIONER-APPELLANT,

V ORDER

BLACK AND CALABRESE INTERIOR RESOURCE
COMPANY, LLC, AND DOUGLAS CALABRESE,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 3.)

REFERMAT & DANIEL PLLC, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered December 16, 2022. The order, inter alia, directed that the proceeds of a bank account be paid to petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

228

CA 23-00492

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

IN THE MATTER OF DOUGLAS W. BLACK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BLACK AND CALABRESE INTERIOR RESOURCE
COMPANY, LLC, AND DOUGLAS CALABRESE,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 4.)

REFERMAT & DANIEL PLLC, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), entered January 3, 2023. The judgment, inter alia, awarded petitioner $137,917.44 against respondent Black and Calabrese Interior Resource Company, LLC.

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

Memorandum: On appeal from a judgment that, inter alia, awarded petitioner $137,917.44 following the judicial dissolution of respondent Black and Calabrese Interior Resource Company, LLC (Company) pursuant to section 702 of the Limited Liability Company Law, petitioner contends that Supreme Court erred in failing to order that respondent Douglas Calabrese be held jointly and severally liable for the judgment. We reject that contention. Here, inasmuch as the judgment was granted based on the parties' agreement to dissolve the Company, the court properly imposed the judgment against the Company alone (*see generally Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-142 [1993]).

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-00925

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

IN THE MATTER OF JAYCOB S. AND JAYMES S.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JANICE M., AND ROBERT M.M., II,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

MULLEN ASSOCIATES PLLC, BATH (ALAN P. REED OF COUNSEL), FOR RESPONDENT-APPELLANT ROBERT M.M., II.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT JANICE M.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered December 27, 2021, in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject children in the custody of petitioner and issued "a complete stay-away order of protection" on behalf of the subject children against both respondents.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the order of protection against respondent Robert M.M., II, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondents maternal grandfather and his stepsister appeal, in appeal No. 1, from an order that, inter alia, placed Jaymes S. and Jaycob S. in the custody of petitioner. In appeal No. 2, respondents appeal from an order that, inter alia, placed Jaylynn J. in the custody of petitioner. In each order, Family Court issued "a complete stay-away order of protection . . . on behalf of the children" against respondents.

"Family Court Act § 1046 (a) (ii) provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of [the] respondents, and (2) that [the] respondents were the caretakers of the child at the time the injury occurred" (*Matter of Grayson R.V. [Jessica D.]*, 200 AD3d 1646, 1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022] [internal quotation marks omitted]; *see*

Matter of Philip M., 82 NY2d 238, 243 [1993]; *Matter of Nancy B.*, 207 AD2d 956, 957 [4th Dept 1994]). Contrary to respondents' contention in appeal No. 2, petitioner established that Jaylynn J. suffered numerous injuries that "would ordinarily not occur absent an act or omission of respondents" (*Philip M.*, 82 NY2d at 243). Section 1046 (a) (ii) "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" (*Philip M.*, 82 NY2d at 244). Although the burden of proving child abuse or neglect rests with the petitioner (*see id.*; *Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1493 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]), once the petitioner "has established a prima facie case, the burden of going forward shifts to [the] respondents to rebut the evidence of . . . culpability" (*Philip M.*, 82 NY2d at 244; *see generally Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]). Not only did petitioner elicit medical testimony of Jaylynn J.'s injuries to establish its prima facie case, but it also elicited testimony of the children's disclosures of physical abuse inflicted on Jaylynn J. at the hands of respondents. Petitioner further established that Jaylynn J. failed to receive adequate nutrition in respondents' care (*see Matter of Ahren B.-N. [Gary B.-N.]*, 222 AD3d 1403, 1405 [4th Dept 2023]; *Matter of Dustin B.*, 24 AD3d 1280, 1281 [4th Dept 2005]). Respondents failed to rebut the evidence of culpability.

Contrary to respondents' further contention, we conclude that the court did not impermissibly place the burden of proof on them. Rather, the court's decision reflects that it properly considered whether respondents had rebutted the evidence of their culpability (*see Philip M.*, 82 NY2d at 244).

Contrary to respondents' contention in appeal No. 1, the court properly determined that respondents derivatively neglected Jaymes S. and Jaycob S. Pursuant to Family Court Act § 1046 (a) (i), "proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, [a] respondent." "In order [t]o sustain a finding of derivative neglect, the prior 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 . . . ; however, there is no bright-line, temporal rule beyond which [this Court] will not consider older child protective determinations" (*Matter of Sean P. [Sean P.]*, 162 AD3d 1520, 1520 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018] [internal quotation marks omitted]). We conclude that the evidence adduced at the fact-finding hearing concerning Jaylynn J. indicates that Jaymes S. and Jaycob S. were "equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]).

We agree with respondent grandfather, however, in appeal Nos. 1 and 2, that the court erred in imposing orders of protection against him pursuant to Family Court Act § 1056 (4). "Subdivision (4) of [Family Court Act] section 1056 allows a court to issue an independent order of protection . . . , but only against a person . . . who is not related by blood or marriage to the child" (*Matter of Kayla K. [Emma*

P.-T.], 204 AD3d 1412, 1414 [4th Dept 2022] [internal quotation marks omitted]). We therefore modify the order in each appeal accordingly.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-00927

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

IN THE MATTER OF JAYLYNN J.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JANICE M., AND ROBERT M.M., II,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

MULLEN ASSOCIATES PLLC, BATH (ALAN P. REED OF COUNSEL), FOR RESPONDENT-APPELLANT ROBERT M.M., II.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT JANICE M.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered December 27, 2021, in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody of petitioner and issued "a complete stay-away order of protection" on behalf of the subject child against both respondents.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the order of protection against respondent Robert M.M., II, and as modified the order is affirmed without costs.

Same memorandum as in *Matter of Jaycob S. (Janice M.)* ([appeal No. 1] — AD3d — [July 3, 2024] [4th Dept 2024]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

245

CA 23-00116

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

FOAM DEPOT, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-APPELLANT.

LIPPES MATHIAS LLP, BUFFALO (KRISTIE A. MEANS OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (MARC SMITH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 13, 2022. The order granted the motion of defendant for leave to reargue and, upon reargument, adhered to a prior determination denying that part of defendant's motion seeking summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for breach of contract arising from a contract with defendant pursuant to which defendant agreed to purchase, among other things, 500,000 masks. Defendant moved for, inter alia, summary judgment dismissing the complaint, contending, among other things, that the contract had been modified by the parties. Supreme Court, inter alia, denied defendant's motion insofar as it sought summary judgment, and defendant then moved for leave to reargue that part of the motion. Defendant now appeals from an order granting leave to reargue and, upon reargument, adhering to the prior determination denying that part of defendant's motion for summary judgment. We affirm.

We conclude that defendant failed to meet its initial burden on its underlying motion of establishing its entitlement to summary judgment dismissing the complaint. Contrary to defendant's contention, the emails that it submitted on its underlying motion do not establish as a matter of law that the revised purchase order was understood to be a modification of the parties' agreement (*see Technologies Multi Source T.M.S.S.A. v MRP Elecs., Inc.*, 8 AD3d 361, 363 [2d Dept 2004]). Defendant's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment dismissing the complaint] requires a denial of [that part of] the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d

320, 324 [1986]; *see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In any event, even assuming, arguendo, that defendant met its initial burden on its underlying motion insofar as it sought summary judgment dismissing the complaint, we conclude that plaintiff raised a triable issue of fact in opposition. Plaintiff's president and sole shareholder averred in his affidavit in opposition to defendant's underlying motion that he "did not agree that the [original] [p]urchase [o]rder for the . . . masks was being modified." He further averred that it was his belief "that [defendant] was not replacing the original [p]urchase [o]rder but rather ordering a different type of mask." We conclude that a triable issue of fact exists whether the contract was modified (*see generally All-Year Golf v Products Invs. Corp.*, 34 AD2d 246, 250 [4th Dept 1970], *lv denied* 27 NY2d 485 [1970]), and thus defendant is not entitled to summary judgment dismissing the complaint (*see Vega*, 18 NY3d at 503).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

265

CA 23-00909

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

RPOWER, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANB SYSTEM SUPPLIES, LLC AND CHRISTOPHER MCGOVERN, DEFENDANTS-APPELLANTS.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (JAMES C. ROSCETTI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF KEVIN T. STOCKER, ESQ., P.C., TONAWANDA (KEVIN B. CAMPBELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered April 26, 2023. The order imposed a fine of $250 per day against defendants for every day that they remained in noncompliance with a prior order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fine imposed and instead imposing a fine of $250 plus the amount of plaintiff's costs and expenses, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action asserting multiple causes of action, including breach of contract and fraud, and seeking damages of, inter alia, $755,800, which represented the amount of a "reservation fee" that plaintiff had allegedly remitted to defendants in connection with an agreement regarding the purchase of certain equipment. Near the outset of the action, plaintiff moved for, inter alia, an order enjoining defendants from dissipating the $755,800 reservation fee. In June 2022, Supreme Court, among other things, granted plaintiff's motion in part, enjoined defendants from dissipating the reservation fee, and ordered defendants to place the $755,800 in escrow. Defendants failed to place those funds in escrow and plaintiff moved for, inter alia, an order finding defendants in contempt. In an order dated November 29, 2022, the court found defendants in civil contempt but provided them until December 5, 2022 to purge the contempt by placing the funds in escrow. When defendants failed to purge the contempt by that deadline, by order entered April 26, 2023, the court imposed a fine of $250 per day for every day that defendants remained not in compliance with the June 2022 order. Defendants appeal from only the April 26, 2023 order.

By opposing the contempt application on the merits and failing to object that the contempt application failed to contain the notice and warning required by Judiciary Law § 756, defendants waived the protections of that statute (*see Matter of Rappaport*, 58 NY2d 725, 726 [1982]; *Matter of Hensley v Demun*, 163 AD3d 1100, 1101 [3d Dept 2018]; *Matter of Gregoire v Gregoire*, 278 AD2d 925, 925 [4th Dept 2000]; *cf. Rennert v Rennert*, 192 AD3d 1513, 1514 [4th Dept 2021]).

Defendants' contentions that the June 2022 order should be vacated, that they were not in contempt of the June 2022 order, and that the court erred in failing to hold an evidentiary hearing prior to issuing the November 2022 order finding them in contempt are not properly before us. " '[A]n appeal from a contempt order that is jurisdictionally valid does not bring up for review [a] prior order' " (*Burns v Grandjean*, 210 AD3d 1467, 1475 [4th Dept 2022]; *see Matter of Pritty-Pitcher v Hargis*, 221 AD3d 1546, 1546 [4th Dept 2023]; *Matter of North Tonawanda First v City of N. Tonawanda*, 94 AD3d 1537, 1538 [4th Dept 2012]; *St. Regis Mohawk Dev. Corp. v Cook*, 181 AD2d 964, 966 [3d Dept 1992]). However " 'misguided and erroneous' " a party may believe an order to be, the party may not " 'disregard it and decide for [itself] the manner in which to proceed' " (*Pritty-Pitcher*, 221 AD3d at 1546, quoting *Matter of Balter v Regan*, 63 NY2d 630, 631 [1984], *cert denied* 469 US 934 [1984]). Here, defendants appeal from only the April 2023 order, and that appeal does not bring up for review the propriety of the June 2022 order or the finding of contempt in the November 2022 order (*see North Tonawanda First*, 94 AD3d at 1538; *Town of Coeymans v Malphrus*, 252 AD2d 874, 874-875 [3d Dept 1998]; *see generally Abasciano v Dandrea*, 83 AD3d 1542, 1543 [4th Dept 2011]).

We agree with defendants, however, that the court erred in imposing a fine of $250 per day until defendants purged the contempt. "Unlike criminal contempt sanctions which are intended to punish, civil contempt fines are intended to compensate victims for their actual losses" (*Matter of Barclays Bank v Hughes*, 306 AD2d 406, 407 [2d Dept 2003]; *see State of New York v Unique Ideas*, 44 NY2d 345, 349 [1978]). Plaintiff did not establish an actual loss or injury as a result of the contempt (*see generally Lesnick v Lesnick*, 167 AD2d 888, 888 [4th Dept 1990]), and therefore Judiciary Law § 773 authorized the court to impose "a fine . . . not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto." Under these circumstances, the fine of $250 per day until the contempt was purged is not authorized by the statute and improperly sought to punish defendants for their continuing contempt, rather than to compensate plaintiff for an amount of damages suffered (*see Matter of Ferrante v Stanford*, 172 AD3d 31, 39 [2d Dept 2019]; *Barclays Bank*, 306 AD2d at 407; *Rechberger v Rechberger*, 139 AD2d 906, 907 [4th Dept 1988]; *Page v Cheung On Mansion, Inc.*, 138 AD2d 324, 325 [1st Dept 1988]). We therefore modify the order by vacating the fine imposed and instead imposing a fine of $250 plus the amount of plaintiff's costs and expenses, and we remit the matter to Supreme Court for a determination of the reasonable costs and expenses,

including attorney's fees, incurred by plaintiff in the contempt proceedings.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

266

CA 22-01826

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, AND KEANE, JJ.

IN THE MATTER OF CAYUGA NATION,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CARLIN SENECA-JOHN AND CARLIN SENECA-JOHN,
DOING BUSINESS AS GRAMMA APPROVED SOVEREIGN
TRADES, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

BARCLAY DAMON LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR PETITIONER-APPELLANT.

JOSEPH J. HEATH, SYRACUSE, FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered July 26, 2022. The order denied the petition.

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

Same memorandum as in *Matter of Cayuga Nation v Seneca-John* ([appeal No. 2] — AD3d — [July 3, 2024] [4th Dept 2024]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

267

CA 23-00740

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, AND KEANE, JJ.

IN THE MATTER OF CAYUGA NATION,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CARLIN SENECA-JOHN, AND CARLIN SENECA-JOHN,
DOING BUSINESS AS GRAMMA APPROVED SOVEREIGN
TRADES, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

BARCLAY DAMON LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR PETITIONER-APPELLANT.

JOSEPH J. HEATH, SYRACUSE, FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered April 12, 2023. The order granted the motion of petitioner seeking leave to renew and reargue, and upon renewal and reargument, adhered to the prior determination denying the petition.

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

Memorandum: In appeal No. 1, petitioner appeals from an order that denied its CPLR article 4 petition seeking recognition of a Cayuga Nation Civil Court (Nation Court) judgment against respondents, Carlin Seneca-John and Carlin Seneca-John, doing business as Gramma Approved Sovereign Trades. In appeal No. 2, petitioner appeals from an order that, in effect, granted petitioner's motion for leave to renew and reargue with respect to the order in appeal No. 1 and, upon renewal and reargument, adhered to the prior determination.

At the outset, we note that, in deciding petitioner's motion for leave to renew and reargue, Supreme Court considered and rejected the substantive arguments raised by petitioner. Therefore, although the order in appeal No. 2 does not state as much, it is clear to this Court that the court, in effect, granted petitioner's motion insofar as it sought leave to renew and reargue and, upon renewal and reargument, adhered to its original determination. We therefore dismiss the appeal from the order in appeal No. 1 (*see Manes v State of New York*, 182 AD3d 1012, 1013 [4th Dept 2020], *lv denied* 35 NY3d 913 [2020]; *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Addressing petitioner's contentions in appeal No. 2, we conclude that the court did not abuse its discretion in adhering to its determination to deny the petition seeking recognition of the Nation Court judgment (*see generally Unkechaug Indian Nation v Treadwell*, 192 AD3d 729, 733 [2d Dept 2021]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

268

CA 22-01776

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, AND KEANE, JJ.

IN THE MATTER OF CAYUGA NATION,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DUSTIN PARKER AND DUSTIN PARKER, DOING
BUSINESS AS PIPEKEEPERS TOBACCO & GAS,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

BARCLAY DAMON LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR PETITIONER-APPELLANT.

NIXON PEABODY LLP, ALBANY (ERIK A. GOERGEN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered July 26, 2022. The order denied the petition.

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

Same memorandum as in *Matter of Cayuga Nation v Parker* ([appeal No. 2] — AD3d — [July 3, 2024] [4th Dept 2024]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

269

CA 23-00739

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, AND KEANE, JJ.

IN THE MATTER OF CAYUGA NATION,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DUSTIN PARKER, AND DUSTIN PARKER, DOING
BUSINESS AS PIPEKEEPERS TOBACCO & GAS,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

BARCLAY DAMON LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR PETITIONER-APPELLANT.

NIXON PEABODY LLP, ALBANY (ERIK A. GOERGEN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered April 12, 2023. The order granted the motion of petitioner seeking leave to renew and reargue, and upon renewal and reargument, adhered to the prior determination denying the petition.

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

Memorandum: In appeal No. 1, petitioner appeals from an order that denied its CPLR article 4 petition seeking recognition of a Cayuga Nation Civil Court (Nation Court) judgment against respondents, Dustin Parker and Dustin Parker, doing business as Pipekeepers Tobacco & Gas. In appeal No. 2, petitioner appeals from an order that, in effect, granted petitioner's motion for leave to renew and reargue with respect to the order in appeal No. 1 and, upon renewal and reargument, adhered to the prior determination.

At the outset, we note that, in deciding petitioner's motion for leave to renew and reargue, Supreme Court considered and rejected the substantive arguments raised by petitioner. Therefore, although the order in appeal No. 2 does not state as much, it is clear to this Court that the court, in effect, granted petitioner's motion insofar as it sought leave to renew and reargue and, upon renewal and reargument, adhered to its original determination. We therefore dismiss the appeal from the order in appeal No. 1 (*see Manes v State of New York*, 182 AD3d 1012, 1013 [4th Dept 2020], *lv denied* 35 NY3d 913 [2020]; *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985,

985 [4th Dept 1990]).

Addressing petitioner's contentions in appeal No. 2, we conclude that the court did not abuse its discretion in adhering to its determination to deny the petition seeking recognition of the Nation Court judgment (*see generally Unkechaug Indian Nation v Treadwell*, 192 AD3d 729, 733 [2d Dept 2021]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

270

CA 23-00163

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, AND KEANE, JJ.

IN THE MATTER OF CAYUGA NATION,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DUSTIN PARKER AND DUSTIN PARKER, DOING
BUSINESS AS PIPEKEEPERS,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

NIXON PEABODY LLP, ALBANY (ERIK A. GOERGEN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered January 11, 2023. The judgment granted petitioner a money judgment against respondents.

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

Memorandum: In appeal No. 1, respondents, Dustin Parker and Dustin Parker, doing business as Pipekeepers, appeal from a judgment granting petitioner's CPLR article 4 petition to domesticate a Cayuga Nation Civil Court (Nation Court) judgment in the amount of $126,000, which was granted after a finding by the Nation Court that respondents were in contempt of its order permanently enjoining respondents from the operation of Pipekeepers. The Nation Court assessed a fine of $1,000 per day against respondents, totaling $126,000. In appeal No. 2, respondents appeal from a judgment granting a separate CPLR article 4 petition to domesticate a judgment of the Nation Court in the amount of $39,050, which was granted after a finding by the Nation Court that respondents were in violation of a Cayuga Nation ordinance, and the Nation Court assessed a fine of $1,000 per day plus costs, totaling $39,050.

In each appeal, respondents contend, inter alia, that the respective foreign country judgment is a fine and, therefore, may not be recognized under CPLR article 53. We agree, and we therefore reverse the judgments in appeal Nos. 1 and 2 and dismiss the petitions.

Petitioner argues that respondents' contention is unpreserved. We conclude that the contention falls within "the rarely invoked exception [to the preservation requirement] for a newly raised point of law that is decisive in a civil case and could not have been obviated by factual showings or legal countersteps if it had been raised below" (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009] [internal quotation marks omitted]; *see Wells Fargo Bank v Islam*, 174 AD3d 670, 672 [2d Dept 2019]; *Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]).

With respect to the merits, 22 NYCRR 202.71 provides that: "[a]ny person seeking recognition of a judgment, decree or order rendered by a court duly established under tribal or federal law by any Indian tribe, band or nation recognized by the State of New York or by the United States may commence a special proceeding in Supreme Court pursuant to Article 4 of the CPLR by filing a notice of petition and a petition with a copy of the tribal court judgment, decree or order appended thereto in the County Clerk's office in any appropriate county of the state. If the court finds that the judgment, decree or order is entitled to recognition under principles of the common law of comity, it shall direct entry of the tribal judgment, decree or order as a judgment, decree or order of the Supreme Court of the State of New York. This procedure shall not supplant or diminish other available procedures for the recognition of judgments, decrees and orders under the law." Thus, under the regulation, filing a notice of petition and a petition with a copy of the tribal court judgment, decree or order appended thereto initiates review by a Supreme Court Justice; mere compliance with those procedural guidelines, however, does not entitle recognition of a foreign judgment.

A tribal court judgment is a foreign judgment (*see Unkechaug Indian Nation v Treadwell*, 192 AD3d 729, 733 [2d Dept 2021]; *see also Iowa Mut. Ins. Co. v LaPlante*, 480 US 9, 15 [1987]). Judgments of foreign countries are recognized in New York under the doctrine of comity in accordance with the principles and procedures set forth in article 53 of the CPLR (*see Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi*, 10 NY3d 243, 247 [2008]). "[C]omity is not a rule of law, but a voluntary decision by one state to defer to the policy of another, especially in the face of a strong assertion of interest by the other jurisdiction" (*Boudreaux v State of La., Dept. of Transp.*, 11 NY3d 321, 326 [2008], *cert denied* 557 US 936 [2009] [internal quotation marks omitted]). "It is well settled that laws of foreign governments have extraterritorial jurisdiction only by comity . . . . The principle which determines whether we shall give effect to foreign legislation is that of public policy and, where there is a conflict between our public policy and application of comity, our own sense of justice and equity as embodied in our public policy must prevail" (*Lippens v Winkler Backereitechnik GmbH* [appeal No. 2], 138 AD3d 1507, 1509 [4th Dept 2016] [internal quotation marks omitted]). " 'Comity,' in a legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other" (*Hilton v Guyot*, 159 US 113, 163-164 [1895]; *see Sorensen v Sorensen*, 219 App Div 344, 348 [2d Dept 1927]). "The doctrine of comity, which applies to the acts of Indian Nations as well as those of the courts of sister states and foreign nations, provides that the courts of this State

have discretion to consider whether the determination comports with the laws and public policy of this State and to determine whether to enforce it" (*Unkechaug Indian Nation*, 192 AD3d at 733).

"Under CPLR article 53, a judgment issued by a foreign country is recognized and enforceable in New York State if it is 'final, conclusive and enforceable where rendered' " (*Daguerre, S.A.R.L. v Rabizadeh*, 112 AD3d 876, 877 [2d Dept 2013], quoting CPLR 5302 [a] [2]). Article 53, however, "does not apply to a foreign country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent the judgment is . . . a *fine or penalty*" (CPLR 5302 [b] [2] [emphasis added]). "A party seeking recognition of a foreign country judgment has the burden of establishing that [article 53] applies to the foreign country judgment" (CPLR 5302 [c]; *see Gemstar Can., Inc. v George A. Fuller Co., Inc.*, 127 AD3d 689, 690 [2d Dept 2015]; *Trejos Hermanos Sucesores S.A. v Verizon Communications Inc.*, 2024 WL 149551, *3 [SD NY, Jan. 12, 2024, No. 1:21-cv-08928 (JLR)]).

Here, there is no dispute that each of the foreign country judgments at issue in these appeals is a fine. The foreign country judgments were granted by the Nation Court against respondents after the Nation Court found respondents in contempt of an order permanently enjoining respondents from operating Pipekeepers and in violation of a Cayuga Nation ordinance and assessed fines based on those findings. Thus, inasmuch as petitioner failed to meet its burdens of establishing that article 53 applied to the foreign country judgments (*cf. Trejos Hermanos Sucesores S.A.*, 2024 WL 149551 at *5; *Yi Feng Leather Intl. Ltd. v Tribeca Design Showroom, LLC*, 2019 WL 4744620, *2 [SD NY, Sept. 30, 2019, No. 17 Civ. 05195 (AJN)]; *see generally Invest Bank PSC v Al Tadamun Glass & Aluminium Co. LLC*, 77 Misc 3d 1202[A], 2022 NY Slip Op 51096[U], *2-3 [Sup Ct, NY County 2022]), the burdens never shifted to respondents to establish a mandatory or discretionary ground for non-recognition of the judgments under CPLR 5304 (*see* CPLR 5302 [b] [2]; CPLR 5304 [c]; *Vinogradov v Sokolova*, 77 Misc 3d 284, 290 [Sup Ct, NY County 2022]; *see generally Stumpf AG v Dynegy Inc.*, 32 AD3d 232, 233 [1st Dept 2006]) and the petitions must be dismissed.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

271

CA 22-01729

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, AND KEANE, JJ.

IN THE MATTER OF CAYUGA NATION,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DUSTIN PARKER AND DUSTIN PARKER, DOING
BUSINESS AS PIPEKEEPERS,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

NIXON PEABODY LLP, ALBANY (ERIK A. GOERGEN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered October 12, 2022. The judgment granted petitioner a money judgment against respondents.

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

Same memorandum as in *Matter of Cayuga Nation v Parker* ([appeal No. 1] — AD3d — [July 3, 2024] [4th Dept 2024]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

274

KA 22-01948

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES ZELLEFROW, DEFENDANT-APPELLANT.

NATHANIEL L. BARONE, II, PUBLIC DEFENDER, MAYVILLE (HEATHER BURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (MICHAEL J. PISKO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Chautauqua County Court (David W. Foley, J.), entered November 23, 2022. The order, insofar as appealed from, designated defendant a sexually violent offender pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs and the designation of defendant as a sexually violent offender is vacated.

Memorandum: Defendant appeals from an order insofar as it designated him a sexually violent offender under the Sex Offender Registration Act (Correction Law § 168 *et seq.*). The designation is based on a felony conviction entered against defendant in the Commonwealth of Pennsylvania for which he was required to register as a sex offender in that state. There is no dispute that the crime of which defendant was convicted, sexual assault in violation of 18 Pa Cons Stat § 3124.1, does not include all of the essential elements of a sexually violent offense in New York enumerated in Correction Law § 168-a (3) (a), and therefore is not a sexually violent offense under the first disjunctive clause of Correction Law § 168-a (3) (b). Instead, after defendant moved to New York approximately 20 years after the sexual assault conviction was entered and the Board of Examiners of Sex Offenders determined that he was required to register as a sex offender in New York (*see* Correction Law § 168-k [2]), the People contended that County Court should designate him a sexually violent offender under the second disjunctive clause of Correction Law § 168-a (3) (b). That clause defines a sexually violent offense as including a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." The court designated defendant a sexually violent offender under the foreign registration clause.

For the same reasons set forth in our memorandum in *People v Malloy* (— AD3d —, —, 2024 NY Slip Op 03264, *2 [4th Dept 2024]), we agree with defendant that the foreign registration clause of Correction Law § 168-a (3) (b) is unconstitutional, as applied to him, under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Like his counterpart in *Malloy*, defendant was charged with a sexually violent offense in another state but ultimately convicted of a lesser offense that is not the equivalent of a sexually violent offense in New York, and neither the Board nor the People requested that points be assessed for use of violence on the risk assessment instrument. The only difference between the two cases is that the jury found defendant guilty of the lesser offense while the defendant in *Malloy* pleaded guilty to the lesser offense. In our view, that distinction is immaterial inasmuch as the designations under the foreign registration clause of Correction Law § 168-a (3) (b) are based on the out-of-state crime of conviction, not the unproven underlying allegations. Of course, if defendant had committed his offense in New York, he would not be designated a sexually violent offender, and the result should not change simply because he committed the offense in a neighboring state.

We have reviewed defendant's remaining contentions and conclude that they lack merit.

LINDLEY and NOWAK, JJ., concur; OGDEN, J., concurs in the result in the following memorandum: I concur in the result reached by the plurality but, for the reasons stated in my concurring memorandum in *People v Malloy* (— AD3d —, —, 2024 NY Slip Op 03264, *2 [4th Dept 2024] [Ogden, J., concurring]), I disagree with the plurality's reasoning in this case.

WHALEN, P.J., and DELCONTE, J., dissent and vote to affirm in the following memorandum: We respectfully dissent. In our view, defendant failed to meet his heavy burden of proving beyond a reasonable doubt that the foreign registration clause in Correction Law § 168-a (3) (b), that is, the definition of a sexually violent offense as including a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred," is either facially unconstitutional or unconstitutional as applied to him (*see People v Viviani*, 36 NY3d 564, 576 [2021]; *People v Foley*, 94 NY2d 668, 677 [2000], *cert denied* 531 US 875 [2000]; *People v Taylor*, 42 AD3d 13, 16 [2d Dept 2007], *lv dismissed* 9 NY3d 887 [2007]). We would therefore affirm the order determining that defendant is a level two risk and designating him a sexually violent offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.).

Here, inasmuch as defendant presents both a facial and an as-applied challenge, our first task is to decide whether the challenged statute is unconstitutional as applied to defendant (*see generally People v Stuart*, 100 NY2d 412, 422 [2003]). "As the term implies, an as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the defendant *under the facts of the case*" (*id.* at 421 [emphasis added]). To that

end, as we noted in our dissent in *People v Malloy* (— AD3d —, —, 2024 NY Slip Op 03264, *2 [4th Dept 2024] [Whalen, P.J., and DelConte, J., dissenting]), under relevant Court of Appeals precedent, a statute requiring a defendant to register as a sex offender based on a conviction for a specified offense is not constitutionally invalid simply because that statute may encompass defendants whose criminal conduct was not sexual in nature "as that term is commonly understood" (*People v Knox*, 12 NY3d 60, 65 [2009], *cert denied* 558 US 1011 [2009]; *see People v Brown*, 41 NY3d 279, 289 [2023]). Indeed, the Court acknowledged in *People v Brown* that "the Legislature may cast a wide net by 'employ[ing] overinclusive terms' to include within SORA's reach those who commit a non-sexual crime but nonetheless present a future risk of sexual harm" (*Brown*, 41 NY3d at 289; *see Knox*, 12 NY3d at 69). Nonetheless, the *Brown* Court specifically recognized the existence of a judicial remedy for constitutional harm caused by the application of an overbroad SORA designation statute where there is an affirmative showing in the record that the defendant, although technically falling within the statutory definition of "sex offender," is nonetheless one "for whom the sex offender designation 'is unmerited' " (*Brown*, 41 NY3d at 289, quoting *Knox*, 12 NY3d at 69). We see no reason to depart from the logic of *Brown* in the present case.

Contrary to the conclusion of the plurality, defendant did not meet his burden of establishing that his designation as a sexually violent offender was unmerited and that the People's reliance on the foreign registration clause in Correction Law § 168-a (3) (b) was therefore unconstitutional as applied to him. Initially, we note that defendant did not argue before the SORA court, as the plurality implies that he did, that his predicate Pennsylvania conviction did not include the essential elements of an enumerated sexually violent offense in New York (*see* Correction Law § 168-a [3] [a]). Although defendant did successfully oppose the People's request to assess points under risk factor 1, that argument was not raised in support of his contention that a sexually violent offender designation was unconstitutional as applied to him. In any event, this single factor, entitled "Use of Violence," is limited to the assessment of points for the use of forcible compulsion, infliction of physical injury, or presence of a dangerous instrument in the underlying crime. New York law, however, defines a wider range of conduct as "sexually violent," including conduct that does not involve physical violence or the use of a weapon (*see e.g.* Penal Law § 130.35 [2], [3], [4]; § 130.50 [2], [3], [4]; § 130.80; *see generally* Correction Law § 168-a [3] [a]). Defendant instead presented to the SORA court, without distinguishing between a facial and an as-applied constitutional challenge, the same generalized argument that was presented by the defendant in *Malloy*, specifically, that "[t]here is no logical rationale in defining all registerable out-of-state sex offenses as 'violent.' " Defendant repeats his generalized argument on appeal without further explication. Defendant's failure to make a *factual* argument that his foreign conviction involved no conduct defined as sexually violent under New York law or that his "conduct provides no basis to predict risk of future sexual[ly violent] harm" alone warrants rejection of his as-applied challenge (*Brown*, 41 NY3d at 290; *see generally Stuart*,

100 NY2d at 421).

Further, inasmuch as we previously concluded that the as-applied challenge to the foreign registration clause in Correction Law § 168-a (3) (b) raised by the defendant in *Malloy* lacks merit (*see Malloy*, — AD3d at —, 2024 NY Slip Op 03264, *2-3 [Whalen, P.J., and DelConte, J., dissenting]), "the facial validity of the statute is confirmed" (*Stuart*, 100 NY2d at 422). Finally, we conclude that defendant's remaining constitutional challenge based on the Privileges and Immunities Clause lacks merit and, as such, we would affirm.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-00772

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFFORD WOODS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered September 16, 2021. The judgment convicted defendant, upon a jury verdict, of attempted kidnapping in the second degree, stalking in the first degree, and forcible touching.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of attempted kidnapping in the second degree as a sexually motivated felony and forcible touching and dismissing counts 1 and 3 of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted kidnapping in the second degree as a sexually motivated felony (Penal Law §§ 110.00, 135.20, 130.91), stalking in the first degree (§ 120.60 [2]), and forcible touching (§ 130.52 [1]).

Defendant approached the victim while she was walking alone on a street. After a brief verbal encounter, defendant began to follow the victim, grabbing her buttocks and then restraining her before ultimately releasing her and walking away. Defendant was charged in a three-count indictment, and the case proceeded to a jury trial, one of the first to be conducted in Onondaga County after jury trials were suspended due to the COVID-19 pandemic. Microphones and other equipment were used to broadcast portions of the trial to an overflow room established for spectators to ensure that all persons were able to socially distance from one another.

Defendant contends that his constitutional right to consult his defense counsel in private was violated at his trial. Defendant asserts that, on at least one occasion, the monitor placed at the

defense table malfunctioned in a way that may have permitted unknown listeners in the courthouse to covertly monitor confidential communications between defendant and his defense counsel without their knowledge. While it is true that "in a very narrow category of cases, [the Court of Appeals has] recognized so-called 'mode of proceedings' errors that go to the essential validity of the process and are so fundamental that the entire trial is irreparably tainted" (*People v Kelly*, 5 NY3d 116, 119-120 [2005]), here, in the absence of a fully developed record on the issue, we conclude that defendant's contentions "must be raised in a proceeding pursuant to CPL article 440, 'wherein a record focused on this issue may be developed' " (*People v Burgos*, 130 AD3d 1493, 1494 [4th Dept 2015]).

We agree with defendant, however, that the kidnapping merger doctrine applies and that the first count of the indictment must be dismissed. The merger doctrine is "a means of effectuating the Legislature's intent [to effectuate a statutory scheme presenting a range of offenses and penalties measured by the gravity of a defendant's conduct] by precluding additional kidnapping sanctions for conduct that, while literally falling within the definition of that crime, was not intended to be separately treated as kidnapping," such as "conduct that, in fairness, should result in a single conviction" (*People v Gonzalez*, 80 NY2d 146, 152 [1992]). The "guiding principle" of the merger doctrine inquiry is whether the acts of restraint or abduction were " 'so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that independent criminal responsibility may not fairly be attributed to them' " (*id.* at 153, quoting *People v Cassidy*, 40 NY2d 763, 767 [1976]). Where the alleged "abduction and underlying crime are discrete, for example, there is no merger," but "where there is minimal asportation immediately preceding [the underlying crime], the abduction should not be considered kidnapping" (*id.*; *see People v Hanley*, 20 NY3d 601, 605-606 [2013]). Here, defendant's restraint of the victim was "simultaneous [with] and inseparable from" defendant's stalking and forcible touching of the victim (*Gonzalez*, 80 NY2d at 153), such that "independent criminal responsibility may not fairly be attributed" to the attempted kidnapping (*id.*; *see People v James*, 114 AD3d 1202, 1203-1204 [4th Dept 2014], *lv denied* 22 NY3d 1199 [2014]).

Finally, we conclude that, as charged (*see People v Green*, 56 NY2d 427, 430-431 [1982], *rearg denied* 57 NY2d 775 [1982]), it was impossible for defendant to commit stalking in the first degree without, by the same conduct, committing forcible touching, thereby rendering forcible touching an inclusory concurrent count of stalking in the first degree (*see* CPL 300.30 [4]; *see generally People v Lee*, 224 AD3d 1372, 1376 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Scott*, 61 AD3d 1348, 1350 [4th Dept 2009], *lv denied* 12 NY3d 920 [2009], *reconsideration denied* 13 NY3d 799 [2009]).

We therefore modify the judgment by reversing those parts convicting defendant of attempted kidnapping in the second degree as a sexually motivated felony and forcible touching and dismissing counts 1 and 3 of the indictment.

The sentence imposed on defendant's conviction, as modified by our determination, is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that none warrants further modification or reversal of the judgment.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-01062

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK DUBLINO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered July 1, 2021. The judgment convicted defendant, upon a nonjury 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 nonjury verdict, of assault in the second degree (Penal Law § 120.05 [7]). Viewing the evidence in light of the elements of the crime and the defense of justification in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in his main brief that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v McKenzie*, 207 AD3d 1070, 1071 [4th Dept 2022], *lv denied* 39 NY3d 987 [2022]).

We reject defendant's contentions in his main and pro se supplemental briefs that Supreme Court violated his right to self-representation (*see generally* US Const 6th, 14th Amends; NY Const, art I, § 6; *People v McIntyre*, 36 NY2d 10, 14 [1974]). Although we agree with defendant that the court improperly denied his unequivocal request to proceed pro se based solely on his lack of legal acumen (*see People v Ryan*, 82 NY2d 497, 507-508 [1993]), we nonetheless conclude that there is no reversible error because defendant subsequently "abandoned any request to proceed pro se . . . [by] acquiesc[ing] to continued representation by counsel at subsequent proceedings" (*People v Couser*, 210 AD3d 1513, 1514 [4th Dept 2022], *lv denied* 39 NY3d 1071 [2023] [internal quotation marks omitted]; *see People v Gillian*, 8 NY3d 85, 88 [2006]). Here, following the court's denial of defendant's request to proceed pro se and in response to the court's direct inquiry, defendant abandoned his motion to reargue the

court's denial and expressly withdrew his request to proceed pro se in light of his satisfaction with the representation provided by his current assigned counsel.

Contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe. We have reviewed the remaining contentions in the main and pro se supplemental briefs and conclude that none warrants modification or reversal of the judgment.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01453

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

BL DOE 5, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN D. FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

COZEN O'CONNOR, NEW YORK CITY (AMANDA L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), AND O'BRIEN & FORD, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered May 26, 2023. The order and judgment, among other things, denied the motion of defendant Rochester City School District for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that she was sexually abused during a period from 1968 to 1970 by defendant Edwin D. Fleming (Fleming) while attending West High School in defendant Rochester City School District (defendant). Defendant filed a pre-answer motion to dismiss the complaint against it, which Supreme Court (Chimes, J.) denied. This Court, on a prior appeal, modified that order by granting those parts of the motion seeking to dismiss the second and third causes of action against defendant (*BL Doe 5 v Fleming*, 199 AD3d 1426, 1427-1428 [4th Dept 2021]). Defendant did not challenge on appeal the denial of that part of the motion seeking to dismiss the first cause of action against defendant, for negligence (*see id.* at 1427). After discovery, plaintiff moved for, inter alia, partial summary judgment on defendant's liability, and defendant moved for summary judgment dismissing the complaint against it. Supreme Court (Schiano, Jr., J.), inter alia, denied plaintiff's motion to the extent that it sought partial summary judgment on liability and denied defendant's motion. Defendant now appeals, as limited by its brief, from that part of the order and judgment that denied its motion. We affirm.

Plaintiff's negligence cause of action is premised on two theories, specifically defendant's alleged negligent supervision of plaintiff and defendant's alleged negligent retention of Fleming, a music teacher employed by defendant. Both theories require consideration of whether Fleming's misconduct was reasonably foreseeable. "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]). This duty "requires that the school exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*BL Doe 3 v Female Academy of the Sacred Heart*, 199 AD3d 1419, 1422 [4th Dept 2021] [internal quotation marks omitted]; *see David v County of Suffolk*, 1 NY3d 525, 526 [2003]). A plaintiff may succeed on a claim of negligent supervision by establishing "that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury" (*Mirand*, 84 NY2d at 49). Further, although unanticipated third-party acts generally will not give rise to liability (*see Brandy B.*, 15 NY3d at 302), a school district may nonetheless "be held liable for an injury that is the reasonably foreseeable consequence of circumstances it created by its inaction" (*Doe v Fulton School Dist.*, 35 AD3d 1194, 1195 [4th Dept 2006] [hereinafter *Fulton School Dist.*]; *see Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946-947 [1997]; *Mirand*, 84 NY2d at 49-51; *Murray v Research Found. of State Univ. of N.Y.*, 283 AD2d 995, 997 [4th Dept 2001], *lv denied* 96 NY2d 719 [2001]). Similarly, to establish a claim of negligent retention, "it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Shapiro v Syracuse Univ.*, 208 AD3d 958, 960 [4th Dept 2022] [internal quotation marks omitted]; *see Pater v City of Buffalo*, 141 AD3d 1130, 1131 [4th Dept 2016], *lv denied* 29 NY3d 911 [2017]).

Defendant contends that the court erred in concluding that there is a triable issue of fact whether it knew or should have known of Fleming's propensity to sexually abuse minors. In support of its motion, defendant submitted, among other things, plaintiff's deposition wherein she testified that she never explicitly told anyone about the sexual abuse by Fleming during the time that it was occurring and, further, that the actual abuse took place, as relevant, after school hours in the back of a music room that was in a remote part of the school building. Although plaintiff also testified that, prior to her graduation, an orchestra teacher told her that he was aware of the abuse, defendant contends that the court erred in concluding that the orchestra teacher's statement could be properly considered as a nonhearsay party admission of defendant under CPLR 4549 (*see generally Watson v Peschel*, 188 AD3d 1693, 1695-1696 [4th Dept 2020]).

Specifically, plaintiff testified that the orchestra teacher offered her a ride home from a bus stop after an evening event at the school. Instead of taking her home, however, the orchestra teacher took her to a park where, according to plaintiff, he told her "that he

knew what was going on because he could hear through the walls from the orchestra room into that back room [where Fleming's office was located] and that [plaintiff] didn't want it to get out – [plaintiff] wouldn't want it to come out, so [she] should be nice to him." When plaintiff responded that she did not know what the orchestra teacher was talking about, he attempted to kiss her.

CPLR 4549 provides that "[a] statement offered against an opposing party shall not be excluded from evidence as hearsay if made . . . by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship." The rule was enacted in 2021 with the intent of "caus[ing] New York's hearsay exception to follow the approach of Federal Rule of Evidence 801(d)(2)(D)" (Senate Introducer's Mem in Support of 2021 NY Senate Bill S7093; *see also* Mem of Off of Ct Admin in Support of 2021 NY Senate-Assembly Bill S7093/A8040). Previously, in order for a statement by an employee or agent of a defendant to be admissible as a vicarious party admission, New York law required a showing that the declarant had "authority to speak on behalf of the defendant" (*Cohn v Mayfair Supermarkets*, 305 AD2d 528, 529 [2d Dept 2003]; *see Hyde v Transcontinent Record Sales, Inc.*, 111 AD3d 1339, 1340 [4th Dept 2013]).

The court determined that the entirety of the statement attributed to the orchestra teacher was admissible as a vicarious party admission of defendant under CPLR 4549 and therefore properly considered when evaluating defendant's motion for summary judgment, because the orchestra teacher was employed by defendant and "[r]ecognizing and responding to the abuse of students while on school grounds certainly falls within the scope of the duties of a teacher employed by [defendant]."

Contrary to defendant's contention, CPLR 4549 does not predicate admissibility upon the location or timing of the utterance—whether on or off school grounds or during or after school hours. Indeed, while federal courts require a party seeking to invoke Federal Rules of Evidence rule 801 (d) (2) (D) to "establish (1) the existence of the agency relationship, (2) that *the statement was made during the course of the relationship*, and (3) that it relates to a matter within the scope of the agency" (*Pappas v Middle Earth Condominium Assn.*, 963 F2d 534, 537 [2d Cir 1992] [emphasis added]), the legislature did not draft the statute so narrowly. Rather, as drafted, CPLR 4549 merely requires that the statement be uttered "during the *existence* of that [employment] relationship" (emphasis added) and does not also require that it be uttered during the "course" of the relationship—i.e., during work hours, as required by federal caselaw (*see United States v Rioux*, 97 F3d 648, 660 [2d Cir 1996]; *see also Pappas*, 963 F2d at 537; *cf. Broome Lender LLC v Empire Broome LLC*, 220 AD3d 611, 611 [1st Dept 2023]). Had the legislature intended to mirror the test utilized by the Second Circuit, they certainly could have done so. They did not, and thus we give effect to the plain meaning of the statute as drafted.

We conclude that it is within the scope of a teacher's employment

relationship to identify and assist a student who they believe is being sexually abused, and that the orchestra teacher's statement indicating awareness of the abuse of plaintiff was therefore "on a matter within the scope of [the employment] relationship" (CPLR 4549). We further conclude that the orchestra teacher's statement professing knowledge of the abuse occurred "during the existence of" the employment relationship, within the meaning of CPLR 4549, inasmuch as it is undisputed that he was employed by defendant at the time the statement was made. Therefore, we agree with the court that the statement is admissible pursuant to CPLR 4549.

Moreover, inasmuch as it is undisputed that the orchestra teacher's knowledge of Fleming's abuse was acquired while the orchestra teacher was acting within the scope of his employment, we conclude that his knowledge " 'is imputed to his . . . principal and the latter is bound by such knowledge [even if] the information is never actually communicated to [the principal]' " (*Pauszek v Waylett*, 173 AD3d 1631, 1633 [4th Dept 2019], quoting *Center v Hampton Affiliates*, 66 NY2d 782, 784 [1985]; *see Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]). Whether the employee's knowledge may be imputed to the employer hinges upon whether that knowledge was *acquired* while the employee was acting within the scope of their employment (*see Center*, 66 NY2d at 784; *Pauszek*, 173 AD3d at 1633). Notably, we perceive no inconsistency between imputing knowledge acquired by an employee acting within the scope of their employment to the employer and the potential that the employer will escape vicarious liability for the employee's later actions outside the scope of that relationship.

We agree with our concurring colleague that the orchestra teacher's attempt to sexually abuse plaintiff falls well outside the scope of his employment relationship, and thus, his statement that the plaintiff "should be nice to him" if she did not want the news to get out is inadmissible under CPLR 4549. We disagree, however, that this renders the entirety of the orchestra teacher's statement inadmissible. The orchestra teacher's statement that he knew of the abuse was, as we concluded above, "on a matter within the scope of [the employment] relationship" (CPLR 4549), and is readily distinguishable from his later statement that plaintiff "should be nice to him," which was part of his attempt to abuse plaintiff.

Moreover, even without the disputed statement by the orchestra teacher, we conclude that defendant failed to meet its prima facie burden of establishing that the sexual abuse that led to plaintiff's injuries was unforeseeable as a matter of law (*see Bell*, 90 NY2d at 946-947). In the deposition submitted by defendant, plaintiff testified that her grades declined during her junior and senior years—while the abuse occurred—because she began "missing a lot of [her] regular classes [that she] was supposed to be scheduled in" (*see generally Doe v Whitney*, 8 AD3d 610, 611-612 [2d Dept 2004] [hereinafter *Whitney*]). Defendant does not dispute that plaintiff's scholastic decline was significant enough to be noticed by its personnel, but contends that it did in fact take relevant action by requiring plaintiff to meet with a counselor. Plaintiff, however,

testified that the counselor was aware of and specifically questioned her on why she was spending so much time with Fleming, at which point plaintiff "just stopped" and "didn't want to talk any more about it." Contrary to defendant's characterization, plaintiff's response does not amount to an affirmative denial of abuse (*cf. Ernest L. v Charlton School*, 30 AD3d 649, 651 [3d Dept 2006]). In light of plaintiff's testimony regarding her behavior upon being questioned about Fleming, we conclude that there is a triable issue of fact whether defendant, in failing to investigate further, exercised the same degree of care and supervision over plaintiff that a reasonably prudent parent would have exercised (*see Doe v Lorich*, 15 AD3d 904, 905 [4th Dept 2005]; *Whitney*, 8 AD3d at 611-612).

Further, defendant offered no affirmative evidence establishing the existence of any sexual harassment prevention policies or the absence of any relevant complaints regarding Fleming prior to or during the relevant time period (*cf. Ernest L.*, 30 AD3d at 651). Defendant did submit, among other things, the deposition testimony of a teacher who worked at plaintiff's high school during the years relevant to plaintiff's allegations and who continued his career with defendant as an administrator. The administrator testified that, in reference to complaints regarding sexual misconduct, "there was a time where we didn't cross our T's and dot our I's." The administrator explained that, before the 1980s, when the state "got a lot more forceful," there had been "always an effort to resolve the problem by removing the teacher." The administrator agreed that defendant "didn't necessarily take the action that would prevent [sexual abuse] from happening again." A factfinder could reasonably infer from that testimony that defendant was aware of other instances of sexual abuse of students by West High School teachers occurring prior to the 1980s and maintained a practice of removing the offending teachers without taking further action to prevent future sexual abuse.

Thus, defendant's own submissions raise a triable issue of fact whether plaintiff's injuries were the "reasonably foreseeable consequence of circumstances it created by its inaction" (*Fulton School Dist.*, 35 AD3d at 1195). We therefore do not consider the sufficiency of plaintiff's submissions in opposition to defendant's motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Destiny S. v John Quincy Adams Elementary Sch.*, 98 AD3d 1102, 1103 [2d Dept 2012]).

All concur except WHALEN, P.J., who concurs in the result in the following memorandum: I concur with the majority that Supreme Court properly denied the motion for summary judgment of defendant Rochester City School District (defendant) inasmuch as defendant failed to meet its prima facie burden of establishing that the sexual abuse that led to plaintiff's injuries was unforeseeable as a matter of law (*see Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946-947 [1997]). I respectfully disagree, however, with the conclusion of the majority that any portion of the hearsay statement attributed to the orchestra teacher is admissible under CPLR 4549 as a party admission of defendant.

As the majority notes, CPLR 4549 provides that "[a] statement offered against an opposing party shall not be excluded from evidence as hearsay if made . . . by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship." The rule was enacted in 2021 with the intent of "caus[ing] New York's hearsay exception to follow the approach of Federal Rule of Evidence 801(d)(2)(D)" (Senate Introducer's Mem in Support of 2021 NY Senate Bill S7093; *see also* Mem of Off of Ct Admin in Support of 2021 NY Senate-Assembly Bill S7093/A8040). Thus, as enacted, CPLR 4549 uses practically identical language to that found in Federal Rules of Evidence rule 801 (d) (2) (D), which provides that a statement is not hearsay if it "is offered against an opposing party" and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." The majority nonetheless concludes that, in enacting CPLR 4549, the Legislature intended to diverge from the federal case law interpreting Federal Rules of Evidence rule 801 (d) (2) (D). I disagree.

The majority construes the phrase "during the existence of that [employment] relationship" (CPLR 4549) as requiring no more than that the declarant made the statement while employed by the opposing party, regardless of the circumstances under which the statement was made. However, the federal cases applying the analogous rule 801 (d) (2) (D) support the conclusion that the determination whether a declarant's statement is admissible requires, in addition to consideration of the subject matter of the statement, a fact-specific inquiry into the context in which the statement was made and the parameters of the declarant's employment (*see generally Wilkinson v Carnival Cruise Lines, Inc.*, 920 F2d 1560, 1565-1566 [11th Cir 1991]; *compare Rainbow Travel Serv., Inc. v Hilton Hotels Corp.*, 896 F2d 1233, 1242 [10th Cir 1990] *with Tallarico v Trans World Airlines, Inc.*, 881 F2d 566, 572 [8th Cir 1989]). The Second Circuit instructs that admissibility of an employee's statement as a vicarious party admission requires "that a party establish (1) the existence of the agency relationship, (2) *that the statement was made during the course of the relationship*, and (3) that it relates to a matter within the scope of the agency" (*Pappas v Middle Earth Condominium Assn.*, 963 F2d 534, 537 [2d Cir 1992] [emphasis added]; *see Marcic v Reinauer Transp. Cos.*, 397 F3d 120, 128-129 [2d Cir 2005]). "The authority granted in the agency relationship need not include authority to make damaging statements, but simply the authority to take action about which the statements relate" (*Pappas*, 963 F2d at 538).

Here, plaintiff testified that the orchestra teacher stated "that he knew what was going on because he could hear through the walls from the orchestra room into that back room [where defendant Edwin D. Fleming's office was located] and that [plaintiff] didn't want it to get out – [plaintiff] wouldn't want it to come out, so [she] should be nice to him." To the extent that there was any ambiguity in the orchestra teacher's intent in making that statement, that ambiguity was resolved in the orchestra teacher's subsequent actions in attempting to kiss plaintiff. Thus, although the orchestra teacher was employed by defendant at the time he made the statement, that

statement, considered *in toto* and in context, was indisputably made for the purpose of improperly pressuring plaintiff into engaging in sexual activity with him. Such conduct was "a clear departure from the scope of [his] employment [as a teacher], having been committed for wholly personal motives" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; *see Berardi v Niagara County*, 147 AD3d 1400, 1401 [4th Dept 2017]; *see also Doe v Heckeroth Plumbing & Heating of Woodstock, Inc.*, 192 AD3d 1236, 1239 [3d Dept 2021] [hereinafter *Heckeroth*]). Thus, even assuming, arguendo, that a portion of the orchestra teacher's statement pertained to a matter within the scope of his employment, I cannot conclude that "the statement was made during the course of [his employment] relationship" with defendant (*Pappas*, 963 F2d at 537; *see In re Air Crash Disaster*, 86 F3d 498, 536 [6th Cir 1996]) inasmuch as the orchestra teacher's employment relationship with defendant does not encompass his intentional acts of attempted sexual abuse (*see generally N.X.*, 97 NY2d at 251; *Heckeroth*, 192 AD3d at 1239). To hold otherwise on these facts would, in my opinion, open the door to the contradictory legal conclusions that the inappropriate actions of the orchestra teacher—or a similarly situated teacher in a future case—were outside the scope of his employment such that defendant could not be held vicariously liable for them (*see N.X.*, 97 NY2d at 251), but that the statements made by the orchestra teacher in furtherance of and contemporaneous with those actions were nonetheless the vicarious party admissions of defendant. I therefore agree with defendant that the court erred in concluding that the statement attributed to the orchestra teacher constituted nonhearsay that was admissible under CPLR 4549.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

287

CA 23-00750

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

JASON BURNS, INDIVIDUALLY AND DERIVATIVELY
ON BEHALF OF C.R.B. HOLDINGS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

C.R.B. HOLDINGS, INC. AND ROBERT BURNS,
DEFENDANTS-RESPONDENTS.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (CHARLES J. ENGLERT, III, OF COUNSEL), AND CHRISTEN E. CIVILETTO, EAST AMHERST, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered April 6, 2023. The order granted the motion of defendants insofar as it sought to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion seeking dismissal of the first, third, fifth, sixth, and tenth causes of action, reinstating those causes of action, and severing the third, fifth, sixth, and tenth causes of action and holding those causes of action in abeyance pending a determination on the first cause of action, and as modified the order is affirmed without costs.

Memorandum: In this action alleging oppressive conduct by defendant Robert Burns, the majority shareholder of defendant C.R.B. Holdings, Inc. (C.R.B.), plaintiff appeals from an order that granted defendants' motion insofar as it sought to dismiss the amended complaint.

On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, we must "accept the facts as alleged in the complaint as true, accord [the] plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). "Whether a plaintiff can ultimately establish [their] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Cortlandt St. Recovery Corp. v*

Bonderman, 31 NY3d 30, 38 [2018]).

Here, plaintiff alleges that his employment was terminated effective November 6, 2020 and that, consistent with section 3.4 of the parties' Shareholders Agreement, "[t]he consummation of any purchase of [plaintiff's] Shares by [C.R.B.]" was required to "take place on a date not more than sixty (60) days following the effective date of the termination of the employment of [plaintiff]." Plaintiff further alleges that defendants failed to comply with the Shareholders Agreement because they waited well beyond 60 days to exercise C.R.B.'s option to purchase plaintiff's shares when they "purported[ ]" to proceed with the closing on June 25, 2021. In his first cause of action, plaintiff seeks a judgment declaring that the "purported transfer and sale of shares are void and rescinded."

Inasmuch as an "optionee must exercise the option 'in accordance with its terms within the time and in the manner specified in the option' " (*Kaplan v Lippman*, 75 NY2d 320, 325 [1990]), and plaintiff alleges facts that, if true, support the conclusion that defendants failed to do so here, we conclude that Supreme Court erred in dismissing plaintiff's cause of action seeking declaratory relief.

We further agree with plaintiff that whether the court erred in concluding that he lacks standing to maintain a derivative action depends on whether defendants properly exercised C.R.B.'s option to purchase plaintiff's shares. If they did not, then plaintiff has the right to maintain derivative causes of action as a shareholder of C.R.B. (*see generally Center v Hampton Affiliates*, 66 NY2d 782, 785-786 [1985]). Inasmuch as plaintiff's standing to assert derivative causes of action under Business Corporation Law § 626 depends on whether he prevails in his cause of action seeking a declaratory judgment, we conclude that plaintiff's derivative causes of action should be severed and held in abeyance pending disposition of plaintiff's declaratory judgment cause of action (*see Center*, 66 NY2d at 786).

We therefore modify the order by denying those parts of the motion seeking dismissal of the first, third, fifth, sixth, and tenth causes of action, reinstating those causes of action, and severing the third, fifth, sixth, and tenth causes of action and holding those causes of action in abeyance pending a determination on the first cause of action (*see id.*).

We have considered plaintiff's remaining contentions, i.e., those with respect to the second, fourth, seventh, eighth, ninth, and eleventh causes of action, and conclude that they lack merit. We have also considered defendants' contentions raised as alternative grounds for affirmance with respect to the third, fifth, sixth, and tenth causes of action (*see generally Parochial Bus Sys. v Board of Educ. of*

City of N.Y., 60 NY2d 539, 545-546 [1983]) and conclude that they lack merit.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

289

CA 23-01501

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

BL DOE 2, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN D. FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

COZEN O'CONNOR, NEW YORK CITY (AMANDA L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), AND O'BRIEN & FORD, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered May 26, 2023. The order and judgment, inter alia, denied in part the motion of defendant Rochester City School District for summary judgment.

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

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that she was sexually abused during a period from 1972 to 1974 by defendant Edwin D. Fleming (Fleming) while attending East High School in defendant Rochester City School District (defendant). After discovery, defendant moved for summary judgment dismissing plaintiff's complaint against it and plaintiff cross-moved for, inter alia, partial summary judgment on defendant's liability. Supreme Court, inter alia, denied defendant's motion to the extent that it sought dismissal of plaintiff's negligence and negligent failure to report causes of action and denied plaintiff's cross-motion to the extent that it sought partial summary judgment on liability. Defendant now appeals, as limited by its brief, from those parts of the order and judgment that denied its motion to the extent that it sought dismissal of plaintiff's negligence and negligent failure to report causes of action. We affirm.

Plaintiff's negligence cause of action is premised on two theories, specifically defendant's alleged negligent supervision of plaintiff and defendant's alleged negligent retention of Fleming, a music teacher employed by defendant. Both theories require consideration of whether Fleming's misconduct was reasonably

foreseeable. "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]). This duty "requires that the school exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*BL Doe 3 v Female Academy of the Sacred Heart*, 199 AD3d 1419, 1422 [4th Dept 2021] [hereinafter *Female Academy*] [internal quotation marks omitted]; *see David v County of Suffolk*, 1 NY3d 525, 526 [2003]). A plaintiff may succeed on a claim of negligent supervision by establishing "that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury" (*Mirand*, 84 NY2d at 49). Further, although unanticipated third-party acts generally will not give rise to liability (*see Brandy B.*, 15 NY3d at 302), a school district may nonetheless "be held liable for an injury that is the reasonably foreseeable consequence of circumstances it created by its inaction" (*Doe v Fulton School Dist.*, 35 AD3d 1194, 1195 [4th Dept 2006] [hereinafter *Fulton School Dist.*]; *see Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946-947 [1997]; *Mirand*, 84 NY2d at 49-51; *Murray v Research Found. of State Univ. of N.Y.*, 283 AD2d 995, 997 [4th Dept 2001], *lv denied* 96 NY2d 719 [2001]). Similarly, to establish a claim of negligent retention, "it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Shapiro v Syracuse Univ.*, 208 AD3d 958, 960 [4th Dept 2022] [internal quotation marks omitted]; *see Pater v City of Buffalo*, 141 AD3d 1130, 1131 [4th Dept 2016], *lv denied* 29 NY3d 911 [2017]).

Contrary to defendant's contention, the court properly denied that part of its motion seeking dismissal of plaintiff's negligence cause of action inasmuch as defendant failed to meet its prima facie burden of establishing that the sexual abuse that led to plaintiff's injuries was unforeseeable as a matter of law (*see Bell*, 90 NY2d at 946-947). In support of its motion, defendant submitted, among other things, plaintiff's deposition wherein she testified that she never told anyone about the sexual abuse by Fleming during the time that it was occurring. Plaintiff, however, further testified that the abuse occurred during school hours when plaintiff "would [have thought] that people would have seen [her] going into that sanctum back there where his office was a small part of it." Fleming would pull plaintiff out of music classes or when she was "hanging around in the lounge where the kids would assemble." Further, in her senior year, plaintiff began "skipping a lot of classes and not showing up" in order to avoid Fleming, resulting in a noticeable change in her previously "very, very good" attendance. We conclude that defendant's own submissions raise a triable issue of fact whether defendant, in failing to notice or investigate plaintiff's frequent absences from class, exercised the same degree of care and supervision over plaintiff that a parent of ordinary prudence would have exercised (*see Doe v Whitney*, 8 AD3d 610, 611-612 [2d Dept 2004]).

Defendant offered no affirmative evidence establishing as a

matter of law the existence of any sexual harassment prevention policies or the absence of any relevant complaints regarding Fleming prior to or during the relevant time period (*cf. Ernest L. v Charlton School*, 30 AD3d 649, 651 [3d Dept 2006]). Defendant did submit, among other things, the deposition testimony of a teacher who worked at plaintiff's high school during the years relevant to plaintiff's allegations and who continued his career with defendant as an administrator. The administrator testified that, in reference to complaints regarding sexual misconduct, "there was a time where we didn't cross our T's and dot our I's." The administrator explained that, before the 1980s, when the state "got a lot more forceful," there had been "always an effort to resolve the problem by removing the teacher." The administrator agreed that defendant "didn't necessarily take the action that would prevent [sexual abuse] from happening again." A factfinder could reasonably infer from that testimony that defendant was aware of other instances of sexual abuse of students by its teachers occurring prior to the 1980s and maintained a practice of removing the offending teachers without taking further action to prevent future sexual abuse. Thus, defendant's own submissions raise a triable issue of fact whether plaintiff's injuries were the "reasonably foreseeable consequence of circumstances it created by its inaction" (*Fulton School Dist.*, 35 AD3d at 1195).

Even assuming, arguendo, that defendant did meet its initial burden, we conclude that plaintiff raised a triable issue of fact. In opposition to defendant's motion and in support of her cross-motion, plaintiff submitted, inter alia, the deposition testimony of another student, identified as BL Doe 3, who attended East High School at the same time as plaintiff and who alleges that she was also sexually abused by Fleming. BL Doe 3 testified that, beginning in the fall of 1972, she told several school staff members that Fleming "was too touchy-feely or . . . he gave me the creeps," that " 'Mr. Fleming makes me uncomfortable. He's very touchy. I don't like to be touched,' " and that " 'He touches too much.' " Despite the absence of more explicit terminology in BL Doe 3's reports, we conclude that a factfinder could reasonably infer that defendant, in failing to investigate those reports, did not exercise the same degree of care and supervision that a parent of ordinary prudence would have exercised (*see generally David*, 1 NY3d at 526; *Shapiro*, 208 AD3d at 960).

The court also properly declined to dismiss plaintiff's cause of action alleging defendant's violation of the common-law duty to report. Contrary to defendant's contention, a *school's* duty to report falls within the scope of its "common-law duty to adequately supervise its students," which, as noted above, "requires that the school exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*Female Academy*, 199 AD3d at 1422 [internal quotation marks omitted]; *see Matter of Kimberly S.M. v Bradford Cent. School*, 226 AD2d 85, 87-88 [4th Dept 1996]; *see generally Mirand*, 84 NY2d at 49). Thus, regardless of whether a common-law cause of action exists in New York for failure to report

child abuse by a defendant who lacks a school's *in loco parentis* relationship with a child (*see Heidt v Rome Mem. Hosp.*, 278 AD2d 786, 787 [4th Dept 2000] [Lawton, J., dissenting], citing *Eiseman v State of New York*, 70 NY2d 175, 187-189 [1987]), here defendant's alleged failure to do so is a recognized form of negligence (*see Female Academy*, 199 AD3d at 1422-1423). Finally, we conclude that defendant failed to meet its burden of establishing, with respect to its failure to report the abuse of plaintiff, that it exercised such care and supervision over plaintiff as a parent of ordinary prudence would have exercised (*see generally id.*).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01477

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

JEFFREY WEINER, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

LIESELOTTE ROTH WEINER, DEFENDANT-APPELLANT-RESPONDENT,
ESTATE OF IRWIN M. WEINER, M.D., DECEASED,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

ADAMS LECLAIR LLP, ROCHESTER (STACEY E. TRIEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross-appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 3, 2023. The judgment, inter alia, awarded plaintiff the sum of $342,711.54, jointly and severally against defendants Lieselotte Roth Weiner and Estate of Irwin M. Weiner, M.D.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the third decretal paragraph and substituting therefor the language "ADJUDGED AND DECLARED that from December 2022 forward, Plaintiff Jeffrey Weiner is awarded one-third (33 ⅓%) of all amounts paid by Teachers Insurance and Annuity Association of America and College Retirement Equities Fund *from that portion of Irwin M. Weiner's pension benefits accrued during his employment at SUNY Upstate* to Defendant Lieselotte Roth Weiner for the duration of Lois Weiner's life, and that Jeffrey Weiner shall have execution therefor" and as modified the judgment is affirmed without costs.

Memorandum: In this action stemming from a separation agreement between plaintiff's mother, Lois Weiner, and his now-deceased father, Irwin M. Weiner, defendant Lieselotte Roth Weiner, the father's second wife (defendant), appeals and plaintiff cross-appeals from a judgment entered following a damages inquest, which brings up for review an underlying order that, inter alia, granted plaintiff's motion for summary judgment with respect to liability on his breach of contract cause of action against defendant Estate of Irwin M. Weiner, M.D. (estate) and with respect to liability on his unjust enrichment cause of action against defendant and denied defendant's motion for summary

judgment.

Plaintiff's mother and late father married in 1961 and had two children, including plaintiff. During the course of their marriage, the father was employed as a professor at SUNY Upstate Medical Center (SUNY Upstate), where he applied for a deferred annuity through defendants Teachers Insurance and Annuity Association of America and College Retirement Equities Fund (TIAA-CREF annuity). The primary beneficiary of the TIAA-CREF annuity was plaintiff's mother.

In May 1980, plaintiff's mother filed for divorce, and, that same month, plaintiff's parents executed a separation agreement. As relevant here, section (1) (B) (1) of the separation agreement provided that plaintiff's mother "shall have the right to receive upon the death of the husband thirty three and one third per cent (33 ⅓%) of the husband's present pension to the extent that the same is funded, derived from his employment at the Upstate Medical Center and held by the Teachers Insurance and Annuity Association."

Plaintiff's father continued to work at SUNY Upstate until 1991, when he left to take a position with SUNY Health Sciences Center at Brooklyn (SUNY Downstate). Upon his retirement, the father selected a "two-life annuity income" plan whereby 100 percent of his TIAA-CREF annuity would be paid out to him in certain monthly increments beginning in January 1996, and, following his death, to defendant. Plaintiff's father died in September 2013; no payments were made to plaintiff's mother following his death.

Plaintiff's mother assigned her rights under the separation agreement to plaintiff, including "the authority to pursue any and all claims that belong to [plaintiff's mother] and arose via the terms and conditions of the Separation Agreement." Plaintiff and his mother commenced this action sounding in breach of contract against the estate and unjust enrichment against defendant, seeking to recover the one-third interest in his father's pension pursuant to the terms of the separation agreement.

Defendant successfully moved to dismiss plaintiff's mother from the case for lack of standing, given that she had validly assigned her interest to plaintiff, and, following depositions and discovery, plaintiff moved for summary judgment on the complaint and defendant opposed that motion and moved for, inter alia, summary judgment dismissing the complaint. In granting plaintiff's motion, Supreme Court determined that the terms of the separation agreement entitled plaintiff to 33 ⅓% of the value of the father's TIAA-CREF pension at death, to the extent that the pension was derived from his employment at SUNY Upstate—as opposed to SUNY Downstate.

Following a damages inquest, the court awarded judgment to plaintiff in the amount of $342,711.54 jointly and severally against the estate and defendant for plaintiff's share of the two-life annuity income plan retained by defendant between the father's death and the judgment. The court further awarded plaintiff prejudgment interest at the rate of nine percent solely against the estate on the breach of

contract claim in the amount of $289,477.30. The court did not award prejudgment interest on plaintiff's equitable claims against defendant (*see* CPLR 5001 [a]). In the third decretal paragraph of the judgment, the court awarded plaintiff "one-third (33 ⅓%) of all amounts paid by Teachers Insurance and Annuity Association of America and College Retirement Equities Fund to Defendant Lieselotte Roth Weiner for the duration of Lois Weiner's life."

Defendant contends on her appeal that under the terms of the separation agreement, plaintiff is entitled to, at most, one third of the value of his father's pension at the time of the separation agreement. We reject that contention. Defendant's proffered interpretation would "add . . . terms [and] distort the meaning of . . . particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreement[ ]" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017]; *see Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009]), and we conclude that the court properly determined that plaintiff's interpretation "is the only construction which can fairly be placed" on section (1) (B) (1) of the separation agreement (*Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1529 [4th Dept 2017]).

We further reject defendant's contention on her appeal that plaintiff is not an appropriate party because his mother's right to a part of the annuity income plan was not assignable. Defendant successfully moved to dismiss plaintiff's mother from the action on the ground that she had assigned her rights under the separation agreement to plaintiff and, having prevailed on that issue, defendant is estopped from "assuming a contrary position . . . simply because [her] interests have changed" (*Ghatani v AGH Realty, LLC*, 181 AD3d 909, 911 [2d Dept 2020]).

We reject plaintiff's contention on his cross-appeal that the court erred in refusing to award prejudgment interest against defendant. Where, as here, solely equitable causes of action are asserted against a defendant, the decision to award prejudgment interest against a defendant is soundly in the court's discretion (*see* CPLR 5001 [a]), and we perceive no basis to disturb the court's determination on appeal (*see generally Matter of Zane*, 137 AD3d 926, 928 [2d Dept 2016]).

We agree with defendant on her appeal that the third decretal paragraph of the judgment is overly broad and in conflict with the more particular wording of the court's letter decision. We therefore modify the terms of the judgment to conform to that decision by inserting the language "from that portion of Irwin M. Weiner's pension benefits accrued during his employment at SUNY Upstate" in the third decretal paragraph, such that it reads "one-third (33 ⅓%) of all amounts paid by Teachers Insurance and Annuity Association of America and College Retirement Equities Fund *from that portion of Irwin M. Weiner's pension benefits accrued during his employment at SUNY Upstate* to Defendant Lieselotte Roth Weiner for the duration of Lois

Weiner's life" (*see generally Reukauf v Kraft*, 203 AD3d 1652, 1654 [4th Dept 2022]).

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-00432

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

IN THE MATTER OF RICHARD RAWLEIGH, SR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STACI GALLT, RESPONDENT-RESPONDENT.

DAVID J. PAJAK, ALDEN, FOR PETITIONER-APPELLANT.

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

DEBORAH K. JESSEY, CLARENCE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Livingston County (Kevin Van Allen, J.), entered February 16, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint legal custody of the subject child.

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

Memorandum: In this Family Court Act article 6 proceeding, petitioner father appeals from an order that, inter alia, continued primary physical custody of the child with respondent mother. We affirm. Although we agree with the father that Family Court "erred in failing 'to set forth those facts essential to its decision' . . . , 'the record is sufficiently complete for us to make our own findings of fact in the interests of judicial economy and the well-being of the child[ ]' " (*Matter of Williams v Tucker*, 2 AD3d 1366, 1367 [4th Dept 2003], *lv denied* 2 NY3d 705 [2004]; *see Matter of Mathewson v Sessler*, 94 AD3d 1487, 1489 [4th Dept 2012], *lv denied* 19 NY3d 815 [2012]; *Matter of Hilliard v Peroni*, 245 AD2d 1107, 1107 [4th Dept 1997]). Upon our review of the relevant factors (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]; *Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]), we conclude that it is in the child's best interests that the mother retain primary physical custody of the child.

Here, there are several factors that do not clearly favor either parent. For instance, it is undisputed that both parents love the child and want what is best for him. It is also undisputed that both parents have a history of drug abuse and that both have struggled with addressing their drug problem. Indeed, it appears that at separate times during the pendency of the underlying proceedings, each parent

relapsed into drug use. Nonetheless, several crucial factors decisively weigh against awarding the father primary physical custody of the child. Most notably, the testimony at the fact-finding hearing established that the father had an explosive temper, a history of domestic violence, and a lengthy criminal history, and has at times violated court orders. Further, the father's testimony also established that he did not fully appreciate the extent of the child's special needs, which would negatively impact his ability to provide the care and treatment necessary for the child's development. Additionally, the testimony established that the father would have greater difficulty than the mother in providing the child with transportation to various places and in his financial ability to provide for the child.

Finally, it is undisputed that the mother has been the child's primary caretaker for the vast majority of his life and that the child would greatly benefit from the stability and consistency that residency with the mother would provide (*see Matter of Sorrentino v Keating*, 159 AD3d 1505, 1506-1507 [4th Dept 2018]). Indeed, the evidence at the hearing established that the mother is better able to provide for the child's care and is better suited to serve as the primary residential parent (*see Hendrickson v Hendrickson*, 147 AD3d 1522, 1523 [4th Dept 2017]). Thus, contrary to the father's contention, the court's determination that it is in the best interests of the child to continue primary physical custody with the mother is supported by a sound and substantial basis in the record (*see Matter of Papineau v Sanford*, 189 AD3d 2147, 2147-2148 [4th Dept 2020], *lv denied* 36 NY3d 911 [2021]; *Matter of Angel M.S. v Thomas J.S.*, 41 AD3d 1227, 1228 [4th Dept 2007]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

309

KA 22-02023

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL WRIGHT, DEFENDANT-APPELLANT.

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

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 4, 2022. The judgment convicted defendant upon his plea of guilty of riot in the first degree and attempted assault in the second degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentences imposed on counts 2 and 3 of the indictment and as modified the judgment is affirmed, and the matter is remitted to Cayuga County Court for resentencing on those counts.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of one count of riot in the first degree (Penal Law § 240.06 [2]) and three counts of attempted assault in the second degree (§§ 110.00, 120.05 [3]), defendant contends that County Court erred in imposing consecutive sentences for attempted assault in the second degree under counts 2 and 3 of the indictment and that the sentences on those counts must instead run concurrently (*see generally People v Ramirez*, 89 NY2d 444, 451 [1996]). We agree.

Sentences imposed for two or more offenses may not run consecutively where, inter alia, "a single act constitutes two offenses" (*People v Laureano*, 87 NY2d 640, 643 [1996]; *see* Penal Law § 70.25 [2]). Thus, in order for a consecutive sentence to be legally imposed, the People have the burden of demonstrating by "identifiable facts . . . that the defendant's acts underlying the crimes are separate and distinct" (*Ramirez*, 89 NY2d at 451; *see Laureano*, 87 NY2d at 643). Where, as here, the defendant is "convicted upon a plea to a lesser offense than that charged in the indictment, the People may rely only on those facts and circumstances admitted during the plea allocution" in order to meet that burden (*Laureano*, 87 NY2d at 644; *see People v Robinson*, 178 AD3d 861, 862 [2d Dept 2019]).

Here, no facts were adduced at defendant's plea allocution that would establish two separate and distinct acts causing injury to the victims named in counts 2 and 3, and thus there was no basis for imposing consecutive sentences for those counts (*see Laureano*, 87 NY2d at 644-645*; People v Bailey*, 167 AD3d 924, 925 [2d Dept 2018], *lv denied* 33 NY3d 974 [2019]; *People v Jones*, 122 AD3d 1161, 1162 [3d Dept 2014]). Consequently, we modify the judgment by vacating the sentences imposed for counts 2 and 3 of the indictment, and we remit the matter to County Court for resentencing on those counts.

In light of our determination, we do not address defendant's alternative contention that the imposition of consecutive sentences is unduly harsh and severe.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

314

KA 19-01029

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER WIGGINS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered April 1, 2019. The judgment convicted defendant upon his plea of guilty of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, the motion seeking to suppress evidence obtained from defendant's cellular phone is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal. Supreme Court's oral colloquy mischaracterized the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Davis*, 188 AD3d 1731, 1731 [4th Dept 2020], *lv denied* 37 NY3d 991 [2021]) and, although the record establishes that defendant executed a written waiver of the right to appeal, the written waiver did not cure the defects in the oral colloquy (*see Davis*, 188 AD3d at 1732).

Contrary to defendant's further contention, the court properly refused to suppress his statements to the police inasmuch as defendant "did not clearly communicate a desire to cease all questioning indefinitely" (*People v Caruso*, 34 AD3d 860, 863 [3d Dept 2006], *lv denied* 8 NY3d 879 [2007]; *see People v Flowers*, 122 AD3d 1396, 1397 [4th Dept 2014], *lv denied* 24 NY3d 1219 [2015]) and thus did not make an " 'unequivocal and unqualified' " assertion of his right to remain silent (*People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *see People v Young*, 153 AD3d 1618, 1619 [4th Dept

2017], *lv denied* 30 NY3d 1065 [2017], *reconsideration denied* 31 NY3d 1123 [2018], *cert denied* — US —, 139 S Ct 84 [2018]; *People v Cole*, 59 AD3d 302, 302 [1st Dept 2009], *lv denied* 12 NY3d 924 [2009]).

Finally, defendant contends that the court erred in denying his motion seeking to suppress evidence seized from his cellular phone during the execution of a search warrant. Defendant asserts that the search warrant lacked particularity. We agree. A search warrant must be "specific enough to leave no discretion to the executing officer" (*People v Gordon*, 36 NY3d 420, 429 [2021] [internal quotation marks omitted]). To meet the particularity requirement, a search warrant must (1) "identify the specific offense for which the police have established probable cause," (2) "describe the place to be searched," and (3) "specify the items to be seized by their relation to designated crimes" (*United States v Galpin*, 720 F3d 436, 445-446 [2d Cir 2013] [internal quotation marks omitted]; *see People v Saeli* [appeal No. 1], 219 AD3d 1122, 1124 [4th Dept 2023]; *see generally People v Madigan*, 169 AD3d 1467, 1468 [4th Dept 2019], *lv denied* 33 NY3d 1033 [2019]). Here, the search warrant authorized and directed the police to search for, inter alia, "cellular phones (including contents)" located in defendant's vehicle. Significantly, the search was not restricted by reference to any particular crime. Thus, the search warrant failed to meet the particularity requirement and left discretion over the search to the executing officers (*see People v Melamed*, 178 AD3d 1079, 1081 [2d Dept 2019]; *see generally Gordon*, 36 NY3d at 429). The search warrant states that an affidavit from a police investigator provided the basis for the finding of probable cause for the search. Although that affidavit contained information about the crime and defendant's exchange of text messages with the victim before the crime, the mere mention in a search warrant of an affidavit or application "does not save the warrant from its facial invalidity" where the search warrant contains no language incorporating that document (*Melamed*, 178 AD3d at 1083 [internal quotation marks omitted]; *see Groh v Ramirez*, 540 US 551, 557-558 [2004]; *United States v George*, 975 F2d 72, 76 [2d Cir 1992]). We therefore conclude that the court should have granted the motion.

Consequently, we reverse the judgment, vacate the plea, grant defendant's motion seeking to suppress evidence obtained from defendant's cellular phone, and remit the matter to Supreme Court for further proceedings on the indictment.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

319

CAF 23-00919

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF KHALIK A. HUDSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PERSIA CARTER, RESPONDENT-RESPONDENT.

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

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Julie Anne Gordon, R.), entered March 28, 2023, in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, denied the petition for a modification of visitation with respect to the subject children.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the first ordering paragraph is vacated, the petition is granted, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals, as limited by his brief, from an order insofar as it denied his petition seeking to modify the parties' prior order of custody, pursuant to which the father was granted supervised visitation twice a week. Contrary to the father's contention, he was not denied due process by Family Court's consideration of evidence outside the record, specifically orders of protection issued against him. Pursuant to Family Court Act § 651 (e) (3) (ii), the court is required to conduct a review of "reports of the statewide computerized registry of orders of protection."

We agree with the father, however, that the court erred in concluding that he did not establish a change in circumstances sufficient to warrant inquiry into whether modification of the existing visitation arrangement would be in the best interests of the children (*see generally Matter of Peay v Peay*, 156 AD3d 1358, 1360 [4th Dept 2017]). The prior order provided "that sufficient compliance with [the] order for a period of six (6) months will constitute a change of circumstances for [f]ather to re[-]petition for additional visitation time and overnights." The father testified that he had been exercising his visitation consistently until the mother

moved to Arizona with the children, an assertion that went unchallenged during the hearing. We conclude that the father established a change in circumstances based on his compliance with the terms of the prior order. We also conclude that the mother's relocation without permission constituted a change in circumstances because it resulted in a substantial interference with the father's visitation rights (*see Matter of Dubiel v Schaefer*, 108 AD3d 1093, 1093-1094 [4th Dept 2013]; *see generally Matter of Grover v Grover*, 144 AD2d 852, 853 [3d Dept 1988]).

Based on the record before us, we further conclude that modification of the father's visitation schedule to include in-person visitation would serve the children's best interests (*see Matter of Belcher v Morgado*, 147 AD3d 1335, 1336 [4th Dept 2017]; *Williams v Williams*, 100 AD3d 1347, 1349 [4th Dept 2012]). We therefore reverse the order insofar as appealed from and grant the petition, and we remit the matter to Family Court to fashion an appropriate in-person visitation schedule in accordance with the best interests of the children, following a hearing if necessary.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

320

CA 23-01047

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

KEITH BLANCHARD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

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

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (CHRISTOPHER M. MILITELLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEITZ & LUXENBERG, P.C., NEW YORK CITY (JASON P. WEINSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Charles A. Schiano, Jr., J.), entered June 2, 2023. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the second and fourth through sixth causes of action of the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking summary judgment dismissing the fourth cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that he was sexually abused by a principal while a student in defendant Moravia Central School District (District) in the early 1980s. Plaintiff alleges that the first incident of abuse occurred in 1981 when he was called out of his classroom over the public announcement system, led into the principal's office by a secretary, and then left alone with the principal behind a closed, windowless door for approximately 45 minutes, during which time the principal inappropriately touched plaintiff. Plaintiff further alleges that the principal continued to call him into his private office in the same manner at least 50 times over the next two years, without providing an explanation to plaintiff's teachers and despite the fact that plaintiff was not misbehaving in class, and sexually abused him there. The abuse ended when plaintiff transferred to another school district.

Defendants moved for summary judgment dismissing the amended complaint. Supreme Court denied the motion with respect to the second, fourth, fifth, and sixth causes of action and granted the

motion with respect to the remaining causes of action. Defendants appeal from the order insofar as it denied their motion.

With respect to the second cause of action, for negligent supervision of plaintiff, it is well established that "[a] school district has the duty to exercise the same degree of care and supervision over [students] under its control as a reasonably prudent parent would exercise under the same circumstances" (*Lisa P. v Attica Cent. School Dist.*, 27 AD3d 1080, 1081 [4th Dept 2006]). "The standard for determining whether this duty was breached is whether a parent of ordinary prudence placed in an identical situation and armed with the same information would invariably have provided greater supervision" (*id.* [internal quotation marks omitted]). Prior knowledge of an individual's propensity to engage in criminal conduct is not required to establish a claim for the negligent supervision of a student inasmuch as there are situations in which such conduct "may . . . be a reasonably foreseeable consequence of circumstances created by the defendant" (*Murray v Research Found. of State Univ. of N.Y.*, 283 AD2d 995, 997 [4th Dept 2001], *lv denied* 96 NY2d 719 [2001], quoting *Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946 [1997]). In other words, even without actual or constructive notice of an individual's criminal propensity, a school district may "be held liable for an injury that is the reasonably foreseeable consequence of circumstances it created by its inaction" (*Doe v Fulton School Dist.*, 35 AD3d 1194, 1195 [4th Dept 2006]).

Thus, although defendants met their initial burden for summary judgment by submitting evidence that their employees had no notice of the principal's propensity for sexual abuse of children (*see Lisa P.*, 27 AD3d at 1081), we conclude that plaintiff raised a triable issue of fact whether the principal's sexual abuse of plaintiff was a reasonably foreseeable consequence of the District's and its employees' failure to prevent an employee from repeatedly meeting alone with a student behind closed doors for no articulated reason (*see generally Doe v Whitney*, 8 AD3d 610, 611-612 [2d Dept 2004]; *Murray*, 283 AD2d at 997).

With respect to the fourth cause of action, for negligent hiring, "[t]here is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee" (*Doe*, 8 AD3d at 612 [internal quotation marks omitted]). Here, defendants met their initial burden by submitting, inter alia, the principal's teaching license, letters of recommendation, and employment application from when the principal was first hired at the district, which did not provide notice of any propensity to sexually abuse children (*see Dolgas v Wales*, 215 AD3d 51, 55 [3d Dept 2023], *lv denied* 41 NY3d 904 [2024]; *cf. S.C. v New York City Dept. of Educ.*, 97 AD3d 518, 520 [2d Dept 2012]). We agree with defendants that plaintiff failed to raise a triable issue of fact in opposition inasmuch as plaintiff does not identify any facts that would have lead a reasonably prudent person to investigate the principal further prior to hiring him (*see Nellenback v Madison County*, 223 AD3d 1025, 1026-

1028 [3d Dept 2024]), and plaintiff's "[m]ere speculation" as to the inadequacy of defendants' hiring process "is not sufficient to raise an issue of fact" (*Newman v Regent Contr. Corp.*, 31 AD3d 1133, 1135 [4th Dept 2006] [internal quotation marks omitted]). Thus, we modify the order by granting that part of defendants' motion seeking summary judgment dismissing the cause of action for negligent hiring.

With respect to the fifth cause of action, for negligent supervision and training, and the sixth, for negligent retention, we note that to establish such causes of action a plaintiff must show "that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Shapiro v Syracuse Univ.*, 208 AD3d 958, 959 [4th Dept 2022] [internal quotation marks omitted]; *see McMindes v Jones*, 41 AD3d 1196, 1196 [4th Dept 2007]). While defendants met their initial burden for summary judgment by submitting, inter alia, evidence that they did not have actual knowledge of the principal's propensity to sexually abuse children, plaintiff raised a triable issue of fact in opposition with respect to whether the District should have known about the principal's propensity to improperly meet alone with a student. Specifically, evidence that the principal was repeatedly meeting alone with plaintiff behind closed doors for no articulated reason, and that this practice occurred during school hours and with the awareness of school employees, raised a triable issue of fact whether the District "had notice of the potential for harm to [plaintiff] such that its alleged negligence in supervising and retaining [the principal] 'placed [him] in a position to cause foreseeable harm' " (*Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 636 [2d Dept 2018]; *see generally Miller v Miller*, 189 AD3d 2089, 2090-2091 [4th Dept 2020]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

322

CA 23-00626

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

LISA GUYETT AND JEFFREY GUYETT, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, BUFFALO GENERAL HOSPITAL,
MAHMOUD KULAYLAT, M.D., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS KALEIDA HEALTH, AND BUFFALO GENERAL HOSPITAL.

SUGARMAN LAW FIRM, LLP, BUFFALO (MARINA A. MURRAY OF COUNSEL), FOR DEFENDANT-APPELLANT MAHMOUD KULAYLAT, M.D.

THE JOY E. MISERENDINO LAW FIRM, P.C., ORCHARD PARK (JOY E. MISERENDINO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (John B. Licata, J.), entered March 22, 2023. The order, insofar as appealed from, denied the motion of defendant Mahmoud Kulaylat, M.D., for summary judgment and denied in part the motion for summary judgment of defendants Kaleida Health and Buffalo General Hospital.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendants Kaleida Health and Buffalo General Hospital is granted in its entirety, the motion of defendant Mahmoud Kulaylat, M.D. is granted, and the complaint is dismissed against those defendants.

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries allegedly sustained by Lisa Guyett (plaintiff) as a result of an open appendectomy and ileocecectomy performed by Mahmoud Kulaylat, M.D. (defendant). Defendants Kaleida Health and Buffalo General Hospital (Hospital defendants) maintained and operated the hospital in which the surgery was performed. Plaintiffs raised numerous claims of medical malpractice by defendant, vicarious liability of the Hospital defendants, and negligence by hospital staff. Following discovery, defendant and the Hospital defendants separately moved for summary judgment dismissing the complaint. Supreme Court granted that part of the Hospital defendants' motion for summary judgment dismissing all direct negligence claims against them, denied that part of their motion for

summary judgment dismissing the vicarious liability claims against them, and denied defendant's motion in its entirety. Defendant appeals from the order, and the Hospital defendants appeal from the order insofar as it denied their motion. We reverse the order insofar as appealed from, grant the motions in their entirety, and dismiss the complaint in its entirety against defendant and the Hospital defendants.

Inasmuch as the Hospital defendants' only remaining potential basis for liability is vicarious liability related to defendant, we begin our analysis with the issues concerning defendant's alleged liability. We agree with defendant and the Hospital defendants that they met their initial burdens of establishing that defendant did not deviate from the standard of care in treating plaintiff and, in any event, any deviation was not a proximate cause of plaintiff's injuries (*see generally Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]; *Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]). We further agree with defendant and the Hospital defendants that plaintiffs failed to raise a triable issue of fact with respect to defendant's deviation from the applicable standard of care (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In their complaint and bills of particulars, plaintiffs alleged that defendant, inter alia, "failed to properly, timely and adequately diagnose[ ] and treat [p]laintiff," thereby "causing a *more extensive* surgical procedure and recovery, extensive scarring and a prolonged period of disability" (emphasis added). The crux of plaintiffs' contention was that defendant failed to "timely and properly perform *a surgical procedure*" (emphasis added). Defendant and the Hospital defendants interpreted such claims as alleging that liability was based on a *delay* in performing the appendectomy, resulting in a "more extensive surgery" and greater injuries. The interpretation of defendant and the Hospital defendants is supported by the lines of questioning at various depositions delving into why surgery was delayed, whether the rupture of the appendix occurred during that period of delay, and whether the prudent course of treatment for a person presenting with a ruptured appendix would be "getting her into surgery."

By contrast, in opposition to the motions of defendant and the Hospital defendants, plaintiffs contended that defendant was negligent in his performance of the appendectomy and ileocecectomy. Plaintiffs' expert opined that "[t]he standard of care for a patient with complicated subacute appendicitis with phlegmon, who is hemodynamically stable . . . is admission to the hospital with intravenous antibiotics followed by a percutaneous drainage of any abscesses if necessary." Thus, plaintiffs' expert opined, it was "a deviation [from] the standard of care to first perform surgery" on plaintiff, i.e., according to plaintiffs' expert, defendant should not have performed an appendectomy but, instead, should have commenced intravenous antibiotic treatment and then performed drainage of any abscesses. It should be noted that plaintiff did, in fact, receive intravenous antibiotics within hours of her admission.

We agree with defendant and the Hospital defendants that plaintiff impermissibly raised a new theory of liability for the first time in opposition to the motions. "It is well settled that a plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability for negligence for the first time in opposition to the motion" (*DeMartino v Kronhaus*, 158 AD3d 1286, 1286 [4th Dept 2018] [internal quotation marks omitted]; *see Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]; *Hatch v St. Joseph's Hosp. Health Ctr.*, 174 AD3d 1404, 1405-1406 [4th Dept 2019]). The complaint and bills of particulars centered around allegations that defendant *delayed* in performing the appendectomy. It is true that a generic contention that a defendant "failed to properly diagnose and treat" a certain condition can encompass new allegations regarding the precise nature of the alleged negligence (*Braxton v Erie County Med. Ctr. Corp.*, 208 AD3d 1038, 1042 [4th Dept 2022]; *see Jeannette S. v Williot*, 179 AD3d 1479, 1481 [4th Dept 2020]; *Bubar*, 177 AD3d at 1361). Here, however, we conclude that plaintiffs altered their underlying theory of liability, inasmuch as the complaint and bills of particulars alleged that the surgery was unduly delayed and did not in any way allege that surgery was improper (*see generally Darrisaw*, 74 AD3d at 1770). Inasmuch as plaintiffs' new theory of liability may not be used to defeat the motions (*see Walker v Caruana*, 175 AD3d 1807-1808 [4th Dept 2019]), we conclude that plaintiffs failed to raise a triable issue of fact.

Based on our determination, we do not address the remaining contentions of defendant and the Hospital defendants.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

325

CA 23-01341

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF NUSHAWN W., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

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

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

Appeal from a decision of the Supreme Court, Oneida County (James P. McClusky, J.), entered July 18, 2023, in a proceeding pursuant to Mental Hygiene Law article 10. The decision, inter alia, continued the confinement of petitioner to a secure treatment facility.

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

Memorandum: Petitioner purports to appeal from a decision determining that he is a dangerous sex offender requiring confinement under Mental Hygiene Law § 10.03 (e). We dismiss the appeal. "[N]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]; *see Gunn v Palmieri*, 86 NY2d 830, 830 [1995]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

326

CA 22-01932

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

EDWARD C. COSGROVE, ESQ., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW J. ZINNO AND DEANNA L. ZINNO,
DEFENDANTS-RESPONDENTS.

COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, LENNON & BROWN, PLLC, BUFFALO (DAVID L. ROACH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered November 7, 2022. The order granted the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff appeals from an order granting defendants' motion to dismiss his complaint for failure to comply with the notice requirement of the New York State Fee Dispute Resolution Program (FDRP) (*see* Rules of Chief Admr of Cts [22 NYCRR] part 137). The underlying fee dispute between the parties arises from legal services performed by plaintiff and his firm to defendants between July 2014 and June 2015 in a residential real property contract dispute. Although plaintiff did not provide defendants with a written letter of engagement, defendants delivered to plaintiff a $1,500 advance payment. When the contract dispute settled in June 2015, plaintiff returned the advance payment to defendants along with the settlement proceeds. Four and a half years later, plaintiff's firm sent defendants an invoice for legal services relating to the property contract dispute, but did not provide written notice of defendants' right to arbitration of fee disputes under the FDRP. In 2021, plaintiff commenced this action to recover the invoiced fees, alleging in his complaint that the FDRP did not apply because his firm had not rendered legal services to defendants "for more than two years prior to the date of th[e] complaint." When defendants sought to have the dispute resolved by arbitration, the Bar Association of Erie County rejected their petition and advised that FDRP rules "do not allow for arbitration where no attorney's services have been rendered for more than two years." Defendants then moved to dismiss the complaint based upon plaintiff's failure to provide timely notice of their right to

arbitration of fee disputes pursuant to the FDRP. Supreme Court granted defendants' motion, and plaintiff now appeals. We affirm.

The FDRP was established in 2001 to "provide[ ] for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation" (22 NYCRR 137.0), and applies, with certain enumerated exclusions, to fee disputes in civil matters that range from $1,000 to $50,000 (22 NYCRR 137.1 [b]). It requires, inter alia, that an attorney who seeks to commence an action against a client for attorney's fees provide written notice to the client of the client's right to arbitration of fee disputes under the program (*see* 22 NYCRR 137.6 [a] [1]), and further provides that the complaint in such an action must allege either (1) that the client received notice of the right to pursue arbitration and did not file a timely request for arbitration or (2) that the FDRP does not apply to the subject fee dispute (*see* 22 NYCRR 137.6 [b]; *Pascazi Law Offs., PLLC v Pioneer Natural Pools, Inc.*, 136 AD3d 878, 878-879 [2d Dept 2016], *lv denied in part & dismissed in part* 27 NY3d 1047 [2016]).

As noted, plaintiff alleges in his complaint that the FDRP does not apply to the subject fee dispute because he filed the complaint more than two years after he last performed legal services for defendants. Plaintiff relies on 22 NYCRR 137.1 (b) (6), which provides that the FDRP excludes "disputes where no attorney's services have been rendered for more than two years." Plaintiff is correct that the FDRP generally excludes fee disputes in which more than two years have passed since legal services were last rendered to the client (*see Borah, Goldstein, Altschuler, Schwartz, & Nahins, P.C. v Lubnitzki*, 13 Misc 3d 823, 825-826 [Civ Ct, NY County 2006]). However, that exclusion does not imply that an attorney who failed to provide notice to the client of the right to arbitrate within the two-year period may commence an action for attorney's fees, after two years have elapsed, and "in good faith claim compliance with [the FDRP]" (*Filemyr v Hall*, 186 AD3d 117, 121 [1st Dept 2020]). That is because the right to arbitration belongs to the client and the attorney cannot "through their own delay deprive[ ] the client of that right" (*id.* at 121). Thus, for all fee disputes not otherwise excluded under the FDRP (*see* 22 NYCRR 137.1 [b] [1] - [5], [7], [8]), an attorney must provide the client with both the invoice for disputed legal services and written notice of the client's right to arbitration, and must do so at least 30 days before the two-year anniversary of the last date legal services were rendered (*see* 22 NYCRR 137.1 [b] [6]; 22 NYCRR 137.6 [b]). Where, as here, the attorney's complaint fails to allege that the attorney timely provided the client with notice of both the fee being sought and the right to arbitrate a dispute over that fee, it must be dismissed (*see Filemyr*, 186 AD3d at 119-121).

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

327

CA 23-01196

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

GERALDINE CLARK AND MOSES CLARK,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JOHN CUCINOTTA, M.D., ET AL., DEFENDANTS,
CROUSE HOSPITAL EMERGENCY DEPARTMENT, CROUSE HEALTH HOSPITAL, INC., AND KRISTA J. KANDEL, M.D.,
DEFENDANTS-RESPONDENTS.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CROUSE HOSPITAL EMERGENCY DEPARTMENT AND CROUSE HEALTH HOSPITAL, INC.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT KRISTA J. KANDEL, M.D..

Appeal from an order of the Supreme Court, Onondaga County (Rory A. McMahon, J.), entered May 16, 2023. The order granted the motions of defendants Crouse Hospital Emergency Department, Crouse Health Hospital, Inc., and Krista J. Kandel, M.D., to preclude certain evidence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motions insofar as they seek to preclude plaintiffs from offering testimony or evidence that plaintiff Geraldine Clark suffered from a transient ischemic attack or that defendants failed to diagnose that condition, and as modified the order is affirmed without costs.

Memorandum: In this medical malpractice action, plaintiffs appeal from an order that, inter alia, granted the motions of defendants Krista J. Kandel, M.D., Crouse Health Hospital, Inc., and Crouse Hospital Emergency Department (hospital defendants) insofar as they seek to preclude plaintiffs from offering any testimony or evidence regarding alleged deviations from the standard of care by Dr. Kandel that were not alleged in their bill of particulars. The hospital defendants seek to preclude plaintiffs from introducing what they deem to be a new theory of liability, specifically, that Geraldine Clark (plaintiff) suffered a transient ischemic attack (TIA) and that the hospital defendants were negligent in failing to diagnose

that TIA. We agree with plaintiffs that Supreme Court erred in granting the hospital defendants' motions in that respect, and we therefore modify the order accordingly.

In determining whether a new theory of liability has been improperly alleged by a plaintiff, we must initially focus on the allegations in the complaint (*see generally Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]), and examine whether the allegedly new theory was "sufficiently pleaded to avoid surprise and prejudice to defendants" (*Valette v Correa*, 216 AD3d 500, 500 [1st Dept 2023]; *see generally Byrnes v Satterly*, 85 AD3d 1711, 1712 [4th Dept 2011]).

Here, the complaint alleged, inter alia, that the symptoms plaintiff experienced shortly before her admission "were compatible with stroke, or a [TIA]," that Dr. Kandel was negligent in failing to "rule[ ] out stroke and/or TIA" before plaintiff was discharged, and that the hospital defendants were negligent in "failing to observe, examine, diagnose and attend to plaintiff's condition" while she was under their care. Further, plaintiffs' bill of particulars, which appropriately amplifies the allegations in the complaint (*see generally Darrisaw*, 74 AD3d at 1770; *Randall v Pech*, 51 AD2d 864, 865 [4th Dept 1976]), reiterates that plaintiff's symptoms prior to admission "were compatible with stroke, or a [TIA]," and further that Dr. Kandel was negligent by, inter alia, "failing to . . . diagnose and attend to [plaintiff's] condition," failing to "diagnose and examine [plaintiff] in accordance with acceptable medical practices," and "failing to rule out stroke or TIA before discharging" plaintiff. We therefore conclude that, contrary to the court's determination, the alleged failure to diagnose a TIA is not a new theory of liability, inasmuch as plaintiffs have consistently alleged that plaintiff suffered from a stroke or a TIA before admission and that the hospital defendants were negligent in failing to diagnose a stroke or a TIA or rule out those conditions before she was discharged (*see Braxton v Erie County Med. Ctr. Corp.*, 208 AD3d 1038, 1041-1042 [4th Dept 2022]; *Jeannette S. v Williot*, 179 AD3d 1479, 1481 [4th Dept 2020]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

339

CAF 23-00040

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

IN THE MATTER OF KIEL A., JR. AND
TRENTYN A.

HERKIMER COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT; ORDER

KIEL A., SR., RESPONDENT-APPELLANT,
AND CHELSEA F., RESPONDENT.

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

ROBERT J. MALONE, COUNTY ATTORNEY, HERKIMER (MICHELLE K. FASSETT OF COUNSEL), FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Herkimer County (Thaddeus J. Luke, J.), entered December 21, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Kiel A., Sr., neglected the subject children.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 24 and February 23, 2024,

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

350

CA 23-00974

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

JOAN K. IRWIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ST. JOHN THE EVANGELIST CHURCH OF GREECE,
DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (KARL Z. DEUBLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered June 5, 2023. The order denied the motion of defendant 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 dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleged that defendant had actual notice of the alleged dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this premises liability action seeking damages for injuries she sustained when she allegedly slipped and fell on a patch of ice on the sidewalk of premises owned by defendant, fracturing her arm and cutting her forehead. Plaintiff alleged, inter alia, that an extension to the roof of the building had been designed without gutters, causing water to run off the roof and onto the sidewalk, where it would routinely freeze. Plaintiff alleged that defendant was negligent in creating the dangerous condition, in failing to maintain the premises, and in failing to warn of the dangerous condition. Defendant appeals from an order denying its motion for summary judgment dismissing the complaint.

Defendant contends that it met its initial burden on the motion of establishing that it did not create or have actual or constructive notice of the alleged dangerous condition. A defendant seeking summary judgment dismissing a complaint in a premises liability case bears "the initial burden of establishing that [it] did not create the [allegedly] dangerous condition that caused plaintiff to fall and did not have actual or constructive notice thereof" (*Depczynski v Mermigas*, 149 AD3d 1511, 1511-1512 [4th Dept 2017] [internal quotation

marks omitted]; *see Hagenbuch v Victoria Woods HOA, Inc.*, 125 AD3d 1520, 1521 [4th Dept 2015]). We conclude that defendant met its initial burden of establishing that it did not have actual notice of the alleged dangerous condition "by submitting evidence that [it] did not receive any complaints concerning the area where plaintiff fell and [was] unaware of any [ice] in that location prior to plaintiff's accident" (*Cosgrove v River Oaks Rests., LLC*, 161 AD3d 1575, 1576 [4th Dept 2018] [internal quotation marks omitted]; *see Danielak v State of New York*, 185 AD3d 1389, 1389-1390 [4th Dept 2020], *lv denied* 35 NY3d 918 [2020]). Inasmuch as plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), Supreme Court erred in denying the motion with respect to that part of the complaint alleging that defendant had actual notice of the alleged icy condition. We therefore modify the order accordingly.

We reject defendant's contention that the court erred in denying those parts of its motion seeking summary judgment dismissing the complaint insofar as it alleged that defendant had constructive notice of the alleged dangerous condition and that it created that condition. With respect to constructive notice, a "defendant who has actual knowledge of a recurring dangerous condition can be charged with constructive notice of each specific recurrence of the condition" (*Rachlin v Michaels Arts & Crafts*, 118 AD3d 1391, 1393 [4th Dept 2014] [internal quotation marks omitted]; *see Anderson v Great E. Mall, L.P.*, 74 AD3d 1760, 1761 [4th Dept 2010]). Here, defendant's own submissions raise a triable issue of fact whether it had actual knowledge of a recurring dangerous condition in the area where plaintiff fell that would place it on constructive notice of plaintiff's alleged dangerous condition (*see Britt v Northern Dev. II, LLC*, 199 AD3d 1434, 1436 [4th Dept 2021]; *Phillips v Henry B'S, Inc.*, 85 AD3d 1665, 1666-1667 [4th Dept 2011]). Defendant also failed to establish as a matter of law that it did not create the alleged dangerous condition. Defendant submitted the deposition testimony of its pastor in charge of parish operations, which established that defendant "was aware that the absence of a gutter caused rain and melting snow to run off the roof and [accumulate on the sidewalk], causing ice to form during the winter months in the area where plaintiff fell" (*Migli v Davenport*, 249 AD2d 932, 933 [4th Dept 1998]). Viewing that testimony and defendant's other submissions in the light most favorable to plaintiff (*see generally Gronski v County of Monroe*, 18 NY3d 374, 381 [2011], *rearg denied* 19 NY3d 856 [2012]), we conclude that defendant's own submissions failed to eliminate the existence of a triable issue of fact whether the ice on which plaintiff allegedly slipped and fell was formed when water dripped from the roof onto the sidewalk below due to the lack of gutters (*see Britt*, 199 AD3d at 1436).

Finally, defendant contends that it had no duty to warn of a naturally occurring condition and that, in any event, it fulfilled its duty by posting warning signs in the area where plaintiff fell. We reject that contention. "Ordinarily, a landowner's duty to warn of a latent, dangerous condition on [its] property is a natural counterpart to [the] duty to maintain [the] property in a reasonably safe

condition" (*Carol S. v State of New York*, 185 AD3d 1385, 1386 [4th Dept 2020] [internal quotation marks omitted]; *see Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). However, "a landowner has no duty to warn of an open and obvious danger" (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]). We conclude that defendant's own submissions raise issues of fact with respect to the open and obvious nature of the alleged dangerous condition inasmuch as defendant submitted both the deposition testimony of plaintiff, who stated that she did not see the patch of ice until she was on the ground, and the affidavit of the pastor, who averred that he did not see any ice in the area where plaintiff fell. We further conclude that there are issues of fact whether defendant nevertheless met its obligation to warn of the alleged dangerous condition.

In light of defendant's failure to meet its initial burden on its motion with respect to its constructive notice of the alleged dangerous condition, its creation of that condition, or its duty to warn, the court properly denied those parts of the motion regardless of the sufficiency of plaintiff's opposing submissions (*see Britt*, 199 AD3d at 1436; *Taylor v Kwik Fill-Red Apple*, 181 AD3d 1317, 1318 [4th Dept 2020]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

356

KA 17-00157

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRUCE D. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered January 13, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of a weapon in the fourth degree and dismissing count 2 of the indictment, and as modified the judgment is 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]) and criminal possession of a weapon in the fourth degree (§ 265.01 [1]). The conviction stems from the recovery of a loaded handgun that was discovered in a safe in defendant's residence during the execution of a search warrant. Defendant, who was on probation at the time because of a prior conviction of criminal possession of a weapon in the fourth degree, was at a scheduled meeting in the probation office when the search warrant was executed at his residence. In a subsequent videotaped interrogation, defendant admitted that the handgun was his firearm.

Contrary to defendant's contention, we conclude that County Court did not err in ruling that the People could present *Molineux* evidence that defendant was on probation when the handgun was recovered. Here, the evidence was "necessary in order to complete the narrative of the crime[s] charged" (*People v Couser*, 126 AD3d 1419, 1420 [4th Dept 2015], *affd* 28 NY3d 368 [2016] [internal quotation marks omitted]; *see People v Washington*, 122 AD3d 1406, 1408 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]), and the court did not abuse its discretion in

determining that the probative worth of the evidence on that matter outweighed the danger of unfair prejudice to defendant (*see People v Redfield*, 144 AD3d 1548, 1550 [4th Dept 2016], *lv denied* 28 NY3d 1187 [2017]). We also reject defendant's contention that the court erred in refusing to grant a mistrial when the People played a portion of defendant's interrogation videotape that referred to the nature of his prior conviction in violation of the court's *Molineux* ruling. "Any prejudice to defendant that might have arisen from the mention of [prior] criminal activity was alleviated when [the c]ourt sustained defendant's objection and gave prompt curative instructions to the jury" (*People v Houghtaling*, 144 AD3d 1591, 1592 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017], *reconsideration denied* 30 NY3d 950 [2017] [internal quotation marks omitted]; *see People v Reyes-Paredes*, 13 AD3d 1094, 1095 [4th Dept 2004], *lv denied* 4 NY3d 802 [2005]). Defendant's claim of prejudice necessarily assumes that the jury ignored the court's limiting instructions, and "the law does not permit such an assumption" (*People v Cutaia*, 167 AD3d 1534, 1535 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]).

Finally, although not raised by the parties, we note that criminal possession of a weapon in the fourth degree under Penal Law § 265.01 (1), of which defendant was convicted under count 2 of the indictment, is a lesser included offense of criminal possession of a weapon in the second degree under section 265.03 (3) as that offense was charged in count 1 of the indictment (*see People v Laing*, 66 AD3d 1353, 1355 [4th Dept 2009], *lv denied* 13 NY3d 908 [2009]; *see generally People v Lee*, 224 AD3d 1372, 1376 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]). We therefore modify the judgment by reversing that part convicting defendant of criminal possession of a weapon in the fourth degree under count 2 of the indictment and dismissing that count of the indictment (*see People v Coleman*, 206 AD3d 1710, 1710 [4th Dept 2022], *lv denied* 39 NY3d 961 [2022]; *People v Ested*, 129 AD3d 858, 859 [2d Dept 2015], *lv denied* 26 NY3d 1087 [2015], *reconsideration denied* 27 NY3d 964 [2016]).

Entered: July 3, 2024 Ann Dillon Flynn
Clerk of the Court

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

358

KA 19-01115

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY JESMER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 8, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and endangering the welfare of a child (§ 260.10 [1]). Defendant's conviction of the murder count stems from his conduct in intentionally killing a 101-year-old woman who lived in his apartment building. The victim was strangled and stabbed more than 30 times with a kitchen knife. His conviction of the endangering the welfare of a child (EWC) count stems from his conduct in offering a 13-year-old girl money in exchange for coming to his apartment. The crime of EWC was committed on the same day that the homicide victim's body was found, and the police questioned defendant on both charges during the same interrogation.

Defendant's contention that his conviction of EWC is not supported by legally sufficient evidence is preserved only in part (*see People v Gray*, 86 NY2d 10, 19 [1995]) and, in any event, is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We conclude that, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see People v Babb*, 186 AD3d 1058, 1058 [4th Dept 2020], *lv denied* 36 NY3d 1049 [2021]). In particular, we conclude

that there is legally sufficient evidence establishing that, by offering a large sum of money to a 13-year-old girl he met on a bus if she agreed to go back to his apartment, defendant engaged in conduct that was likely to be injurious to the child's "physical, mental or moral welfare," even though his efforts to lure the child to his apartment were unsuccessful inasmuch as an onlooker observed defendant talking to the seemingly distressed child and called the police (Penal Law § 260.10 [1]).

Furthermore, viewing the evidence in light of the elements of murder in the second degree and EWC as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that, contrary to defendant's contention, the verdict with respect to both counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Indeed, based on our independent review of the evidence (*see People v Delamota*, 18 NY3d 107, 116-117 [2011]), we conclude that a different verdict would have been unreasonable (*see People v Muhammad*, 204 AD3d 1402, 1403 [4th Dept 2022], *lv denied* 38 NY3d 1073 [2022]; *People v Peters*, 90 AD3d 1507, 1508 [4th Dept 2011], *lv denied* 18 NY3d 996 [2012]; *see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that County Court erred in refusing to sever the murder and EWC counts. We reject that contention. The court properly determined that the two offenses were joinable pursuant to CPL 200.20 (2) (b), which allows joinder of offenses based upon different criminal transactions where, as here, "such offenses, or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first." Contrary to defendant's contention, evidence relating to the EWC charge was relevant and necessary to complete the narrative of events that led to defendant's initial arrest and to the police's initial suspicions that defendant was involved in the murder (*see generally People v Hall*, 194 AD3d 1372, 1373 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *People v Blocker*, 128 AD3d 1483, 1484 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]; *People v Childs*, 8 AD3d 116, 116 [1st Dept 2004], *lv denied* 3 NY3d 672 [2004]). Indeed, without the testimony relating to the EWC charge, the jury would have had no way of knowing why defendant was initially arrested. Because the two crimes were properly joined in one indictment under CPL 200.20 (2) (b), the court lacked statutory authority to sever them (*see People v Bongarzone*, 69 NY2d 892, 895 [1987]; *People v Cornell*, 17 AD3d 1010, 1011 [4th Dept 2005], *lv denied* 5 NY3d 805 [2005]).

Defendant's sentence is not unduly harsh or severe.

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

361

CA 23-00713

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, KEANE, AND HANNAH, JJ.

MARC BROWN AND DEANNA BROWN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

OVER THE TOP ROOFING, LLC,
DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (VICTOR L. PRIAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered April 19, 2023. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this breach of contract action against defendant alleging that it failed to perform work on their home in a skillful and workmanlike manner. The underlying work was performed pursuant to two home improvement contracts, one for a new roof and the other for siding. Following discovery, defendant moved for summary judgment dismissing the complaint. Supreme Court denied the motion, and defendant now appeals. We affirm.

Contrary to defendant's contention, and notwithstanding the absence of any specific provisions in the contracts describing defendant's performance, defendant's own submissions raise questions of fact whether it breached the implied promise in construction agreements to perform the work "in a skillful and workmanlike manner" (*Marinaccio v Town of Clarence*, 215 AD3d 1289, 1290 [4th Dept 2023]; *see Rush v Swimming Pools by Jack Anthony, Inc.*, 98 AD3d 728, 729-730 [2d Dept 2012]), and whether the damages alleged by plaintiffs were proximately caused thereby (*see Rivers v Deane*, 209 AD2d 936, 936 [4th Dept 1994]; *cf. Jacob & Youngs, Inc. v Kent*, 230 NY 239, 244 [1921], *rearg denied* 230 NY 656 [1921]; *see generally Brushton-Moira Cent.*

School Dist. v Thomas Assoc., 91 NY2d 256, 261-262 [1998]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

362

CA 23-01084

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, KEANE, AND HANNAH, JJ.

MICHELLE KRUTULIS AND DAVID KRUTULIS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DAIKER'S, INC., DAIKER'S, INC., DOING
BUSINESS AS DAIKER'S, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered June 21, 2023. The order denied the motion of defendants Daiker's, Inc., and Daiker's, Inc., doing business as Daiker's, for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiffs commenced this negligence action seeking damages for injuries that Michelle Krutulis (plaintiff) allegedly sustained when she tripped and fell on a step located between an outside porch and a deck at a restaurant operated by Daiker's, Inc. and Daiker's, Inc., doing business as Daiker's (collectively, defendants). Supreme Court denied defendants' motion for summary judgment dismissing the complaint against them, and we affirm.

We reject defendants' contention that the condition of the step that allegedly caused plaintiff's injuries is too trivial to be actionable. It is well settled that "the trivial defect doctrine is best understood with our well-established summary judgment standards in mind. In a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law before the burden shifts to the party opposing the motion to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses.

Only then does the burden shift to the plaintiff to establish an issue of fact" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]).

In support of their motion, defendants submitted, inter alia, plaintiff's deposition testimony and photographs of the area where plaintiff allegedly fell. The photographs depict a step located between the porch and the deck, which are at different levels. In her deposition testimony, plaintiff testified that the floorboards on the porch and deck levels were not only the same color, but were all facing the same way, and that the step led down from the porch to the deck, in the direction of a scenic view. In addition, one of the photographs submitted on the motion appears to reflect that, at least from the angle from which that photograph was taken, a person could be given the illusion that the porch and deck areas constitute a single-level deck area. Based on the evidence submitted on the motion, we conclude that defendants failed to meet their initial burden of establishing as a matter of law that the defect was trivial (*see generally id.*; *Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]).

Defendants also contend that they are entitled to summary judgment dismissing the complaint against them because the defect was open and obvious. We reject that contention. "The fact that a dangerous condition is open and obvious does not negate the duty to maintain premises in a reasonably safe condition but, rather, bears only on the injured person's comparative fault" (*Bax v Allstate Health Care, Inc.*, 26 AD3d 861, 863 [4th Dept 2006]; *see Custodi v Town of Amherst*, 81 AD3d 1344, 1346-1347 [4th Dept 2011], *affd* 20 NY3d 83 [2012]; *Ahern v City of Syracuse*, 150 AD3d 1670, 1671 [4th Dept 2017]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

363

CA 23-00263

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, KEANE, AND HANNAH, JJ.

JOSEPH DENNIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VINCENT CERRONE, DEFENDANT, AND
MARK CERRONE, INC., DEFENDANT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MAGAVERN MAGAVERN GRIMM, LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered January 5, 2023. The order dismissed the amended complaint after a nonjury trial.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while working for a framing subcontractor on a residential construction project. The property owner, defendant Vincent Cerrone, served as his own general contractor on the project, which involved building a 900-square-foot addition to his home. The accident occurred when plaintiff fell through an unguarded hole in the first floor decking that was cut to accommodate a basement stairwell that had yet to be installed. Plaintiff landed on the cement basement floor approximately nine feet below.

The amended complaint asserted causes of action against Cerrone and defendant Mark Cerrone, Inc. (MCI), a contracting business partially owned by Cerrone, for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Following discovery, Supreme Court (Boniello, III, J.) issued an order that, inter alia, granted Cerrone's cross-motion for summary judgment dismissing the amended complaint against him and granted MCI's cross-motion insofar as it sought summary judgment dismissing the Labor Law § 240 (1) cause of action against it. We modified the order by denying MCI's cross-motion in its entirety and reinstating the section 240 (1) cause of action against it, and otherwise affirmed (*Dennis v Cerrone*, 167 AD3d 1475, 1477 [4th Dept 2018]).

Upon remittal, the matter proceeded to a nonjury trial on all

four causes of action against MCI, the only remaining defendant. At the close of plaintiff's case, the court granted a directed verdict to MCI, but on appeal we reinstated the amended complaint against MCI and granted a new trial (*Dennis v Cerrone*, 192 AD3d 1572, 1573 [4th Dept 2021]). Viewing the evidence in the light most favorable to plaintiff, we concluded that there was "a rational process by which a factfinder could find that MCI had either the power to enforce safety standards and choose responsible contractors or the power to coordinate and supervise the overall project as required for liability under Labor Law §§ 240 (1) and 241 (6)" (*id.* at 1573). With respect to the other causes of action, we concluded that there was "a rational process by which a factfinder could determine that MCI is liable under Labor Law § 200 or the common law, i.e., that it had the ability to supervise and control the method and manner of work of plaintiff's employer . . . , and that MCI actually exercised such authority" (*id.*).

At the retrial, Supreme Court (Sedita, III, J.), sitting as the trier of fact, rendered a verdict in favor of MCI. Plaintiff now appeals from an order dismissing the amended complaint against MCI based upon that verdict, contending that he met his burden of proof on all causes of action. We affirm.

It is well settled that a verdict in a nonjury civil trial "should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1993], *rearg denied* 81 NY2d 835 [1993] [internal quotation marks omitted]; *see Tarsel v Trombino*, 196 AD3d 1100, 1101 [4th Dept 2021]; *Livingston v State of New York*, 129 AD3d 1660, 1660 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015]). When conducting our factual review power in a "close case," we must take into account " 'the fact that the trial judge had the advantage of seeing the witnesses' " (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]), and we must view the evidence "in the light most favorable to sustain the [order or] judgment" (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1287 [4th Dept 2014]).

Here, plaintiff introduced evidence at trial, as he had done in opposition to MCI's cross-motion for summary judgment, supporting his claim that MCI acted as a contractor, or the agent of a contractor, on the construction project. For instance, the evidence established that a site superintendent for MCI recommended contractors for Cerrone to hire, met with some of the contractors at the worksite, solicited a bid for lumber on Cerrone's behalf, and, upon seeing the unguarded hole in the floor through which plaintiff later fell, told framing workers that it should be covered. Plaintiff further established that a laborer employed by MCI was occasionally at the worksite and performed various tasks for Cerrone, such as cleaning debris, using an excavator owned by MCI to demolish the garage, and spreading stone on the driveway. There was also evidence that MCI provided a flatbed trailer and driver to deliver the driveway stones and certain

equipment to the worksite, and that Cerrone used MCI's corporate account to purchase lumber and concrete.

On the other hand, however, there was ample evidence militating against a finding that MCI, as opposed to Cerrone himself, had the power to enforce safety standards and hire responsible contractors. For instance, MCI had never performed residential construction work; it was a general site contractor that primarily performed road and sewer work for municipalities. MCI did not hire or pay any of the contractors who worked on the construction project at Cerrone's home, and Cerrone, who owned only 34% of MCI, did not have authority to bind MCI without the consent of the majority owner. In fact, the majority owner had no idea that Cerrone was doing construction work at his residence; she learned about the project after plaintiff's accident. MCI was a union shop, meaning that it used only union workers on its projects, and the contractors who worked on the construction project at Cerrone's residence used nonunion labor. More importantly, the two MCI employees who appeared periodically at the worksite testified that they did not have authority to enforce safety standards or to direct or supervise any of the work, and their testimony was not contradicted by plaintiff, his employer or any other witness who performed work on the construction project. Not a single person who performed work on the project testified that he or she believed that MCI had authority to enforce safety standards or to direct or control the work.

Viewing the record in the light most favorable to sustain the order and giving deference to the trial court's credibility determinations (*see Howard v Pooler*, 184 AD3d 1160, 1163 [4th Dept 2020]), we conclude that there is "a fair interpretation of the evidence" supporting the court's verdict (*Meyers v Berl*, 213 AD3d 1233, 1234 [4th Dept 2023]), and that the verdict is therefore not against the weight of the evidence (*see generally Tarsel*, 196 AD3d at 1101; *Livingston*, 129 AD3d at 1660).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

364

CA 23-01161

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, KEANE, AND HANNAH, JJ.

RODERICK E. COE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF WATERLOO AND COUNTY OF SENECA,
DEFENDANTS-RESPONDENTS.

ADAMS LECLAIR LLP, ROCHESTER (DANIEL P. ADAMS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MCGIVNEY KLUGER CLARK & INTOCCIA, P.C., SYRACUSE (ROBERT J. CONNOR, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT VILLAGE OF WATERLOO.

GERBER CIANO KELLY BRADY LLP, BUFFALO (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF SENECA.

Appeal from an order of the Supreme Court, Seneca County (Jason L. Cook, J.), entered January 18, 2023. The order, inter alia, granted the motions of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages and injunctive relief based on allegations that defendants were responsible for damage to certain properties owned by him as a result of the artificial diversion of water onto such properties. Plaintiff asserted causes of action for trespass, nuisance, and injunction. Defendants each moved for summary judgment dismissing the complaint against them, contending, in relevant part, that plaintiff's causes of action were time-barred. Supreme Court granted the respective motions, and we now affirm.

Plaintiff owns three adjacent parcels of property that rely on a century-old stone box culvert drainage system located underground. Adjacent to, and upstream of plaintiff's properties is the Seneca County Courthouse (courthouse). In 2015, defendants both participated in a renovation project for the courthouse. The renovation project included, in relevant part, the installation of a new stormwater drainage system, which was connected to the stone culvert located under plaintiff's properties. Thereafter, stormwater from the courthouse flowed from that property into the stone culvert located under plaintiff's properties, causing those properties to flood. The flooding started in 2015 and continued through 2021. Plaintiff never

experienced flooding problems prior to the renovation project.

We conclude that the court properly determined that the trespass and nuisance causes of actions are time-barred. As relevant here, "General Municipal Law § 50-e (1) (a) requires service of a notice of claim within 90 days after the claim arises" (*Margerum v City of Buffalo*, 24 NY3d 721, 730 [2015]; *see Sharpe v Town of Conesus*, 19 AD3d 1029, 1029 [4th Dept 2005]). Further, General Municipal Law § 50-i (1) (c) requires commencement of an action for damage to real property "alleged to have been sustained by reason of the negligence or wrongful act" of a village or county to occur "within one year and [90] days after the happening of the event upon which the claim is based." An action to recover damages for injury to property "accrues 'when the damage [is] apparent' " (*Russell v Dunbar*, 40 AD3d 952, 953 [2d Dept 2007]; *see EPK Props., LLC v Pfohl Bros. Landfill Site Steering Comm.*, 159 AD3d 1567, 1568 [4th Dept 2018]). Here, defendants met their initial burdens on their respective motions of establishing that the trespass and nuisance causes of action accrued, at the latest, in 2015 upon the completion of the courthouse renovation project, which is when plaintiff first observed the flooding of his properties (*see EPK Props., LLC*, 159 AD3d at 1569).

In opposition, plaintiff did not raise any triable issues of fact with respect to the timeliness of the causes of action for nuisance and trespass based on the application of the continuing wrong doctrine. Plaintiff contends that, because the diversion of water onto his properties as a result of the renovation project continually occurred and, indeed, has caused flooding as recently at 2021, the torts are continuous and, consequently, his trespass and nuisance causes of action are not time-barred. We reject that contention and conclude that the continuing wrong doctrine does not apply here. Courts will apply the continuing wrong doctrine in cases of " 'nuisance or continuing trespass where the harm sustained by the complaining party *is not exclusively traced to the day when the original objectionable act was committed*' " (*Capruso v Village of Kings Point*, 23 NY3d 631, 639 [2014] [emphasis added]; *see Webster Golf Club, Inc. v Monroe County Water Auth.*, 219 AD3d 1136, 1141 [4th Dept 2023], *amended on rearg* 221 AD3d 1604 [4th Dept 2023]; *EPK Props., LLC*, 159 AD3d at 1569). However, "[t]he doctrine may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" (*Matter of Salomon v Town of Wallkill*, 174 AD3d 720, 721 [2d Dept 2019] [internal quotation marks omitted]). Stated another way, "[t]he distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs" (*Webster Golf Club, Inc.*, 219 AD3d at 1141 [internal quotation marks omitted]; *see Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017]; *see also Bratge v Simons*, 167 AD3d 1458, 1460 [4th Dept 2018]).

Here, the undisputed facts establish that plaintiff's damages can be traced to a specific, objectionable act—i.e., the renovation project completed in 2015. The evidence shows that the flooding of plaintiff's properties did not occur until after the project was complete and that plaintiff was aware of the flooding at that time.

Plaintiff did not submit any evidence in opposition to rebut defendants' evidence about when the flooding first occurred and his awareness of it. Moreover, he did not submit any evidence to show that any subsequent flooding of his properties was the result of anything but the work performed by defendants in 2015. Consequently, we conclude that the continuing wrong doctrine does not apply here to preclude dismissal of the trespass and nuisance causes of action (*see generally Webster Golf Club, Inc.*, 219 AD3d at 1141; *EPK Props., LLC*, 159 AD3d at 1569).

Finally, inasmuch as we conclude that the court properly granted defendants' motions with respect to the trespass and nuisance causes of action, we further conclude that the court properly granted defendants' motions with respect to plaintiff's cause of action seeking a permanent injunction. Such relief "is simply not available when the plaintiff does not have any remaining substantive cause of action" (*Pickard v Campbell*, 207 AD3d 1105, 1110 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023] [internal quotation marks omitted]; *see Town of Macedon v Village of Macedon*, 129 AD3d 1639, 1641 [4th Dept 2015]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

371

KA 19-01418

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT T. NORRY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered May 30, 2019. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment which convicted him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]). We affirm.

The victim—defendant's girlfriend—was stabbed 34 times in the throat, torso and back, resulting in, among other injuries, a perforated heart, in the apartment in Rochester that she shared with defendant. The police found clothing, which bore defendant's DNA and was covered in the victim's blood, in the apartment, and security camera footage showed that defendant was wearing that clothing before the victim was killed. On the night of the murder, a neighbor heard defendant and the victim arguing loudly and, after the victim was stabbed, defendant visited several local bars wherein he told a series of friends that he was moving away and would soon be in jail or dead. Three days after the murder, defendant was arrested in the State of Washington.

Contrary to defendant's contention, under the fellow officer rule (*see People v Rosario*, 78 NY2d 583, 588 [1991], *cert denied* 502 US 1109 [1992]), police officers in Washington had probable cause to arrest him based on the information contained in the National Crime Information Center bulletin issued with respect to defendant. The bulletin gave the license plate number of defendant's vehicle, asked officers to stop the "felony involved vehicle" and identify its occupants, described defendant's physical appearance, and identified

him as a "possible murder suspect" who was believed to be armed (*see People v Motter*, 235 AD2d 582, 583, 586 [3d Dept 1997], *lv denied* 89 NY2d 1038 [1997]; *People v Arefaine*, 221 AD2d 979, 979 [4th Dept 1995], *lv denied* 87 NY2d 919 [1996]).

Defendant failed to preserve for our review his contentions that his statements to the police should be suppressed because the Uniform Criminal Extradition Act (UCEA) (CPL art 570; Wash Rev Code ch 10.88) is the exclusive means to effect an out-of-state arrest, and because officers from the Rochester Police Department purposely circumvented defendant's indelible right to counsel by choosing not to obtain an arrest warrant and use the procedures set forth in the UCEA (*see* CPL 470.05 [2]). In any event, even if the statements were obtained in violation of defendant's indelible right to counsel, any error in admitting those statements in evidence is harmless beyond a reasonable doubt (*see People v Lopez*, 16 NY3d 375, 386-387 [2011]; *People v Crimmins*, 36 NY2d 230, 240-241 [1975]) inasmuch as there is no "reasonable possibility that the . . . [error] might have contributed to the conviction" (*Crimmins*, 36 NY2d at 241; *see Lopez*, 16 NY3d at 386-387). Likewise, we conclude that, even assuming, arguendo, that defendant's statements to the police were involuntary, any error in admitting those statements is harmless beyond a reasonable doubt (*see Lopez*, 16 NY3d at 386-387; *Crimmins*, 36 NY2d at 240-241).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

373

KA 20-01137

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON J. MURRAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered July 30, 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 (two counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]), defendant contends that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. We reject those contentions.

"Where, as here, there is no evidence that defendant actually possessed the [drugs and drug paraphernalia], the People must establish that defendant exercised dominion or control over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Pichardo*, 34 AD3d 1223, 1224 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007] [internal quotation marks omitted]; *see People v Manini*, 79 NY2d 561, 573-574 [1992]; *People v Mattison*, 41 AD3d 1224, 1225 [4th Dept 2007], *lv denied* 9 NY3d 924 [2007]). We conclude that there is a valid line of reasoning and permissible inferences to support the jury's determination that defendant had constructive possession of the drugs and paraphernalia found in his mother's residence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Much of the drugs and drug paraphernalia recovered from the residence was found in close proximity to defendant's personal

property, "which permits 'the reasonable inference that defendant had both knowledge and possession' of the drugs and paraphernalia" (*People v Grovner*, 206 AD3d 1638, 1640 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]; *see People v Tirado*, 47 AD2d 193, 195 [1st Dept 1975], *affd* 38 NY2d 955 [1976]; *People v Slade*, 133 AD3d 1203, 1205 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]). The remaining drugs and drug paraphernalia recovered from the residence were " 'readily accessible and available' " to defendant inasmuch as they were located in the same room with or immediately adjacent to the rooms where defendant's possessions were kept (*Grovner*, 206 AD3d at 1640; *see People v Tucker*, 173 AD3d 1817, 1818 [4th Dept 2019], *lv denied* 34 NY3d 938 [2019]; *Mattison*, 41 AD3d at 1225).

We further conclude that, 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]), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

377

CA 23-00950

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

IN THE MATTER OF MARCELINO LOPEZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 4, 2023, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the determination of the Parole Board that denied his request for release to parole supervision. The Attorney General has advised this Court that, following that denial and during the pendency of this appeal, petitioner reappeared before the Parole Board in April 2024, and was subsequently denied parole. Consequently, this appeal must be dismissed as moot (*see Matter of Hill v Annucci*, 149 AD3d 1540, 1541 [4th Dept 2017]). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply (*see Matter of Lopez-Contreras v Annucci*, 221 AD3d 1580, 1580 [4th Dept 2023]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

381

CA 23-00455

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

DEAN TAYLOR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO POLICE DEPARTMENT, COMMISSIONER BYRON C. LOCKWOOD, POLICE OFFICER KYLE T. MORIARITY, POLICE OFFICER CHRISTOPHER BRIDGETT AND JOHN DOES 1-10, DEFENDANTS-APPELLANTS.

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (RYAN M. SOLLENNE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Craig D. Hannah, J.), entered February 21, 2023. The order denied the motion of defendants 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, dismissing the complaint against defendants City of Buffalo Police Department, Commissioner Byron C. Lockwood, and John Does 1-10, dismissing the 4th, 5th, 6th and 11th causes of action, and dismissing the claim for punitive damages, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages stemming from plaintiff's arrest by defendants Police Officer Kyle T. Moriarity and Police Officer Christopher Bridgett for making a video recording of police officers at a crime scene. Defendants appeal from an order that denied their motion for summary judgment dismissing the complaint.

We agree with defendants that Supreme Court erred in denying those parts of their motion seeking to dismiss the complaint against defendants City of Buffalo Police Department, Commissioner Byron C. Lockwood, and John Does 1-10 (John Doe defendants). First, inasmuch as the City of Buffalo Police Department is merely an administrative unit of defendant City of Buffalo, it cannot be independently sued (*see generally Village of Brockport v County of Monroe Pure Waters Div.*, 75 AD2d 483, 486-487 [4th Dept 1980], *affd* 54 NY2d 678 [1981]), and we therefore modify the order accordingly.

Similarly, the court erred in denying that part of the motion seeking to dismiss the complaint against Lockwood, and we therefore further modify the order accordingly. Plaintiff has not asserted any theory of liability against Lockwood and his name appears nowhere in the complaint save for the caption. Furthermore, Lockwood is not sued in his individual capacity and there are no allegations that he was personally involved in the incident. Thus, even assuming, arguendo, that the complaint states claims against Lockwood in his official capacity, they must be dismissed as duplicative of the claims against the City of Buffalo (*see Kanderskaya v City of New York*, 11 F Supp 3d 431, 435 [SD NY 2014], *affd* 590 Fed Appx 112 [2d Cir 2015]; *Reinhardt v City of Buffalo*, 2021 WL 2155771, *5 [WD NY, May 27, 2021, No. 1:21-cv-206]).

We further agree with defendants that the complaint against the John Doe defendants must be dismissed, and we therefore further modify the order accordingly. Defendants established that plaintiff did not identify and effect service upon the John Doe defendants within the relevant statute of limitations period, and plaintiff failed to raise a triable issue of fact in response (*see Lepore v Town of Greenburgh*, 120 AD3d 1202, 1204 [2d Dept 2014]). Inasmuch as the John Doe defendants are the only defendants being sued in their individual capacity and plaintiff sought "[p]unitive [d]amages against all individual defendants" only, plaintiff's claim for punitive damages must also be dismissed. We therefore further modify the order by granting that part of the motion seeking to dismiss the claim for punitive damages.

Contrary to defendants' contention, the court properly denied their motion insofar as it sought dismissal of plaintiff's first cause of action against Moriarity and Bridgett, sounding in excessive force. "Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness . . . . Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide" (*Wright v City of Buffalo*, 137 AD3d 1739, 1742 [4th Dept 2016] [internal quotation marks omitted]; *see Snow v Schreier*, 193 AD3d 1346, 1347 [4th Dept 2021]; *Bridenbaker v City of Buffalo*, 137 AD3d 1729, 1730 [4th Dept 2016]; *Combs v City of New York*, 130 AD3d 862, 864-865 [2d Dept 2015]). Here, the evidence submitted by defendants, including the body camera footage of the incident and the deposition testimony of Moriarity, who testified that he punched plaintiff in the head while effecting plaintiff's arrest, raise a triable issue of fact concerning "the degree of plaintiff's resistance, the threat [he] posed, and the degree of force [Moriarity and Bridgett] used" (*Snow*, 193 AD3d at 1348).

For the same reason, we reject defendants' contention that the court erred in denying their motion insofar as it sought dismissal of plaintiff's seventh, eighth, and ninth causes of action against Moriarity and Bridgett, sounding in assault, battery, and battery committed in performance of a public duty. By submitting the deposition testimony of plaintiff and Moriarity and the bodycam

videos, defendants' initial submission created triable issues of fact with respect to those causes of action "without regard to the sufficiency of the opposing papers" (*Rivera v Rochester Gen. Health Sys.*, 173 AD3d 1758, 1760 [4th Dept 2019]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Contrary to defendants' contention, the court properly denied their motion with respect to the 10th cause of action against Moriarity and Bridgett, for false imprisonment, inasmuch as defendants failed to establish that there was probable cause to arrest plaintiff. " 'The existence of probable cause serves as a legal justification for [an] arrest and an affirmative defense to [a] claim' for . . . false imprisonment" (*Shaw v City of Rochester*, 200 AD3d 1551, 1552 [4th Dept 2021], *appeal dismissed* 38 NY3d 1181 [2022], quoting *Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]). Whether the defendants have probable cause to effect a plaintiff's arrest is generally a question of fact to be decided by the jury, and should "be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn surrounding the arrest" (*MacDonald v Town of Greenburgh*, 112 AD3d 586, 586-587 [2d Dept 2013]; *see Orminski v Village of Lake Placid*, 268 AD2d 780, 781 [3d Dept 2000]). Defendants' submissions in support of the motion create a triable issue of fact whether there was probable cause to arrest plaintiff (*see generally Shaw*, 200 AD3d at 1553; *MacDonald*, 112 AD3d at 587), and thus, because defendants failed to meet their burden with respect to the 10th cause of action against Moriarity and Bridgett, that part of the motion was properly denied "without regard to the sufficiency of the opposing papers" (*Rivera*, 173 AD3d at 1760).

We further conclude that the court properly denied that part of defendants' motion for summary judgment dismissing plaintiff's second cause of action against the City of Buffalo, for liability under 42 US § 1983 based on allegations that, inter alia, Moriarity and Bridgett deprived plaintiff of his constitutional rights by assaulting him. Inasmuch as there are questions of fact with respect to the use of force against plaintiff by Moriarity and Bridgett, and defendants merely pointed to gaps in plaintiff's proof (*see generally Freeland v Erie County*, 204 AD3d 1465, 1467 [4th Dept 2022]) with respect to the existence of a policy or custom of using excessive force by members of the City of Buffalo Police Department (*see generally Brooks v City of Buffalo*, 209 AD3d 1270, 1271 [4th Dept 2022]), defendants failed to meet their initial burden on their motion with respect to the second cause of action.

We further reject defendants' contention that the court erred in denying that part of their motion seeking to dismiss the 12th cause of action against Moriarity and Bridgett, for negligent infliction of emotional distress. Contrary to defendants' contention, " 'extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress' " (*Stephanie L. v House of the Good Shepherd*, 186 AD3d 1009, 1014 [4th Dept 2020]).

We agree with defendants that the court erred in denying their motion with respect to the fourth, fifth, and sixth causes of action against the City of Buffalo, sounding in negligent hiring, negligent retention, and negligent training and supervision, and we therefore further modify the order accordingly. As relevant here, in those causes of action plaintiff alleges that the City of Buffalo was negligent in the hiring, retention and training and supervision of Moriarity and Bridgett, and plaintiff further alleges that Moriarity and Bridgett were acting in their capacities as employees of the City of Buffalo. It is well settled, however, that "where an employee is acting within the scope of [their] employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision, or training" (*Moll v Griffith*, 208 AD3d 1032, 1033 [4th Dept 2022] [internal quotation marks omitted]).

Finally, we also agree with defendants that the court erred in denying their motion with respect to the 11th cause of action against Moriarity and Bridgett, for intentional infliction of emotional distress. Moriarity and Bridgett are sued in their official capacity only, and "[p]ublic policy bars claims for intentional infliction of emotional distress against a governmental entity" (*Liranzo v New York City Health & Hosps. Corp.*, 300 AD2d 548, 548 [2d Dept 2002]; *see Boyle v Caledonia-Mumford Cent. Sch.*, 140 AD3d 1619, 1620-1621 [4th Dept 2016], *lv denied* 28 NY3d 905 [2016]). We therefore further modify the order accordingly.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

386

KA 23-00132

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. RAINEY, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered October 12, 2022. The judgment convicted defendant upon a jury verdict of grand larceny in the fourth degree and criminal possession of stolen property 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 grand larceny in the fourth degree (Penal Law § 155.30 [1]) and criminal possession of stolen property in the fourth degree (§ 165.45 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim testified at trial that, without her knowledge or permission, defendant signed the victim's name on a check made payable to her, deposited the check into their joint account, and then withdrew the funds from the account the next day. Contrary to defendant's contention, the evidence established that he acted with larcenous intent (*see People v Lane*, 25 AD3d 517, 518 [1st Dept 2006], *affd* 7 NY3d 888 [2006]), and he "may not evade liability for larcenous conduct merely because the stolen funds were funneled through [a joint] bank account" (*People v Rodriguez*, 34 NY3d 967, 969 [2019]; *see People v Collins*, 273 AD2d 802, 803 [4th Dept 2000], *lv denied* 95 NY2d 933 [2000]). Moreover, although defendant testified that the victim gave him permission to deposit the check and withdraw the funds, the victim, as noted above, denied giving such permission, and we accord great deference to the jury's credibility determinations (*see People v Swackhammer*, 65 AD3d 713, 714 [3d Dept 2009]; *People v Harris*, 56 AD3d 1267, 1268 [4th Dept 2008], *lv denied* 11 NY3d 925 [2009]).

Defendant's challenges to the jury charge are not preserved for our review, and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see People v Waggoner*, 218 AD3d 1221, 1222 [4th Dept 2023], *lv denied* 40 NY3d 1082 [2023], *reconsideration denied* 41 NY3d 967 [2024]; *People v Santiago*, 195 AD3d 1460, 1461 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021]; *People v Streeter*, 21 AD3d 1291, 1291-1292 [4th Dept 2005], *lv denied* 6 NY3d 898 [2006]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01442

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

JON M. GRADY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRANK W. SZCZECH, DEFENDANT-RESPONDENT.

WEGERSKI LAW FIRM, NEW YORK CITY (JOHN P. WEGERSKI, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered March 7, 2023. The judgment dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he attempted to stop his motorcycle after observing a vehicle driven by defendant making a left-hand turn and crossing plaintiff's lane of travel. The action proceeded to a jury trial, after which the jury returned a verdict finding that defendant was not negligent. Plaintiff now appeals from an order denying his motion to set aside the verdict pursuant to CPLR 4404 (a). Although the order is subsumed in the final judgment subsequently entered and the appeal properly lies from the judgment (*see* CPLR 5501 [a] [1]; *Thornton v City of Rochester*, 160 AD3d 1446, 1446 [4th Dept 2018]), we exercise our discretion to treat the notice of appeal as valid and deem the appeal taken from the judgment (*see* CPLR 5520 [c]; *Warme v Banas*, 200 AD3d 1672, 1672 [4th Dept 2021]; *see also Thornton*, 160 AD3d at 1446). On appeal, plaintiff contends that Supreme Court erred in determining that the verdict is not against the weight of the evidence. We reject that contention.

A motion to set aside a verdict rendered in favor of a defendant as against the weight of the evidence (*see* CPLR 4404 [a]) may be granted "only when the evidence so preponderated in favor of the plaintiff that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Senycia v Vosseler*, 217 AD3d 1520, 1522 [4th Dept 2023] [internal quotation marks omitted]; *see Tozan v Engert*, 188 AD3d 1659, 1660 [4th Dept 2020]). In light of the conflicting testimony of the parties' expert witnesses regarding the

speed of plaintiff's vehicle and the distance at which he first observed defendant's vehicle turning into his lane of travel, it cannot be said that the evidence so preponderated in favor of plaintiff that the jury's verdict could not have been reached on any fair interpretation of the evidence (*see Senycia*, 217 AD3d at 1522; *Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392 [4th Dept 2011]; *see generally Clark v Loftus*, 162 AD3d 1643, 1644 [4th Dept 2018]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-00651

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVONTE S.B., ALSO KNOWN AS DAVONTA S.B.,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered May 14, 2015. The judgment convicted defendant upon a guilty plea of robbery in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is reversed as a matter of discretion in the interest of justice, the conviction is vacated, and defendant is adjudicated a youthful offender and sentenced in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]).

We agree with defendant, and the People properly concede, that he did not validly waive his right to appeal. Here, County Court's oral colloquy mischaracterized the waiver "as encompassing not only an absolute bar to the taking of a direct appeal and the loss of attendant rights of counsel and poor person relief, but also all postconviction relief separate from the direct appeal" (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Shea'honnie D.*, 217 AD3d 1419, 1420 [4th Dept 2023]). Furthermore, the written waiver executed by defendant did not contain any clarifying language to correct deficiencies in the oral colloquy and, indeed, perpetuated the oral colloquy's mischaracterization of the waiver of the right to appeal (*see Thomas*, 34 NY3d at 566; *Shea'honnie D.*, 217 AD3d at 1420). Because the purported waiver of the right to appeal is unenforceable, it does not preclude our review of defendant's challenge to the court's refusal to grant him youthful offender status (*see Shea'honnie D.*, 217 AD3d at 1420; *see also People v Johnson*, 182 AD3d 1036, 1036 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]).

We further agree with defendant that he should be afforded youthful offender status. In determining whether to afford a defendant youthful offender status, "a court must consider the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life" (*People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018] [internal quotation marks omitted]; *see People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]). "[T]he Appellate Division may exercise its interest of justice jurisdiction to adjudicate a defendant a youthful offender even if it does not conclude that the trial court abused its discretion in denying youthful offender treatment" (*People v Nicholas G.*, 181 AD3d 1273, 1273 [4th Dept 2020] [internal quotation marks omitted]).

Here, the factors weighing against affording defendant youthful offender treatment are the seriousness of the offense, defendant's alleged gang affiliation, and defendant's failure to complete interim probation (*see Keith B.J.*, 158 AD3d at 1160; *People v Shrubsall*, 167 AD2d 929, 930 [4th Dept 1990]). However, defendant was 15 years old at the time of the crime and had no prior criminal record. He accepted responsibility for his actions and cooperated with both police on the date of the incident and probation during his presentence report interview. According to his probation officer, although he had not yet begun substance abuse treatment in the extremely short period of time between his release from custody and his remand, he "report[ed] as directed, and ha[d] not secured any new charges." Probation described defendant as "[m]otivated to avoid further difficulties" and his prognosis for lawful behavior as "guarded." Indeed, probation asked that defendant's "sentencing be adjourned for sixty days to allow . . . defendant the opportunity to be placed on electronic monitoring through Probation." In addition, despite the senseless nature of this incident, defendant did not use a weapon, there is no allegation that this crime was gang-related, defendant was the youngest participant in the crime by approximately three years, and it was clearly an unplanned, spur-of-the-moment decision for which youthful offender adjudication is meant (*see People v Z.H.*, 192 AD3d 55, 58 [4th Dept 2020]; *cf. People v Simpson*, 182 AD3d 1046, 1047 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *see also Keith B.J.*, 158 AD3d at 1160-1161). Therefore, we reverse the judgment as a matter of discretion in the interest of justice, vacate the conviction, and adjudicate defendant a youthful offender. We impose the same sentence on the adjudication that was previously imposed on the conviction (*see Nicholas G.*, 181 AD3d at 1274).

All concur except SMITH, J.P., and CURRAN, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent and vote to affirm inasmuch as, upon our review of the record and consideration of other applicable factors pertinent to a youthful offender determination, we perceive no basis for exercising our own discretion in the interest of justice to adjudicate defendant a

youthful offender (*see People v Blake*, 227 AD3d 1421, 1422 [4th Dept 2024]; *People v Hall*, 221 AD3d 1600, 1600-1601 [4th Dept 2023], *lv denied* 40 NY3d 1092 [2024]; *People v Graham*, 218 AD3d 1359, 1360 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]). Initially, we agree with the majority that several important factors support County Court's discretionary determination not to afford defendant a youthful offender adjudication—i.e., the seriousness of the underlying offenses, defendant's alleged gang affiliation, and defendant's failure to successfully complete interim probation. Unlike the majority, however, we conclude that there are several other factors present in the record that strongly militate against adjudicating defendant a youthful offender.

First, we disagree with the majority that defendant's lack of a criminal history supports adjudicating him a youthful offender. Indeed, the majority's characterization that defendant "had no prior criminal record" is true only by virtue of the fact that he previously faced prosecution at a time when he was under the age of criminal responsibility and instead was adjudicated a juvenile delinquent (*see* Penal Law § 30.00 [1]). We note that, in evaluating the factors relevant to making a youthful offender determination, nothing precludes courts from considering prior juvenile delinquency adjudications (*see e.g. People v Mix*, 111 AD3d 1417, 1418 [4th Dept 2013]; *People v Washpun*, 41 AD3d 1233, 1233 [4th Dept 2007], *lv denied* 9 NY3d 883 [2007]; *see generally People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]). Here, the record reflects that defendant was previously charged as a juvenile with, inter alia, robbery in the second and third degrees, grand larceny in the fourth degree, and criminal possession of stolen property in the fifth degree. Ultimately, he was adjudicated a juvenile delinquent for criminal possession of stolen property in the fifth degree and was sentenced to probation. Approximately one month later, however, defendant admitted that he violated the terms of his juvenile probation, causing the court to resentence him to a one-year placement with the Office of Child and Family Services (OCFS) (*see People v Brodhead*, 106 AD3d 1337, 1337 [3d Dept 2013], *lv denied* 22 NY3d 1087 [2014]). The instant offense occurred approximately one year after defendant started his placement with OCFS, presumably shortly after his release. Thus, although it is technically true that defendant has no criminal history, relying on that fact to support affording him the benefits of a youthful offender adjudication would be potentially misleading to the extent it suggests that the underlying offense constituted defendant's first experience with the criminal justice system.

Second, we also disagree with the majority's conclusion that defendant "accepted responsibility for his actions." During his interview with the Department of Probation, defendant recanted on the underlying crime, despite his guilty plea, and instead blamed his codefendants. Specifically, defendant stated that he did nothing to assist the codefendants in committing the robbery and that he was merely an observer; indeed, he claimed to have told them he would not help with the robbery and that he did not want to get in trouble. Defendant also stated during his interview that he falsely confessed

to committing the underlying crime because he did not want the codefendants to get into trouble. He further stated his belief that it was unfair for him to be "in jail for something he 'didn't do' " (*see People v Ford*, 144 AD3d 1682, 1683 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]; *cf. People v Keith B.J.*, 158 AD3d 1160, 1160-1161 [4th Dept 2018]). Relatedly, we note that the majority's conclusion that defendant cooperated with the police is not entirely accurate and overstates its importance. Defendant's cooperation consisted merely of him stating, "I did it," a statement made *after* he was identified by the victim at a show up that he refused to confirm in writing (*cf. People v Amir W.*, 107 AD3d 1639, 1641 [4th Dept 2013]).

Third, the court was very clear at the time of the plea that, if defendant successfully completed his period of interim probation, it would formally sentence him to five years of probation and would adjudicate him a youthful offender. It cautioned defendant, however, that if he was unsuccessful with interim probation, it would sentence him to any sentence permitted by law, up to the maximum of 2⅓ to 7 years in prison. In other words, the court made clear that the youthful offender adjudication would be unavailable at that point. Despite the court's admonitions, defendant failed interim probation almost immediately (*see People v Ternoois*, 151 AD3d 1779, 1780 [4th Dept 2017]; *People v Lewis*, 128 AD3d 1400, 1401 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]). Specifically, he failed to comply with the Department of Probation's request to obtain a chemical dependency and mental health evaluation. Indeed, he admitted that, rather than comply with that term of his interim probation, defendant continued to regularly use marihuana. Further, while on interim probation, he received a five-day suspension from high school for fighting (*see People v Wilson*, 165 AD3d 1323, 1325 [3d Dept 2018]). Defendant had recently transferred to a new high school because he regularly got into fights with other students at his old school.

Ultimately, given defendant's history of juvenile delinquency, his immediate failure at interim probation, his relative lack of cooperation with law enforcement, and his total denial of responsibility during his probation interview, we see no abuse of discretion by County Court in declining to adjudicate defendant a youthful offender—indeed, the majority itself tacitly concludes that the court did not abuse its discretion. For many of the same reasons, we further perceive no basis upon which to exercise our own discretion to grant him that status (*see People v Davis*, 188 AD3d 1731, 1732 [4th Dept 2020], *lv denied* 37 NY3d 991 [2021]).

Entered: July 3, 2024 Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-01761

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

IN THE MATTER OF JOSEPH W. DONOHUE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTIE M. KATERLE, RESPONDENT-RESPONDENT.

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICE OF EMANUEL MOUGANIS, BROCKPORT (EMANUEL MOUGANIS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered April 3, 2023, in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objection to an order of the Support Magistrate.

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

Memorandum: Petitioner father appeals from an order denying his objection to the order of the Support Magistrate. The support order dismissed without prejudice, following a hearing, the father's petition for further modification of the child support opting-out provisions contained in the parties' settlement agreement, which was incorporated but not merged into the parties' judgment of divorce and previously modified by Supreme Court in 2020. We affirm.

Preliminarily, the father's contention that the opting-out provision contained in the parties' settlement agreement that waived certain grounds upon which they can make an application to modify the child support obligations under Domestic Relations Law § 236 (B) (9) (2) (ii) is void or unenforceable because the agreement does not contain the opt-out recitals mandated by the Child Support Standards Act is raised for the first time on appeal and, thus, is not properly before us (*see Adirondack Bank, N.A. v CBB Realty, LLC*, 222 AD3d 1422, 1422 [4th Dept 2023]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, such a contention—in which a party seeks to void a term of a settlement agreement, as opposed to merely modifying the child support obligations in accordance with the terms of that agreement—would not have been properly before Family Court inasmuch as "Family Court is a court of limited jurisdiction and is without the power to set aside . . . the

terms of a settlement agreement" (*Matter of Huddleston v Huddleston*, 14 AD3d 511, 512 [2d Dept 2005]; *see generally Matter of Brescia v Fitts*, 56 NY2d 132, 139 [1982]).

Further, although case law and the terms of the parties' settlement agreement permit Family Court to modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, " 'upon a showing of a substantial change in circumstances' " (*Provenzano v Provenzano*, 151 AD3d 1800, 1801 [4th Dept 2017]), the father "failed to demonstrate the requisite 'unanticipated and unreasonable change in circumstances warranting an adjustment of support or that the current level of support is inadequate to meet the children's basic needs' " (*Matter of Markowski v Hetzler*, 57 AD3d 1510, 1510-1511 [4th Dept 2008]). Specifically, there was no change in the custody of the subject children since the last modification order was issued, and the "increase in the income of [the mother] and the cost of providing for maturing children is not an unanticipated and unreasonable circumstance" (*Matter of Culton v Culton*, 277 AD2d 935, 936 [4th Dept 2000]; *see Matter of Graves v Ramsey*, 19 AD3d 1147, 1148 [4th Dept 2005]).

We have considered the father's remaining contentions and conclude that they are without merit.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00912

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

RESIDE CAPITAL PARTNERS, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRENDON CLAR, DEFENDANT-APPELLANT.

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

RELIN, GOLDSTEIN & CRANE LLP, ROCHESTER, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered May 9, 2023. The order denied defendant's motion seeking to vacate a default judgment entered against defendant on October 25, 2022.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the judgment entered October 25, 2022 is vacated.

Memorandum: Defendant appeals from an order denying his motion pursuant to CPLR 317 to vacate the default judgment entered against him in this action seeking to recover on a residential lease guarantee. We reverse.

Pursuant to CPLR 317, a defendant "served with a summons other than by personal delivery to [the defendant] or [the defendant's] agent . . . who does not appear may be allowed to defend the action within one year after [the defendant] obtains knowledge of entry of the judgment . . . upon a finding of the court that [the defendant] did not personally receive notice of the summons in time to defend and has a meritorious defense."

We agree with defendant that "[p]ersonal delivery means 'in-hand delivery' " and, thus, CPLR 317 applies where, as here, the summons and complaint were served in accordance with the "affix and mail" or "nail and mail" provision of CPLR 308 (4) (*National Bank of N. N.Y. v Grasso*, 79 AD2d 871, 871 [4th Dept 1980]; *see Pilawa v Dalbey*, 275 AD2d 1035, 1036 [4th Dept 2000]). Furthermore, defendant established that he did not receive personal notice of the summons in time to defend the action inasmuch as he did not reside at the address where copies of the summons and complaint were affixed and subsequently mailed to (*see Newman v Old Glory Real Estate Corp.*, 89 AD3d 599, 599

[1st Dept 2011]; *see also L&W Supply Corp. v Built-Rite Drywall Corp.*, 220 AD3d 1205, 1206 [4th Dept 2023]), and that he has a potentially meritorious defense with respect to the amount of damages (*see Weichert v Brown*, 133 AD3d 1341, 1341 [4th Dept 2015]; *Golden v Romanowski*, 128 AD3d 1009, 1010 [2d Dept 2015]).

Although the determination whether to vacate a default judgment "rests within the sound discretion of the Supreme Court, . . . a disposition on the merits is favored" (*Centennial El. Indus., Inc. v Ninety-Five Madison Corp.*, 90 AD3d 689, 689 [2d Dept 2011]; *see Morgan v Sullivan*, 158 AD2d 927, 927 [4th Dept 1990]), and we conclude that, under the circumstances in this action, the court erred in denying defendant's motion.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

416

CA 23-00966

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

JOSHUA R. DOORES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JILLIAN M. DOORES, DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOSHUA R. DOORES, PLAINTIFF-RESPONDENT PRO SE.

Appeal from a judgment of the Supreme Court, Ontario County (Cynthia L. Snodgrass, R.), entered May 4, 2023, in a divorce action. The judgment, inter alia, equitably distributed the parties' assets and debts.

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

Memorandum: In this divorce action, defendant appeals from a judgment of divorce that, among other things, equitably distributed the parties' assets and debts, declined to make an award to defendant for maintenance, and made awards to defendant for child support and attorney's fees. We affirm.

We reject defendant's contention that Supreme Court erred in its determination of equitable distribution. "It is well settled that [e]quitable distribution presents issues of fact to be resolved by the trial court, and its judgment should be upheld absent an abuse of discretion" (*Haggerty v Haggerty*, 169 AD3d 1388, 1390 [4th Dept 2019] [internal quotation marks omitted]; *see Wagner v Wagner*, 136 AD3d 1335, 1336 [4th Dept 2016]). " 'It is also well settled that trial courts are granted substantial discretion in determining what distribution of marital property[—including debt—]will be equitable under all the circumstances' " (*Wagner*, 136 AD3d at 1336; *see Haggerty*, 169 AD3d at 1390). Here, upon considering the requisite statutory factors set forth in Domestic Relations Law § 236 (B) (5) (d), we conclude that the court properly exercised its broad discretion in making an equitable distribution of the marital debts and assets (*see Haggerty*, 169 AD3d at 1391; *Wagner*, 136 AD3d at 1337).

Contrary to defendant's further contention, the court did not err in declining to award maintenance to her. "[A]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Anastasi v Anastasi*, 207 AD3d 1131,

1131 [4th Dept 2022] [internal quotation marks omitted]; *see Mehlenbacher v Mehlenbacher*, 199 AD3d 1304, 1307 [4th Dept 2021]). This Court's authority in determining issues of maintenance is "as broad as that of the trial court" (*Anastasi*, 207 AD3d at 1131 [internal quotation marks omitted]; *see Reed v Reed*, 55 AD3d 1249, 1251 [4th Dept 2008]). Nevertheless, where, as here, the court gave appropriate consideration to the statutory factors under Domestic Relations Law § 236 (B) (6), this Court "will not disturb the determination of maintenance absent an abuse of discretion" (*Anastasi*, 207 AD3d at 1131 [internal quotation marks omitted]; *see Wilkins v Wilkins*, 129 AD3d 1617, 1618 [4th Dept 2015]). Among other things, the court considered the length of the marriage, defendant's education, employment history, and earning potential, and the fact that defendant was the beneficiary of many expenses paid by plaintiff while the divorce was pending (*see generally Lisowski v Lisowski*, 218 AD3d 1214, 1217 [4th Dept 2023]; *Mehlenbacher*, 199 AD3d at 1307; *Myers v Myers*, 87 AD3d 1393, 1394-1395 [4th Dept 2011]). The court balanced "[defendant's] needs and [plaintiff's] ability to pay" (*Gutierrez v Gutierrez*, 193 AD3d 1363, 1364 [4th Dept 2021] [internal quotation marks omitted]), and the court properly determined that defendant is capable of self-support (*see Weidner v Weidner*, 136 AD3d 1425, 1426 [4th Dept 2016], *lv dismissed* 28 NY3d 1101 [2016], *rearg denied* 29 NY3d 990 [2017]; *see also Zufall v Zufall*, 109 AD3d 1135, 1136-1137 [4th Dept 2013], *lv denied* 22 NY3d 859 [2014]).

Defendant further contends that the court erred in determining the amount of child support. Preliminarily, we reject defendant's contention that the court erred in calculating her income based on her actual rate of compensation for the job she obtained during the pendency of the divorce. Here, the parties submitted a joint stipulation of undisputed facts, which reflected that defendant had been employed in a full-time capacity earning certain hourly wages since approximately seven months before trial. Contrary to defendant's contention, inasmuch as she was receiving higher rates of compensation at the time of trial than she had received before, the court was not required to determine her income based on previous tax returns or W-2s (*see Eberhardt-Davis v Davis*, 71 AD3d 1487, 1488 [4th Dept 2010]).

Defendant further contends that the court erred in ordering a downward deviation from the presumptive support obligation calculated pursuant to the Child Support Standards Act (CSSA) (*see* Domestic Relations Law § 240 [1-b] [c] [2]). "It is well settled that, where the statutory formula results in an unjust or inappropriate result, the court may resort to the factors set forth in section 240 (1-b) (f) (1)-(10) and order payment of an amount that is just and appropriate" (*Jocoy v Jocoy*, 217 AD3d 1588, 1588 [4th Dept 2023]; *see Bast v Rossoff*, 91 NY2d 723, 729 [1998]). The court here found that the presumptive amount would be unjust and inappropriate and considered several factors under section 240 (1-b) (f) in awarding a lower amount. We reject defendant's contention that the court was in effect improperly applying the proportional offset method and conclude that the court did not abuse its discretion in deviating from the

presumptive amount of child support (*see Jocoy*, 217 AD3d at 1589; *Mehlenbacher*, 199 AD3d at 1307; *cf. Wagner v Wagner*, 217 AD3d 1509, 1512 [4th Dept 2023]).

We reject defendant's contention that the court erred in awarding her, "as 'the non-monied spouse,' [only] a portion of her attorney's fees" (*Aggarwal v Aggarwal*, 225 AD3d 1226, 1228 [4th Dept 2024]; *see also Terranova v Terranova*, 138 AD3d 1489, 1489-1490 [4th Dept 2016]). "The award of reasonable counsel fees is a matter within the sound discretion of the trial court" (*Iannazzo v Iannazzo* [appeal No. 2], 197 AD3d 959, 961 [4th Dept 2021] [internal quotation marks omitted]; *see Decker v Decker*, 91 AD3d 1291, 1291 [4th Dept 2012]). "In exercising its discretion to award such fees, a court may consider all of the circumstances of a given case, including the financial circumstances of both parties, the relative merit of the parties' positions . . . , the existence of any dilatory or obstructionist conduct . . . , and the time, effort and skill required of counsel" (*Iannazzo*, 197 AD3d at 961 [internal quotation marks omitted]; *see Terranova*, 138 AD3d at 1490). We perceive no abuse of discretion here.

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

418

CA 23-01891

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

ROBERT BLIZNIAK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FENCES BY PRECISION, LLC, AND ERIC J. GLENDENNING, DEFENDANTS-APPELLANTS.

RUPP PFALZGRAF LLC, BUFFALO (ALYSON R. TUFILLARO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 30, 2023. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action asserting, inter alia, a fraud cause of action against defendants after the sale of certain fencing to plaintiff and the installation thereof. Defendants, a limited liability company and its sole member, moved to dismiss the complaint, and Supreme Court denied that part of the motion seeking to dismiss the fraud cause of action as time-barred. Defendants appeal from the resulting order to that extent, and we reverse the order insofar as appealed from.

In December 2014, plaintiff entered into a contract with defendant Fences by Precision, LLC to purchase and install sections of six-foot-tall and four-foot-tall "Country Estate" brand fencing. On June 11, 2015, plaintiff entered into a second contract with defendants to purchase and install, among other products, an additional section of four-foot-tall fencing. Plaintiff alleges that "at the time [he] entered into the [s]econd [c]ontract, [he] understood that he was again purchasing 'Country Estate' brand fencing, of the same kind and quality as provided in the [f]irst [c]ontract."

On February 1, 2020, plaintiff contacted defendants after noticing that the fencing installed under the second contract was

beginning to fade, while the fencing installed under the first contract was not. Plaintiff asked whether the fencing installed under the second contract was manufactured by Country Estate. On March 2, 2020, plaintiff again contacted defendants by text message, noting that the invoice for the fencing installed under the first contract reflected that it was Country Estate brand, but the invoice under the second contract did not. By February 24, 2021, plaintiff had retained counsel, who sent a letter to defendants threatening to commence an action against them absent a satisfactory resolution within 15 days. Plaintiff contacted Country Estate Fence for the first time on June 15, 2021 and, the following day, that company's representative confirmed that they did not manufacture the fading fencing at issue. Plaintiff commenced this action on May 19, 2023.

A cause of action for fraud must be commenced within six years of accrual, or within two years of the date that plaintiff discovered or could have discovered the fraud with reasonable diligence, whichever is later (*see* CPLR 213 [8]). "The two-year period does not commence from the date that plaintiff has positive knowledge of the fraud, but from the date that plaintiff becomes aware of enough operative facts so that, with reasonable diligence, [they] could have discovered the fraud" (*Stride Rite Children's Group v Siegel*, 269 AD2d 875, 876 [4th Dept 2000] [internal quotation marks omitted]). While the date of discovery is generally a jury question, it may be determined as a matter of law where it conclusively appears that the plaintiff had knowledge of facts raising a reasonable inference of fraud (*see generally Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]).

On a motion to dismiss, the defendant bears the initial burden of showing that the initial six-year statute of limitations for fraud has run; once met, the burden shifts to the plaintiff to show that the two-year discovery exception applies (*see Brooks v AXA Advisors, LLC* [appeal No. 2], 104 AD3d 1178, 1180 [4th Dept 2013], *lv denied* 21 NY3d 858 [2013]). Here, it is undisputed that defendants established that the action was not commenced within six years. Thus, the burden shifted to plaintiff to show that the two-year discovery exception applies (*see id.*).

Plaintiff failed to do so. The record established that plaintiff had knowledge of facts from which the fraud could reasonably be inferred as early as February 2020 when the four-foot fencing began to fade while the six-foot fencing did not (*see Animal Protective Found. of Schenectady, Inc. v Bast Hatfield, Inc.*, 306 AD2d 683, 685 [3d Dept 2003]) and, at the latest, by February 2021 when plaintiff's counsel threatened to commence an action against defendants. The statute of limitations thus ran, at the latest, in February 2023, and plaintiff's complaint filed nearly three months thereafter was not timely and the remaining fraud cause of action must therefore be dismissed.

Contrary to plaintiff's argument raised as an alternative ground for affirmance, even assuming, arguendo, that defendants misled him to believe that they were pursuing a warranty claim on his behalf, we conclude that plaintiff failed "to establish that subsequent and specific actions by defendants somehow kept [him] from timely bringing

suit" (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006]).

Defendants' remaining contentions are academic in light of the foregoing conclusion.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

420

KA 22-01911

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS NORRIS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRAEDAN M. GILLMAN 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 August 19, 2022. The judgment convicted defendant upon his plea of guilty of kidnapping in the second degree, criminal possession of a weapon in the second degree (two counts) and attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of counts 1 and 4 of the indictment, vacating the plea with respect to those counts and dismissing those counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him as a juvenile offender upon his plea of guilty of kidnapping in the second degree (Penal Law § 135.20), attempted robbery in the first degree (§§ 110.00, 160.15 [4]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Before addressing defendant's only contention on appeal, which challenges the severity of the sentence, we conclude that, as the People correctly point out, kidnapping in the second degree is not a charge for which defendant, who was 15 years old at the time of the offense, can be held criminally responsible (*see* § 30.00 [1]; *People v Boye*, 175 AD2d 924, 924 [2d Dept 1991]). Similarly, defendant cannot be held criminally responsible for attempted robbery in the first degree (*see People v Faith QQ.*, 20 AD3d 584, 584 [3d Dept 2005]; *People v Cruz*, 225 AD2d 790, 791 [2d Dept 1996]; *People v Lebron*, 197 AD2d 416, 417 [1st Dept 1993]).

Because that portion of defendant's plea with respect to kidnapping in the second degree and attempted robbery in the first degree was not "an integral part of a nonseverable plea bargain" (*Boye*, 175 AD2d at 924), we agree with defendant that only that part

of his "plea with respect to those counts of the indictment must be vacated and deemed a nullity" (*People v Tyler L.*, 111 AD3d 1416, 1417 [4th Dept 2013] [internal quotation marks omitted]; *see People v McKoy*, 60 AD3d 1374, 1375 [4th Dept 2009], *lv denied* 12 NY3d 856 [2009]). We therefore modify the judgment accordingly.

Finally, contrary to defendant's contention, the sentence on the remaining counts is not unduly harsh or severe.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

423

KA 22-01380

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS G. DRAGER, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (ALEXANDER PRIETO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 22, 2022. The judgment convicted defendant upon a jury verdict of criminal mischief in the second degree, grand larceny in the fourth degree and auto stripping in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of criminal mischief in the second degree (Penal Law § 145.10) to criminal mischief in the third degree (§ 145.05 [2]) and vacating the sentence imposed on count 1 of the indictment and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for sentencing on the conviction of criminal mischief in the third degree.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal mischief in the second degree (Penal Law § 145.10), grand larceny in the fourth degree (§ 155.30 [1]), and auto stripping in the second degree (§ 165.10 [2]). Defendant's conviction stems from his conduct in removing and stealing two catalytic converters from two vehicles at an automotive shop (shop). On the evening of the incident, the wife of the owner of the shop received an alert on her phone that a security camera at the shop had activated and, when she watched the video on her phone, she observed a man walking by the entrance of the closed shop. She called 911 and described the man as being tall and wearing a hooded sweatshirt, and she and her husband proceeded to the shop. The police responded to the scene and found a man with a hooded sweatshirt, later identified as defendant, walking on a road just 300 yards away from the shop. There were no other pedestrians in the area at that time of the evening. Defendant's clothes and boots were muddy and had burrs on them, and the police found a bag of tools and two catalytic converters in a wooded area in between where defendant was found and the shop.

When the shop owner and his wife arrived at the shop, defendant was standing with the officers, and the wife positively identified him as the man she saw on the security camera video.

We agree with defendant that the evidence is legally insufficient to establish that he damaged property in an amount exceeding $1,500 and thus that the conviction of criminal mischief in the second degree is not supported by legally sufficient evidence. "In a criminal mischief case, the damage to property is generally established by evidence of the reasonable cost of *repairing* the property" (*People v Shannon*, 57 AD3d 1016, 1016 [3d Dept 2008] [emphasis added]; *see People v Failing*, 129 AD3d 1677, 1678 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015]; *People v Brown*, 177 AD2d 942, 942 [4th Dept 1991], *lv denied* 79 NY2d 944 [1992]). It is only when property is not repairable that the replacement cost is an appropriate measure of the damage (*see Shannon*, 57 AD3d at 1016; *People v Woodard*, 148 AD2d 997, 998 [4th Dept 1989], *lv denied* 74 NY2d 749 [1989]). Here, the owner of the shop gave testimony regarding the value of the two catalytic converters, but the only testimony he gave regarding the cost of repairs to the two vehicles was that the installation of certain sensors cost $300. The People did not present any evidence that the vehicles could not be repaired using the recovered catalytic converters (*see People v Gina*, 137 AD2d 555, 555 [2d Dept 1988], *lv denied* 71 NY2d 1027 [1988]; *People v David*, 133 AD2d 277, 278 [2d Dept 1987]; *cf. Shannon*, 57 AD3d at 1016). Thus the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), did not establish that the cost of repairs to the vehicles exceeded the statutory threshold for criminal mischief in the second degree. The evidence is legally sufficient, however, to establish that defendant committed the lesser included offense of criminal mischief in the third degree (*see* Penal Law § 145.05 [2]). We therefore modify the judgment accordingly, and we remit the matter to County Court for sentencing on that conviction (*see* CPL 470.15 [2] [a]).

Contrary to defendant's further contention, the conviction of grand larceny in the fourth degree and auto stripping in the second degree is supported by legally sufficient evidence. The evidence, viewed in the light most favorable to the People (*see Contes*, 60 NY2d at 621), established that defendant stole property that was valued in excess of $1,000 (Penal Law § 155.30 [1]) and removed vehicle parts that exceeded an aggregate value of $1,000 (§ 165.10 [2]). In this context, value "means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime" (§ 155.20 [1]; *see People v Butcher*, 192 AD3d 1196, 1198 [3d Dept 2021], *lv denied* 36 NY3d 1118 [2021]; *People v Grant*, 189 AD3d 2112, 2114 [4th Dept 2020], *lv denied* 37 NY3d 956 [2021]). Here, the evidence established that the catalytic converters were valued at $1,200 each. Moreover, viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect thereto (*see generally People v*

Bleakley, 69 NY2d 490, 495 [1987]).

Defendant contends that the court erred in allowing the wife to give identification testimony based on video recordings that were not in evidence in violation of the best evidence rule. The best evidence rule requires the production of a video recording " 'where its contents are in dispute and sought to be proven' " (*People v Jackson*, 192 AD3d 15, 17 [4th Dept 2020], *lv denied* 36 NY3d 1098 [2021], quoting *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 [1994]). Here, there was one video in evidence. To the extent that the wife testified that she watched the events live on the camera feed, we conclude that there was no violation of the best evidence rule (*see People v Fulton*, 210 AD3d 1436, 1437 [4th Dept 2022], *lv denied* 39 NY3d 1154 [2023]). To the extent that the wife testified regarding video recordings that were not in evidence, we conclude that any error in admitting that testimony was harmless inasmuch as the evidence was overwhelming and there is no significant probability that the jury would have acquitted defendant if that testimony had been excluded (*see People v Watson*, 183 AD3d 1191, 1195 [3d Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

429

KA 18-02401

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLENN W. HARPER, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), rendered August 23, 2018. The judgment convicted defendant upon a guilty plea of assault in the second degree, grand larceny in the fourth degree, criminal obstruction of breathing and blood circulation and menacing in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, assault in the second degree (Penal Law § 120.05 [12]). Defendant contends that the guilty plea was improperly entered because information in the presentence report and statements defendant made at sentencing should have led Supreme Court to conduct an inquiry into defendant's mental health condition. That contention is not preserved for our review inasmuch as defendant did not move to withdraw the plea or to vacate the judgment of conviction, and the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply here (*see People v Brown*, 204 AD3d 1519, 1519 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Contrary to defendant's contention, "a trial court has no duty, in the absence of a motion to withdraw a guilty plea, to conduct a further inquiry concerning the plea's involuntariness 'based on comments made by [the] defendant during . . . sentencing' " (*Brown*, 204 AD3d at 1519; *see People v Garcia-Cruz*, 138 AD3d 1414, 1415 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]) or based on information in a presentence report (*see People v Wilson*, 197 AD3d 1006, 1007 [4th Dept 2021], *lv denied* 37 NY3d 1100 [2021]; *People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]; *Garcia-Cruz*, 138 AD3d at 1415). Moreover, nothing in the presentence report or statements defendant made at sentencing called into doubt the voluntariness of the plea

(*see generally Lopez*, 71 NY2d at 666). Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

436

CA 23-00914

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

IN THE MATTER OF DANIEL J., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered May 22, 2023, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing his continued confinement in a secure treatment facility (*see* § 10.09 [h]). We affirm.

Petitioner contends that Supreme Court relied on unreliable hearsay evidence in making its determinations. We reject that contention. It is true that the report prepared by respondent's expert contained references to allegations of uncharged sexual misconduct that we deemed inadmissible in our decision on petitioner's appeal from a prior order determining that petitioner is a dangerous sex offender requiring confinement (*Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1349 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]). However, the court agreed with the parties' joint request not to consider those allegations and expressly stated in its order that the uncharged conduct "was excluded, not considered and wholly disregarded." Instead, the court relied on undisputedly admissible evidence relating to petitioner's commission of other sexual offenses against children for which he was convicted, as well as the reports and testimony of the two experts who evaluated petitioner.

At the annual review hearing, respondent had the burden to prove by clear and convincing evidence that petitioner continues to suffer from a mental abnormality and remains a dangerous sex offender requiring confinement, i.e., a person "suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.03 [e]; *see Matter of State of New York v George N.*, 160 AD3d 28, 30 [4th Dept 2018]). Here, contrary to petitioner's contention, the court's determination that he is a dangerous sex offender requiring confinement is not against the weight of the evidence. The independent expert psychologist appointed by the court and respondent's expert both opined that petitioner continues to require confinement in a secure treatment facility, and we perceive no basis in the record to disturb the court's determination to credit the opinions of those experts (*see Matter of Steven L. v State of New York*, 225 AD3d 1230, 1230 [4th Dept 2024]; *Matter of Nushawn W. v State of New York*, 215 AD3d 1227, 1230 [4th Dept 2023], *lv denied* 40 NY3d 901 [2023]; *Matter of State of New York v Robert T.*, 214 AD3d 1405, 1407 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]).

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

437

CA 23-00798

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

PAMELA RENFRO AND RENFRO-HERRALD HOSPITALITY, LLC,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANGELA HERRALD, DAVID STEITZ AND
HERRALD-STEITZ PROPERTIES, LLC,
DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (KEVIN S. COOMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered April 13, 2023. The order denied the motion of defendants for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendants' motion for partial summary judgment on their tenth counterclaim to the extent it seeks a declaration that plaintiffs do not have an interest in the real property owned by defendant Herrald-Steitz Properties, LLC and granting judgment in favor of defendants as follows:

> It is ADJUDGED and DECLARED that plaintiffs do not have an interest in the real property owned by defendant Herrald-Steitz Properties, LLC,

and as modified the order is affirmed without costs.

Memorandum: In this action alleging, inter alia, that defendants breached a purported joint venture agreement between the parties as well as their fiduciary duties as joint venturers, defendants appeal from an order that denied their motion for, inter alia, partial summary judgment seeking, inter alia, a declaration on their tenth counterclaim that plaintiffs have no interest in defendant Herrald-Steitz Properties, LLC (Properties LLC) or real property owned by Properties LLC. We modify the order by granting that part of defendants' motion with respect to their tenth counterclaim solely to the extent of declaring that plaintiffs do not have an interest in the real property owned by Properties LLC (*see Renfro v Herrald*, 206 AD3d

1573, 1574 [4th Dept 2022]). We otherwise affirm the order for reasons stated in the decision at Supreme Court.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

442

KA 23-01631

PRESENT: WHALEN, P.J., LINDLEY, DELCONTE, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHAN J. DUPUIS, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Steuben County Court (Chauncey J. Watches, J.), entered June 19, 2023. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order designating him a sexually violent offender and determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). As the People correctly concede, County Court improperly assessed 20 points against defendant under risk factor 4 for engaging in "a continuing course of sexual misconduct with at least one victim." The assessment of points under risk factor 4 is warranted where a defendant has engaged in "either (i) two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours, or (ii) three or more acts of sexual contact over a period of at least two weeks" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]; *see People v Wassilie*, 201 AD3d 1117, 1117-1118 [3d Dept 2022], *lv dismissed* 37 NY3d 1172 [2022], *lv denied* 38 NY3d 907 [2022]; *People v Haresign*, 149 AD3d 1578, 1579 [4th Dept 2017]). Here, there is no evidence that defendant engaged in acts of sexual contact involving sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact. Moreover, although there is evidence that defendant subjected the victim to three separate acts of sexual contact, the People did not establish that those three acts extended over a period of at least two weeks. Defendant's score on the risk assessment instrument must therefore be

reduced by 20 points, which results in a total score of 100 points and renders defendant a presumptive level two risk. We modify the order accordingly.

We have reviewed defendant's remaining contentions, which involve challenges to the court's assessment of points under risk factors 7 and 12, and conclude that they lack merit.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

444

KA 22-00422

PRESENT: WHALEN, P.J., LINDLEY, DELCONTE, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GRACE A. BROWN, DEFENDANT-APPELLANT.

NANCY J. BIZUB, WEST SENECA, FOR DEFENDANT-APPELLANT.

VINCENT A. HEMMING, ACTING DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered March 17, 2022. The judgment convicted defendant, upon her plea of guilty, of forgery in the second degree (two counts) and petit larceny (two counts).

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

Memorandum: On appeal from a judgment convicting her, upon a plea of guilty, of two counts of forgery in the second degree (Penal Law § 170.10 [1]) and two counts of petit larceny (§ 155.25), defendant contends that her waiver of the right to appeal is invalid, that her sentence is unduly harsh and severe, and that she was denied effective assistance of counsel.

We conclude that County Court "engaged defendant in an adequate colloquy to ensure that the wavier of the right to appeal was a knowing and voluntary choice" (*People v Kastenhuber*, 180 AD3d 1333, 1334 [4th Dept 2020] [internal quotation marks omitted]; *see generally People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Contrary to defendant's contention, "the lack of a written waiver is of no moment where, as here, the oral waiver was adequate" (*People v Witherow*, 203 AD3d 1595, 1595-1596 [4th Dept 2022] [internal quotation marks omitted]; *see People v Thomas*, 178 AD3d 1461, 1461 [4th Dept 2019], *lv denied* 35 NY3d 945 [2020]).

Inasmuch as the court advised defendant of the maximum sentence that could be imposed upon a violation of the plea agreement, the appeal waiver encompasses defendant's contention that the enhanced sentence is unduly harsh and severe (*see People v May*, 169 AD3d 1365, 1365 [4th Dept 2019]).

Defendant contends that she was denied effective assistance of counsel by defense counsel's failure to request a competency

examination. To the extent that defendant's contention survives her guilty plea and valid waiver of the right to appeal (*see People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]), we conclude that it lacks merit inasmuch as "[a] history of prior mental illness or treatment does not itself call into question defendant's competence . . . [, and t]here is no indication in the record that defendant was unable to understand the proceedings or that [she] was mentally incompetent" during any of the court proceedings (*People v Robinson*, 39 AD3d 1266, 1267 [4th Dept 2007], *lv denied* 9 NY3d 869 [2007] [internal quotation marks omitted]). Defendant further contends that counsel was ineffective in failing to argue that the sentencing court should consider defendant's substantial compliance with the plea agreement as a mitigating factor. Even assuming, arguendo, that defendant's contention survives her guilty plea and waiver of the right to appeal (*see People v McFarley*, 144 AD3d 1521, 1522 [4th Dept 2016]; *People v Smith*, 144 AD3d 1547, 1548 [4th Dept 2016]), we conclude that it lacks merit inasmuch as such an argument "would have had little or no chance of success" (*People v Ross*, 118 AD3d 1413, 1416 [4th Dept 2014], *lv denied* 24 NY3d 964 [2014]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

445

KA 23-00648

PRESENT: WHALEN, P.J., LINDLEY, DELCONTE, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT COLUNGA, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Caroline E. Morrison, J.), entered January 12, 2023. 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: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). The risk assessment instrument prepared by the Board of Examiners of Sex Offenders assessed 30 points against defendant under risk factor 5, for the age of the victims, making him a presumptive level one risk. At the People's request, County Court assessed additional points under risk factor 3, for number of victims, and risk factor 7, for conduct directed at a stranger, making defendant a presumptive level two risk. The court thereafter denied defendant's request for a downward departure to a level one risk. We affirm.

Contrary to defendant's contention, the court did not err in assessing points against him under risk factor 5. The People provided clear and convincing evidence supporting an assessment of points for risk factor 5, properly relying on defendant's admission that he used a peer-to-peer network in order to obtain images of child pornography—including images of prepubescent children and images involving sadistic and masochistic conduct—in combination with evidence from his case summary and presentence investigation report that his computer contained thousands of images of child pornography and that he had deleted files with titles describing images of children under 10 years of age (*see People v Vasquez*, 149 AD3d 1584, 1585 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *see generally*

Correction Law § 168-n [3]; *People v Mingo*, 12 NY3d 563, 571-572 [2009]). We thus reject defendant's claim that the People failed to prove by clear and convincing evidence that he possessed an unlawful image of a child who was age "10 or less."

We reject defendant's further contention that the court erred in denying his request for a downward departure. The court properly determined that defendant failed to meet his burden of establishing by a preponderance of the evidence the existence of an appropriate mitigating factor that is of a kind or to a degree not adequately taken into account by the risk assessment guidelines (*see People v Stevens*, 207 AD3d 1061, 1061 [4th Dept 2022], *lv denied* 39 NY3d 903 [2022]; *see generally People v Gillotti*, 23 NY3d 841, 853 [2014]). The court thus lacked the discretion to order a downward departure (*see Stevens*, 207 AD3d at 1061-1062; *People v Johnson*, 120 AD3d 1542, 1542 [4th Dept 2014], *lv denied* 24 NY3d 910 [2014]). Moreover, even assuming, arguendo, that defendant met his burden on the first two steps of the downward departure analysis (*see generally Gillotti*, 23 NY3d at 861), 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 overassessment of his dangerousness and risk of sexual recidivism given, among other factors, the nature and volume of images possessed by defendant (*see Stevens*, 207 AD3d at 1062).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

447

KA 23-01021

PRESENT: WHALEN, P.J., LINDLEY, DELCONTE, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS LEVALLEY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered May 16, 2023. The order determined that respondent is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing 10 points against him under risk factor 12 on the risk assessment instrument (RAI) for failing to accept responsibility. We agree. In assessing points under risk factor 12, the court relied on the fact that defendant answered, "I believe so," when asked during the plea colloquy whether he admitted to having engaged in the conduct alleged in the indictment. We conclude that, under the circumstances of this case, defendant's statement standing alone is insufficient to constitute a failure to accept responsibility, particularly because defendant pleaded guilty and told the probation officer who interviewed him for the presentence investigation report that he stood by his plea. Moreover, we note that the People asserted at the hearing that no points should be assessed against defendant under risk factor 12 and that defendant should be adjudicated a level one risk.

In the absence of evidence at the hearing that defendant failed to accept responsibility for his crime, we conclude that the record does not establish by clear and convincing evidence that points should be assessed against defendant under risk factor 12 (*see People v*

Ritchie, 203 AD3d 1562, 1563 [4th Dept 2022]; *People v Kowal*, 175 AD3d 1057, 1058-1059 [4th Dept 2019]). Deducting the 10 points assessed under that risk factor reduces defendant's score on the RAI to 70, rendering him a presumptive level one risk. We therefore modify the order accordingly.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

466

KA 20-00415

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DISHAWN SINKLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered January 13, 2020. The judgment convicted defendant, upon a guilty plea, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the period of postrelease supervision and imposing a period of 2½ years of postrelease supervision, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). According to police testimony at a suppression hearing, defendant was a passenger in a vehicle that was stopped for traveling at an excessive rate of speed, among other infractions. During the traffic stop, an officer noticed the odor of unburnt marihuana emanating from the vehicle, and that officer testified that he was familiar with the smell of unburnt marihuana based on his training and experience. The officer asked the driver to step out of the vehicle and then placed him in the officer's patrol car. Meanwhile, two other officers arrived, and they approached defendant and asked him to step out of the vehicle. Defendant was then frisked, and a 9 millimeter handgun was recovered from his person.

We reject defendant's contention that Supreme Court erred in determining that the police had probable cause to search his person. At the time that the stop was conducted in 2019, it was "well established that [t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, [was] sufficient to constitute probable cause to search a vehicle and its occupants" (*People v Cuffie*, 109 AD3d 1200, 1201

[4th Dept 2013], *lv denied* 22 NY3d 1087 [2014] [internal quotation marks omitted]; *see People v Chestnut*, 36 NY2d 971, 973 [1975], *affg* 43 AD2d 260 [3d Dept 1974]; *cf. People v Townsend*, 225 AD3d 1156, 1158 [4th Dept 2024], *lv denied* — NY3d — [May 21, 2024]). Although defendant asks us to revisit that rule, the rule was established by the Court of Appeals in *Chestnut*, and "it is not this Court's prerogative to overrule or disregard a precedent of the Court of Appeals" (*People v Boswell*, 197 AD3d 950, 951 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021] [internal quotation marks omitted]; *see Hernandez v City of Syracuse*, 164 AD3d 1609, 1609 [4th Dept 2018]). Defendant's remaining contentions regarding the suppression hearing are either unpreserved or are academic in light of our determination.

Defendant further contends that Penal Law § 265.03 (3) is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). As defendant correctly concedes, that contention is unpreserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, defendant correctly notes that his sentence is illegal insofar as the court imposed a two-year period of postrelease supervision. The sentence for his conviction of criminal possession of a weapon in the second degree, a class C violent felony, should have included a period of postrelease supervision of between 2½ years and five years (*see* Penal Law § 70.45 [2] [f]). "Although [that] issue was not raised before the [sentencing] court . . . , we cannot allow an [illegal] sentence to stand" (*People v Hughes*, 112 AD3d 1380, 1381 [4th Dept 2013], *lv denied* 23 NY3d 1038 [2014] [internal quotation marks omitted]). Defendant requests that we exercise our inherent authority to correct the sentence by imposing the minimum legal period of postrelease supervision (*see generally People v Mabry*, 214 AD3d 1300, 1302 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023], *reconsideration denied* 40 NY3d 1081 [2023]), a request that the People do not oppose. Inasmuch as the court expressed its intention to impose the minimum period of postrelease supervision, we agree with defendant and modify the judgment in the interest of judicial economy by vacating the period of postrelease supervision and imposing a period of 2½ years of postrelease supervision.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

478

KA 22-01415

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JABARI BOYKINS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered August 5, 2022. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [8]). We affirm. On appeal, defendant contends that the waiver of the right to appeal is invalid and that the sentence is unduly harsh and severe. 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]) and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude that the sentence is not unduly harsh or severe.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

482

KA 21-01581

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL LITTLE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Karen Bailey Turner, J.), rendered April 2, 2021. The judgment convicted defendant, upon a guilty plea, 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 that convicted him, upon a guilty plea, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant correctly contends, and the People correctly concede, that defendant's waiver of the right to appeal is invalid because County Court "mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal, and there was no clarification that appellate review remained available for certain issues" (*People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant contends that the court erred in denying his request in August 2020 for new counsel. That contention is without merit because the court relieved the attorney who was then representing defendant and defendant was represented by new counsel during subsequent proceedings. To the extent that defendant's contention concerns a request to replace a prior attorney who represented defendant at the time of his plea in November 2019, that contention "is encompassed by the plea . . . except to the extent that the contention implicates the voluntariness of the plea" (*People v Fernandez*, 218 AD3d 1257, 1259 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023] [internal quotation marks omitted]). To the extent that defendant's contention implicates

the voluntariness of his plea, we conclude that defendant abandoned his request for new counsel when he decided to plead guilty while still being represented by the same attorney (*see id.* at 1260).

Next, defendant contends that the indictment should have been dismissed on statutory and constitutional speedy trial grounds. Defendant's statutory speedy trial contention "is not preserved for appellate review because he never moved to dismiss the indictment on that ground" (*People v Robinson*, 225 AD3d 1266, 1267 [4th Dept 2024] [internal quotation marks omitted]), and his constitutional speedy trial contention is likewise not preserved for appellate review (*see People v Faro*, 83 AD3d 1569, 1569 [4th Dept 2011], *lv denied* 17 NY3d 858 [2011]; *People v Mayo*, 45 AD3d 1361, 1362 [4th Dept 2007]).

We reject defendant's further contention that he was denied effective assistance of counsel as a result of defense counsel's failure to file a speedy trial motion. Defendant was not "denied effective assistance of trial counsel merely because counsel [did] not make a motion or argument that [had] little or no chance of success" (*People v Jackson*, 132 AD3d 1304, 1305 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016] [internal quotation marks omitted]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

499

CAF 23-01710

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

IN THE MATTER OF AMBER M. DONER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THEODORE E. FLORA, III, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

TODD G. MONAHAN, SCHENECTADY, FOR RESPONDENT-APPELLANT.

BROWNLOW LAW OFFICE, P.C., ROCHESTER (WINSTON R. BROWNLOW OF COUNSEL), FOR PETITIONER-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered August 14, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary physical custody of the subject child to petitioner.

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

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

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

Further, we reject the father's contention that he received ineffective assistance of counsel, insofar as the father failed to

establish "the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Ballard v Piston*, 178 AD3d 1397, 1398 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020]; *see generally Matter of Aubree R. [Natasha B.]*, 217 AD3d 1565, 1566-1567 [4th Dept 2023], *lv denied* 40 NY3d 905 [2023]).

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

500

CAF 23-00697

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

IN THE MATTER OF KEVIN V.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RYEN V., RICHARD L., RESPONDENTS,
AND SARAH L., RESPONDENT-APPELLANT.

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

JACQUELINE A. MCCORMICK, LYONS, FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CATONSVILLE, MARYLAND, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered March 20, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had abused the subject child and placed respondents under the supervision of petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, although now expired, brings up for review the underlying corrected fact-finding order wherein Family Court found that respondents abused the subject child (*see Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1535 [4th Dept 2018]; *Matter of Syira W. [Latasha B.]*, 78 AD3d 1552, 1552 [4th Dept 2010]). The mother contends that the court erred in determining that the child was abused by her within the meaning of Family Court Act §§ 1012 (e) and 1046 (a) (ii) because the child had multiple caregivers during the relevant time period. We reject that contention.

As relevant here, the Family Court Act defines an abused child as a child less than 18 years old "whose parent or other person legally responsible for [the child's] care . . . inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ" (Family Ct Act § 1012 [e] [i]). Section 1046 (a)

(ii) "provides that a prima facie case of child abuse . . . may be established by evidence . . . (1) [of] an injury to a child which would ordinarily not occur absent an act or omission of respondents, and (2) that respondents were the caretakers of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *see Matter of Grayson R.V. [Jessica D.]* [appeal No. 2], 200 AD3d 1646, 1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]). Although the petitioner bears the burden of proving child abuse by "a preponderance of evidence" (§ 1046 [b] [i]), the statute "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" and, therefore, once the petitioner "has established a prima facie case, the burden of going forward shifts to [the] respondents to rebut the evidence of parental culpability" (*Philip M.*, 82 NY2d at 244; *see Grayson R.V.*, 200 AD3d at 1648).

Here, we conclude that petitioner established that the child suffered multiple injuries that "would ordinarily not occur absent an act or omission of respondents" (*Philip M.*, 82 NY2d at 243; *see Grayson R.V.*, 200 AD3d at 1648). Specifically, when the child was almost six months old, he was diagnosed with acute on chronic subdural hematoma, ruptured bridging veins, bulging fontanel, retinal hemorrhages, and bruising on the back (*see Matter of Leonard P. [Patricia M.]*, 222 AD3d 1443, 1444 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]; *Matter of Jezekiah R.-A. [Edwin R.-E.]*, 78 AD3d 1550, 1551 [4th Dept 2010]). Petitioner presented the unrebutted testimony of the attending physician and the child abuse specialist pediatrician who examined the child at the pediatric emergency department and reviewed the child's medical records, each of whom concluded that the child sustained non-accidental, inflicted trauma not consistent with routine activities of daily living, self-inflicted injury, or accidental injury (*see Leonard P.*, 222 AD3d at 1444; *Grayson R.V.*, 200 AD3d at 1648). Additionally, the child abuse specialist pediatrician opined that the child had "suffered multiple traumas" rather than only one (*see Grayson R.V.*, 200 AD3d at 1648; *Jezekiah R.-A.*, 78 AD3d at 1551).

We further conclude that petitioner established that "respondents were the caretakers of the child at the time the injur[ies] occurred" (*Philip M.*, 82 NY2d at 243). Contrary to the mother's contention, petitioner's "inability . . . to pinpoint the time and date of each injury and link it to an individual respondent [is not] fatal to the establishment of a prima facie case" of abuse (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 73 [1st Dept 2012]; *see Grayson R.V.*, 200 AD3d at 1648-1649; *Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]). Instead, "[t]he 'presumption of culpability [created by section 1046 (a) (ii)] extends to all of a child's caregivers, especially when they are few and well defined, as in the instant case' " (*Avianna M.-G.*, 167 AD3d at 1524). Petitioner established in this case that respondents " 'shared responsibility for [the child's] care' during the time period in which the injuries were sustained . . . , and the 'presumption of culpability extends' " to all three of them (*Grayson R.V.*, 200 AD3d at 1649; *see Leonard P.*, 222 AD3d at 1444; *Matthew O.*,

103 AD3d at 74-75).

In response to petitioner's prima facie case of child abuse, respondents " 'fail[ed] to offer any explanation for the child's injuries' and simply denied inflicting them" (*Grayson R.V.*, 200 AD3d at 1649, quoting *Philip M.*, 82 NY2d at 246). We therefore conclude that, as the court properly determined, the mother failed to rebut the presumption of culpability (*see Leonard P.*, 222 AD3d at 1444; *Grayson R.V.*, 200 AD3d at 1649; *Avianna M.-G.*, 167 AD3d at 1524).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

501

CAF 23-00048

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

IN THE MATTER OF JENELLE KING,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW PELKEY, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR RESPONDENT-APPELLANT.

PAMELA A. MUNSON, FULTON, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Donald Van Stry, R.), entered January 5, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole legal custody of 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 6, respondent father appeals from an order that, inter alia, awarded petitioner mother sole legal custody of the subject children. We affirm.

The father contends that Family Court erred in denying his application for a judicial subpoena duces tecum with respect to the mother's mental health records. We reject that contention. "It is well settled that 'a party's mental health records are subject to discovery where that party has placed his or her mental health at issue' " (*Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1432-1433 [4th Dept 2018]). Before requiring disclosure of such records, however, there "must be a showing beyond mere conclusory statements that resolution of the custody issue requires revelation of the protected material" (*Perry v Fiumano*, 61 AD2d 512, 519 [4th Dept 1978] [internal quotation marks omitted]). Here, the father did not allege in his cross-petition that the mother's mental health was at issue and failed to demonstrate that the mental health records were material or necessary for the determination of the mother's petition (*see Lauren S. v Alexander S.*, 205 AD3d 632, 633 [1st Dept 2022], *lv denied* 39 NY3d 907 [2023]; *Perry*, 61 AD2d at 519).

We reject the contention of the father and the Attorney for the Children that the court erred in admitting hearsay statements of one

of the children at the trial on the petitions. "It is well settled that there is 'an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family [Court] Act § 1046 (a) (vi)' . . . , where, as here, the statements are corroborated" (*Matter of Mateo v Tuttle*, 26 AD3d 731, 732 [4th Dept 2006]; *see Matter of Sutton v Sutton*, 74 AD3d 1838, 1840 [4th Dept 2010]; *see generally Matter of Cobane v Cobane*, 57 AD3d 1320, 1321 [3d Dept 2008]). The child's hearsay statements were corroborated by the testimony of the mother, documentation contained in the child's school records, and the father's testimony on cross-examination (*see Matter of Dixon v Crow*, 192 AD3d 1467, 1468-1469 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]; *Matter of Ricky A. [Barry A.]*, 162 AD3d 1747, 1748 [4th Dept 2018]). Even assuming, arguendo, that the court erred in admitting the hearsay statements, we conclude that any error is harmless because the result reached by the court would have been the same even had such testimony been excluded (*see Matter of Adorno v Vaillant*, 177 AD3d 1275, 1276 [4th Dept 2019]).

Finally, contrary to the further contention of the father and the Attorney for the Children, we conclude that the court's best interests determination is supported by a sound and substantial basis in the record and that the court properly considered the appropriate factors in awarding sole legal custody to the mother (*see Matter of Burns v Herrod*, 132 AD3d 1336, 1336-1337 [4th Dept 2015]; *see generally Fox v Fox*, 177 AD2d 209, 210-212 [4th Dept 1992]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

503

CAF 23-00051

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

IN THE MATTER OF SAHVANNA FAILING,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM F. CLARK, III, RESPONDENT-APPELLANT.

STEPHANIE R. DIGIORGIO, UTICA, FOR RESPONDENT-APPELLANT.

STACEY L. SCOTTI, UTICA, ATTORNEY FOR THE CHILD.

Appeal from a corrected order of the Supreme Court, Oneida County (Randal B. Caldwell, A.J.), entered December 19, 2022, in a proceeding pursuant to Family Court Act article 6. The corrected order, inter alia, granted petitioner sole legal custody and primary physical residence of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from a corrected order that, inter alia, granted petitioner mother's petition by awarding her sole legal custody and primary physical residence of the subject child and granted the father supervised visitation. The father contends that Supreme Court failed to make sufficient factual findings to support its determination. We reject that contention. "It is well established that the court is obligated to 'set forth those facts essential to its decision' " (*Matter of Rocco v Rocco*, 78 AD3d 1670, 1671 [4th Dept 2010]; *see* CPLR 4213 [b]; Family Ct Act § 165 [a]; *Matter of Brown v Orr*, 166 AD3d 1583, 1583 [4th Dept 2018]). The corrected order appealed from was an initial custody determination with respect to the parties' 10-month-old child. The parties separated and the father moved out of the residence when the child was two months old, after an altercation between the parties. In addition to the custody petition, the mother filed a family offense petition against the father and obtained a temporary order of protection. Since that time, the father had only supervised visitation with the child pursuant to a temporary order of custody. In the circumstances of this case, we conclude that the court set forth the facts essential to its decision, i.e., that the father "dr[a]nk alcohol to excess," committed a family offense against the mother, and violated the temporary order of protection.

Even assuming, arguendo, that the court failed to set forth sufficient findings of fact to support its determination, the record is sufficiently complete for us to make our own findings with regard to whether the custody determination is in the best interests of the child (*see Matter of Belcher v Morgado*, 147 AD3d 1335, 1336 [4th Dept 2017]; *Matter of Brandon v King*, 137 AD3d 1727, 1727-1728 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016]; *Matter of Brothers v Chapman*, 83 AD3d 1598, 1598 [4th Dept 2011], *lv denied* 17 NY3d 707 [2011]). Upon our review of the record and the relevant factors (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]; *Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]), we conclude that the award of sole legal custody and primary physical residence to the mother and supervised visitation to the father is in the best interests of the child.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

504

CAF 23-01709

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

IN THE MATTER OF THEODORE E. FLORA, III,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AMBER M. DONER, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

TODD G. MONAHAN, SCHENECTADY, FOR PETITIONER-APPELLANT.

BROWNLOW LAW OFFICE, P.C., ROCHESTER (WINSTON R. BROWNLOW OF COUNSEL), FOR RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered August 14, 2023, in a proceeding pursuant to Family Court Act article 6. The order dismissed the modification petition.

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

Same memorandum as in *Matter of Doner v Flora* ([appeal No. 1] — AD3d — [July 3, 2024] [4th Dept 2024]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

511

KA 20-00460

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS A. TORRES, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered March 3, 2020. The judgment convicted defendant upon a jury verdict of aggravated criminal contempt and criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, aggravated criminal contempt (Penal Law § 215.52 [1]) arising from his violation of an order of protection in favor of the complainant. He contends that the conviction of aggravated criminal contempt is not supported by legally sufficient evidence that he caused physical injury to the complainant within the meaning of Penal Law § 10.00 (9). We reject that contention. Although the complainant did not testify, the trial evidence includes the testimony of other witnesses, photographs of the complainant, a 911 call, recorded jail calls, and footage from responding police officers' body worn cameras. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]; *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a "valid line of reasoning and permissible inferences" that could lead rational persons to the conclusion that defendant caused the complainant's physical injury (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see generally People v Chiddick*, 8 NY3d 445, 447 [2007]). Furthermore, viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject

defendant's contention that the verdict is contrary to the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

517

CA 23-01666

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

JAMES STEWART, PLAINTIFF-RESPONDENT,

V ORDER

FAITH TEMPLE (NOW ADONAI ASSEMBLY OF GOD
OF ROCHESTER), ET AL., DEFENDANTS,
ASSEMBLIES OF GOD NATIONAL YOUTH MINISTRIES,
THE GENERAL COUNCIL OF THE ASSEMBLIES OF GOD
AND NATIONAL ROYAL RANGERS MINISTRIES,
DEFENDANTS-APPELLANTS.

NELSON MADDEN BLACK LLP, NEW YORK CITY (BARRY BLACK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MARC J. BERN & PARTNERS, LLP, NEW YORK CITY, POLLACK, POLLACK, ISAAC & DECICCO, NEW YORK CITY (JILLIAN ROSEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered March 28, 2023. The order denied the motion of defendants Assemblies of God National Youth Ministries, the General Council of the Assemblies of God and National Royal Rangers Ministries to dismiss the second amended complaint against them.

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

519

CA 23-00801

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

PAUL TUTTLE, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

KIP KELLER, DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.

SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (RYAN J. MILLS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross-appeal from an order of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered April 3, 2023. The order granted in part the motion of plaintiff for sanctions for spoliation of evidence.

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

527

KA 23-01260

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LISA J. PHEARSDORF, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered July 6, 2023. The judgment convicted defendant, upon a guilty plea, of criminal possession of a controlled substance in the third degree.

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

531

KA 21-01336

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RALPH C. BEATON, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Meredith A. Vacca, J.), entered August 30, 2021. 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.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

550

KA 22-00709

PRESENT: SMITH, J.P., CURRAN, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DONALD COOK, DEFENDANT-APPELLANT.

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

DONALD COOK, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered August 18, 2021. The judgment convicted defendant, upon a plea of guilty, of possessing a sexual performance by a child.

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

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

1050.1

CA 23-01292

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

BRUCE D. SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TRIPLE-O MECHANICAL, INC., AND LUKE GIANNONE,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (RYAN J. LUCINSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Timothy J. Walker, A.J.), entered June 30, 2023. The order granted the motion of plaintiff to compel certain discovery and held in abeyance defendants' cross-motion for summary judgment.

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

Same memorandum as in *Smith v Triple-O Mech., Inc.* ([appeal No. 2] — AD3d — [July 3, 2024] [4th Dept 2024]).

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

1050.2

CA 23-01312

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

BRUCE D. SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TRIPLE-O MECHANICAL, INC., AND LUKE GIANNONE,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (RYAN J. LUCINSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Timothy J. Walker, A.J.), entered August 2, 2023. The order denied the motion of defendants to stay discovery and disclosure and directed defendants to produce certain documents.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the directive ordering defendants to produce documents and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Genesee County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action against his former employer and its principal, asserting causes of action for, inter alia, breach of contract and fraud. In appeal No. 1, defendants appeal from an order that granted plaintiff's motion to compel production of certain documents, including financial records, and held in abeyance defendants' cross-motion for summary judgment dismissing the complaint. In appeal No. 2, defendants appeal from an order that denied defendants' order to show cause seeking to stay discovery and enjoin the production of the documents sought by plaintiff and ordered defendants to produce those documents.

As an initial matter, we dismiss the appeal from that part of the order in appeal No. 1 granting plaintiff's motion inasmuch as that part of the order was necessarily superseded by the order in appeal No. 2 insofar as it directed defendants to produce the documents in question (*see Palaszynski v Mattice*, 78 AD3d 1528, 1528 [4th Dept 2010]). Further, we dismiss the appeal from that part of the order in appeal No. 1 holding defendants' cross-motion in abeyance inasmuch as no appeal lies as of right from that determination (*see* CPLR 5701 [a] [2]; *Pacheco v City of New York*, 300 AD2d 554, 554 [2d Dept 2002];

Cirillo v Cremonese, 283 AD2d 601, 602 [2d Dept 2001]; *Nikac v Rukaj*, 276 AD2d 537, 538 [2d Dept 2000]).

In appeal No. 2, we agree with defendants that Supreme Court abused its discretion in granting plaintiff's motion without first conducting an in camera review of the documents in question, and we therefore modify the order accordingly. CPLR 3101 (a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." "The phrase material and necessary should be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Rawlins v St. Joseph's Hosp. Health Ctr.*, 108 AD3d 1191, 1192 [4th Dept 2013] [internal quotation marks omitted]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Here, although plaintiff established that the documents requested are central to his claims (*see Gitlin v Chirinkin*, 71 AD3d 728, 729 [2d Dept 2010]), defendants are nevertheless entitled to an in camera review before producing the documents "to determine whether full disclosure is required and to minimize the intrusion into [defendants'] privacy" (*Carter v Fantauzzo*, 256 AD2d 1189, 1190 [4th Dept 1998]; *see* CPLR 3103 [a]; *Neuman v Frank*, 82 AD3d 1642, 1644 [4th Dept 2011]). In light of our determination, we do not address defendants' contention that this Court should stay discovery pending determination of the cross-motion.

Entered: July 3, 2024

Ann Dillon Flynn
Clerk of the Court