SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 19, 2021

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED NOVEMBER 19, 2021

_____	583/20	CA 19 01555	MARGARITA ALDACO V JOHN DOE
_____	621	CA 20 00852	KAREN S. SIMKO V ROCHESTER GENERAL HOSPITAL
_____	675	CAF 19 01795	Mtr of SYNCERE D.
_____	676	CAF 19 02010	Mtr of JOHN D., JR.
_____	677	CAF 19 02013	Mtr of SYNCERE D.
_____	678	CAF 19 02014	Mtr of NY'JEEM D.
_____	679	CAF 19 02048	Mtr of JOHN D., JR.
_____	680	CAF 20 00040	Mtr of SYRE'NITY D.
_____	687	CA 20 01301	WILLIAM MATTAR, P.C. V RICHARD HALL, IV
_____	688	CA 20 01303	WILLIAM MATTAR, P.C. V RICHARD HALL, IV
_____	729	CA 20 01222	BL DOE 2 V EDWIN FLEMING
_____	730	CA 20 01223	BL DOE 3 V THE FEMALE ACADEMY OF THE SACRED HE ART
_____	731	CA 20 01224	BL DOE 4 V EDWIN D. FLEMING
_____	732	CA 20 01225	BL DOE 5 V EDWIN D. FLEMING
_____	733	CA 20 01226	BL DOE 7 V EDWIN D. FLEMING
_____	735	CA 20 01228	VICTORIA VISIKO V EDWIN D. FLEMING
_____	740	CA 21 00252	ELIZABETH BRITT V NORTHERN DEVELOPMENT II, LLC
_____	740.1	TP 21 00169	THOMAS EDWARDS V ANTHONY ANNUCCI
_____	756	CA 20 01232	JAMES J. BONERB V SUZETTE BONERB
_____	760	CA 20 01253	ANAHITA ALIASGARIAN V STATE OF NEW YORK
_____	761	CA 20 01626	ANAHITA ALIASGARIAN V STATE OF NEW YORK
_____	797	KA 19 00669	PEOPLE V LASHAWN LEWIS
_____	806	CA 21 00319	CAYUGA NATION V TOWN OF SENECA FALLS
_____	809	CA 20 01066	MAGIC CIRCLE FILMS INTERNATIONAL LL C V ENTERTAINMENT ONE U.S. LP
_____	810	CA 21 00084	MAGIC CIRCLE FILMS INTERNATIONAL, L V

			ENTERTAINMENT ONE U.S. LP
_____	817	KA 19 01444	PEOPLE V LEE WILLIAMS
_____	818	KA 18 01993	PEOPLE V ANTHONY C. WILLIAMS
_____	827	CA 20 01557	RICHARD KELLEY V EPISCOPAL CHURCH HOME & AFFILIATE
_____	828	CA 21 00304	GLENDA S. CHRISTIAN V BROOKDALE SENIOR LIVING COMM
_____	832	CA 20 01339	AGAPITO ABREU V FROCIONE PROPERTIES, LLC
_____	837	KA 19 01978	PEOPLE V KEITH KING
_____	840	CAF 20 01550	CHELSEA CLARK V JACKSON CLARK
_____	856	KA 17 01723	PEOPLE V LESEAN FOUCHA
_____	884	KA 20 00315	PEOPLE V LUIS RODRIGUEZ
_____	890	CA 20 01483	MICHELLE H. V BUFFALO EDGE, LLC
_____	892	CA 21 00525	HEIDI G. EDWARDS V BRUCE W. EDWARDS
_____	903	KA 17 00511	PEOPLE V BOBBY GOOD
_____	904	KA 18 01568	PEOPLE V ANDREW W. FARLEY
_____	912	CA 20 01123	LG 46 DOE V JAMES B. JACKSON
_____	926	KA 17 01694	PEOPLE V LEONARD E. HAHN, IV
_____	928	KA 19 00888	PEOPLE V LUIS CABALLERO
_____	937.1	KA 17 00066	PEOPLE V ADALBERTO MARRERO
_____	946	KA 20 01640	PEOPLE V DAVID J. MORSEMAN
_____	957	KA 19 01383	PEOPLE V CHRISTOPHER E. HERRON
_____	958	KA 19 02204	PEOPLE V JOSHUA STEWART
_____	959	KA 19 00535	PEOPLE V LANCE WILLIAMS
_____	960	KA 17 00955	PEOPLE V ESTEBAN OQUENDO
_____	963	KA 15 00768	PEOPLE V ROY D. HARRIGER
_____	965	CAF 19 01349	WAYNE COUNTY SUPPORT COLLECTION V JEFFREY WILLIAMS, SR.
_____	970	CA 21 00514	SUSAN SQUIRES V JENNIFER SAY
_____	979	KA 19 00934	PEOPLE V PRISCILLA GUMPTON
_____	994	KA 17 00495	PEOPLE V TYRONE A. PARSONS
_____	996	KA 15 00884	PEOPLE V KHALEEF REED
_____	997	KA 16 01243	PEOPLE V ANTHONY C. HOLMES

_____	998	KA 18 02376	PEOPLE V BIANCA L. CARBONE
_____	1002	CAF 19 01696	JASON PAUL ALLISON V LAURA ANN SEELEY-SICK
_____	1004	CA 20 01378	ALI AL-SINJARI V OMAR AL-SINJARI
_____	1014	KA 20 01516	PEOPLE V AMBER S. PITCHER
_____	1020	KAH 21 00063	TASHEEN ROBINSON V ANTHONY J. ANNUCCI

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

583/20

CA 19-01555

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

MARGARITA ALDACO, AS ADMINISTRATOR OF THE ESTATE OF JESSICA ARTICA, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

JOHN DOE, JOHN J. BUSH AND LYNN-ETTE & SONS, INC., DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (Tracey A. Bannister, J.), entered May 13, 2019. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 8 and 9, 2021,

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

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

621

CA 20-00852

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

KAREN S. SIMKO AND THOMAS SIMKO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROCHESTER GENERAL HOSPITAL, ROCHESTER REGIONAL HEALTH AND UNIVERSITY OF ROCHESTER, DEFENDANTS-RESPONDENTS.

DOMINIC PELLEGRINO, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ROCHESTER GENERAL HOSPITAL AND ROCHESTER REGIONAL HEALTH.

MARTIN, CLEARWATER & BELL LLP, NEW YORK CITY (BARBARA D. GOLDBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT UNIVERSITY OF ROCHESTER.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered June 11, 2020. The order granted defendants' motions for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this medical malpractice action after Karen S. Simko (plaintiff) was afflicted with Guillain-Barré Syndrome (GBS), claiming that defendants failed to timely diagnose and treat the condition. Plaintiffs appeal from an order that granted the motion of defendant University of Rochester insofar as it sought summary judgment dismissing the complaint against it and granted the motion of defendants Rochester General Hospital and Rochester Regional Health for summary judgment dismissing the complaint against them. We reject plaintiffs' contention that Supreme Court erred in granting the motions, and we therefore affirm.

In moving for summary judgment in a medical malpractice action, a defendant has "the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017] [internal quotation marks omitted]; *see Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521 [4th Dept 2019]). We conclude that defendants met their initial burden on their respective motions with

respect to both issues and, thus, "the burden shifted to plaintiffs to raise triable issues of fact by submitting an expert's affidavit both attesting to a departure from the accepted standard of care and that defendants' departure from that standard of care was a proximate cause of the injur[ies]" (*Isensee*, 174 AD3d at 1522; *see Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]).

Even assuming, arguendo, that plaintiffs raised triable issues of fact with respect to whether defendants deviated from the accepted standard of care, we conclude that the opinion of plaintiffs' expert neurologist with respect to the issue of proximate cause was insufficient to defeat defendants' motions for summary judgment (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Occhino*, 151 AD3d at 1871). Plaintiffs' expert acknowledged that, to be effective, intravenous immunoglobulin therapy must be commenced within a certain time of the onset of GBS symptoms, and it is undisputed that, in this case, the therapy was commenced within that time.

Like the dissent, we acknowledge that plaintiffs' theory of causation is predicated on the allegation that defendants' failure or delay in diagnosing plaintiff's GBS "diminished [her] chance of a better outcome" (*Clune v Moore*, 142 AD3d 1330, 1331 [4th Dept 2016]). Nothing in our decision herein calls into question the viability of such a theory. The Court of Appeals, however, has instructed that when an expert "states his [or her] conclusion unencumbered by any trace of facts or data, [the] testimony should be given no probative force whatsoever" (*Romano v Stanley*, 90 NY2d 444, 451 [1997] [internal quotation marks omitted]; *see Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 n 2 [1991]), and, in this case, as noted above, the opinion of plaintiffs' expert that treatment should have been started sooner was contrary to what the expert agreed was appropriate. We therefore conclude that plaintiffs' expert offered only conclusory and speculative assertions that earlier detection and treatment would have produced a different outcome (*see Martingano v Hall*, 188 AD3d 1638, 1640 [4th Dept 2020], *lv denied* 36 NY3d 912 [2021]), and assertions that are "vague, conclusory, speculative, and unsupported by the medical evidence in the record" are insufficient to raise a triable issue of fact (*Occhino*, 151 AD3d at 1871 [internal quotation marks omitted]; *see Jackson v Montefiore Med. Center/The Jack D. Weiler Hosp. of the Albert Einstein Coll. of Medicine*, 146 AD3d 572, 572 [1st Dept 2017]; *Longtemps v Oliva*, 110 AD3d 1316, 1319 [3d Dept 2013]; *Bullard v St. Barnabas Hosp.*, 27 AD3d 206, 206 [1st Dept 2006]).

All concur except CURRAN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent and would reverse the order and deny defendants' motions for summary judgment dismissing the complaint against them. Although I agree with the majority's tacit conclusion that plaintiffs' submissions, particularly the detailed 44-page affirmation of their expert neurologist, raised triable questions of fact with respect to defendants' deviation from the good and accepted standard of care (*see generally Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020]), I disagree with the majority's express conclusion that the expert

neurologist's affirmation did not raise a question of fact with respect to proximate cause.

As acknowledged by the majority, this appeal implicates the "loss of chance" theory of proximate causation that applies in delayed-diagnosis medical malpractice actions where the allegations are predicated on an "omission" theory of negligence (*Wild v Catholic Health Sys.*, 85 AD3d 1715, 1717 [4th Dept 2011], *affd* 21 NY3d 951 [2013]; *see Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1471 [4th Dept 2020]; *Clune v Moore*, 142 AD3d 1330, 1331-1332 [4th Dept 2016]; *Wolf v Persaud*, 130 AD3d 1523, 1525 [4th Dept 2015]; *Gregory v Cortland Mem. Hosp.*, 21 AD3d 1305, 1306 [4th Dept 2005]; *Cannizzo v Wijeyasekaran*, 259 AD2d 960, 961 [4th Dept 1999]; *see generally* 1B NY PJI3d 2:150 at 47, 82-86 [2021]). In such cases, proximate cause is not analyzed under the ordinary "substantial factor" approach (PJI 2:70), but rather according to whether the alleged delay in diagnosis diminished the plaintiff's "chance of a better outcome or increased the injury" (*Wolf*, 130 AD3d at 1525). Although I have expressed concern "that a loss of chance concept reduces a plaintiff's burden of proof on the element of proximate cause" (*Humbolt v Parmeter*, 196 AD3d 1185, 1194 [4th Dept 2021, Curran, J., dissenting]), the majority and I agree that this Court has nonetheless adopted that causation standard in this type of medical malpractice action.

The majority makes no attempt to distinguish the expert opinion presented here from similar expert opinions on causation we previously reviewed and found sufficient. Plaintiffs correctly observe that their expert's analysis of the issue of causation is very similar to the opinion offered by the plaintiff's expert in *Clune*, in which we concluded that the defendants were not entitled to judgment as a matter of law pursuant to CPLR 4401 inasmuch as the plaintiff presented legally sufficient evidence on the issue of causation (*see* 142 AD3d at 1331-1332). In my view, the facts supporting plaintiffs' theory of causation, as articulated by their expert, are largely indistinguishable from the expert testimony in *Clune*. There, the plaintiff's decedent allegedly suffered a bowel perforation during a colonoscopy, which resulted in peritonitis that ultimately caused his death (*see Clune v Moore*, 45 Misc 3d 427, 428-430 [Sup Ct, Erie County 2014]). The plaintiff's expert testified with respect to causation that the decedent's chance of "survival would [have] increase[d] 'the earlier in time or the closer in time that you catch a [medical problem] and are able to treat a [medical problem]' " (*Humboldt*, 196 AD3d at 1193 [Curran, J., dissenting]). In other words, had the bowel perforation been diagnosed sooner, the outcome would have been better for the decedent. In *Clune*, therefore, the defendants' *delay in diagnosing* the bowel perforation was the deviation that provided the causative effect resulting in death—i.e., the diminished opportunity for a better outcome for the decedent.

Here, although defendants commenced administering intravenous immunoglobulin therapy to Karen S. Simko (plaintiff) within the time frame by which the standard of care for Guillain-Barré Syndrome (GBS) is measured, that does not change the fact that plaintiffs' expert opined that defendants' *delay in diagnosing* plaintiff with GBS

nonetheless deprived her of "a substantial possibility she would have had less injury to her nervous system and less complication[s] cause[d] thereby, recovered quicker, and had less permanent deficits" due to GBS. The expert also stated that, had the intravenous immunoglobulin therapy been administered earlier, "the neutralization of the attack antibodies would have begun immediately . . . and cessation of nerve damage would have begun" and that "[o]nce you stop the damage to the nerves you stop the sensory and motor loss at that point." Thus, even though defendants began therapy to treat plaintiff's GBS in time to be effective, plaintiffs' expert still raised an issue of fact whether defendants' failure to diagnose the GBS sooner diminished plaintiff's chance of a better outcome or increased the injuries she ultimately sustained. Ultimately, in light of the foregoing, "[w]hether a diagnostic delay affected [plaintiff's] prognosis is . . . an issue that should be presented to a jury" (*Wiater v Lewis*, 197 AD3d 782, 784 [2d Dept 2021]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

675

CAF 19-01795

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF SYNCERE D.

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

MEMORANDUM AND ORDER

SHAINA D., ALSO KNOWN AS SHAINA B., AND JOHN D., RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

ANTHONY BELLETIER, SYRACUSE, FOR RESPONDENT-APPELLANT SHAINA D., ALSO KNOWN AS SHAINA B.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (YVETTE VELASCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered August 2, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject child.

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

Same memorandum as in *Matter of John D., Jr. (John D.)* ([appeal No. 2] — AD3d — [Nov. 19, 2021] [4th Dept 2021]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

676

CAF 19-02010

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF JOHN D., JR., NY'JEEM D.,
AND SYNCERE D.
---------- MEMORANDUM AND ORDER
ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND
FAMILY SERVICES, PETITIONER-RESPONDENT;

JOHN D., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (YVETTE VELASCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered October 8, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject children.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent John D. challenges the denial of his attorney's request for an adjournment, and the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent mother and respondent father each appeal from an order of fact-finding and disposition that, among other things, adjudged that respondents had neglected Syncere D. and placed that child in the custody of petitioner. In appeal No. 2, the father appeals from an order pursuant to Social Services Law § 384-b that, inter alia, terminated his parental rights with respect to John D., Jr., Ny'Jeem D., and Syncere on the ground of abandonment upon his default. In appeal No. 3, the mother appeals from an order that, inter alia, terminated her parental rights with respect to Syncere on the ground of abandonment upon her default. In appeal Nos. 4 and 5, the mother appeals from orders that, inter alia, terminated her parental rights with respect to Ny'Jeem and John Jr., respectively, based on permanent neglect. In appeal No. 6, the mother appeals from an order of fact-finding and disposition that, among other things, adjudged that she had neglected Syre'nity D. and placed that child in the custody of petitioner.

Addressing first appeal Nos. 2 and 3, we note that both orders in those appeals were entered following fact-finding and dispositional hearings at which respondents failed to appear and in which their attorneys, although present, elected not to participate (*see Matter of Makia S. [Catherine S.]*, 134 AD3d 1445, 1445-1446 [4th Dept 2015]; *Matter of Shawn A. [Milisa C.B.]*, 85 AD3d 1598, 1598-1599 [4th Dept 2011], *lv denied* 17 NY3d 713 [2011]). Where, as here, the relevant orders appealed from are made upon respondents' default, " 'review is limited to matters which were the subject of contest below' " (*Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]; *see Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080 [4th Dept 2019]; *Matter of Paulino v Camacho*, 36 AD3d 821, 822 [2d Dept 2007]). Thus, in appeal Nos. 2 and 3, review is limited to the denial of the request of respondents' attorneys for an adjournment (*see Ramere D.*, 177 AD3d at 1386-1387).

"Whether to grant or deny an adjournment rests within the trial court's sound discretion, and such requests should be granted only upon a showing of good cause" (*Matter of Thompson v Wood*, 156 AD3d 1279, 1282 [3d Dept 2017] [internal quotation marks omitted]; *see Matter of Tyler W. [Stacey S.]*, 121 AD3d 1572, 1573 [4th Dept 2014]; *Matter of Shavira P.*, 283 AD2d 1027, 1028 [4th Dept 2001], *lv denied* 97 NY2d 605 [2001]). We reject respondents' contention that Family Court abused its discretion in denying the request for an adjournment here inasmuch as counsel offered no "good cause" for the adjournment and instead offered only speculation as to why respondents might be absent. Moreover, that was not respondents' first request for an adjournment; nor was it their first failure to appear for a scheduled hearing without explanation (*cf. Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th Dept 2017]).

In appeal Nos. 4 and 5, the mother contends that the court abused its discretion in not imposing a suspended judgment. Although the mother contends on appeal that a suspended judgment would have been in the best interests of Ny'Jeem and John Jr., she " 'did not request a suspended judgment at the dispositional hearing and thus failed to preserve for our review [her] contention that the court erred in failing to grant that relief' " (*Matter of Justin T. [Wanda T.—Joseph M.]*, 154 AD3d 1338, 1339-1340 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]; *see Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1315 [4th Dept 2015], *lv denied* 25 NY3d 909 [2015]). In any event, a suspended judgment was not warranted here inasmuch as "any progress made by [the mother] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the [subject] child[ren]'s unsettled familial status" (*Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1502 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Donovan W.*, 56 AD3d 1279, 1280 [4th Dept 2008], *lv denied* 11 NY3d 716 [2009]).

With respect to appeal Nos. 1 and 6, as noted above, respondents each appealed from the respective orders in appeal Nos. 2 and 3 terminating their parental rights with respect to Syncere. Further, the mother did not appeal from an order terminating her parental

rights with respect to Syre'nity and the time for appeal has now passed (*see* Family Ct Act § 1113; *Matter of Liliana G. [Orena G.]*, 91 AD3d 1325, 1326 [4th Dept 2012]). Inasmuch as the orders terminating respondents' parental rights to both those children are final, the disposition renders moot the appeals from the orders entered in the neglect proceedings (*see generally Matter of Raychael L.W.*, 298 AD2d 829, 829 [4th Dept 2002], *lv denied* 99 NY2d 504 [2002]; *Matter of Yusef M.*, 276 AD2d 330, 330 [1st Dept 2000], *lv dismissed* 96 NY2d 792 [2001]; *Matter of Unborn Baby B.*, 158 AD2d 455, 456 [2d Dept 1990]; *but see Matter of Keith C.*, 226 AD2d 369, 370 [2d Dept 1996], *lv denied* 88 NY2d 807 [1996]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

677

CAF 19-02013

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF SYNCERE D.

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

MEMORANDUM AND ORDER

SHAINA D.(B.), RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

ANTHONY BELLETIER, SYRACUSE, FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (YVETTE VELASCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered October 8, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent Shaina D.(B.) challenges the denial of her attorney's request for an adjournment, and the order is affirmed without costs.

Same memorandum as in *Matter of John D., Jr. (John D.)* ([appeal No. 2] — AD3d — [Nov. 19, 2021] [4th Dept 2021]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

678

CAF 19-02014

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF NY'JEEM D.

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

MEMORANDUM AND ORDER

SHAINA D.(B.), RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

ANTHONY BELLETIER, SYRACUSE, FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (YVETTE VELASCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered October 8, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of John D., Jr. (John D.)* ([appeal No. 2] — AD3d — [Nov. 19, 2021] [4th Dept 2021]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

679

CAF 19-02048

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF JOHN D., JR.

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

MEMORANDUM AND ORDER

SHAINA D.(B.), RESPONDENT-APPELLANT.
(APPEAL NO. 5.)

ANTHONY BELLETIER, SYRACUSE, FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (YVETTE VELASCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered October 8, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of John D., Jr. (John D.)* ([appeal No. 2] — AD3d — [Nov. 19, 2021] [4th Dept 2021]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

680

CAF 20-00040

PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF SYRE'NITY D.

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

MEMORANDUM AND ORDER

SHAINA D., RESPONDENT-APPELLANT,
AND JOHN D., RESPONDENT.
(APPEAL NO. 6.)

ANTHONY BELLETIER, SYRACUSE, FOR RESPONDENT-APPELLANT SHAINA D.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (YVETTE VELASCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered December 5, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the respondents had neglected the subject child.

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

Same memorandum as in *Matter of John D., Jr. (John D.)* ([appeal No. 2] — AD3d — [Nov. 19, 2021] [4th Dept 2021]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

687

CA 20-01301

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

IN THE MATTER OF WILLIAM MATTAR, P.C.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD HALL, IV, AND DOLCE PANEPINTO P.C.,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

SULLIVAN LAW PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PETITIONER-APPELLANT.

AUGELLO AND MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered September 15, 2020. The order, inter alia, denied the motion of petitioner insofar as it sought leave to renew the petition, granted the motion insofar as it sought leave to reargue, and upon reargument, adhered to a prior order allocating attorneys' fees between the parties.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the petition seeking the division of contingent attorneys' fees in the subject cases pursuant to the terms of the Professional Employment Agreement and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Respondent Richard Hall, IV, was employed by petitioner for approximately 10 years and, during that time, he executed a "Professional Employee Agreement" (Agreement) that provided for the division of contingency fee awards on cases in the event that he retained them after leaving petitioner's employ. After Hall terminated his employment with petitioner, he began to work for respondent Dolce Panepinto, P.C. (DP) and took several cases with him to DP. Petitioner commenced this proceeding seeking, inter alia, its share of the attorneys' fees earned on those cases in accordance with the terms of the Agreement.

After two of the cases settled, Supreme Court resolved the fee dispute with respect to those cases in a prior order, which is not at issue on this appeal. Of note, the court awarded the fees with respect to those cases to petitioner "pursuant to the terms of the . . . Agreement," but stated that the determination was being made

"without a ruling on the validity of the [A]greement or other cases still outstanding."

Thereafter, six additional cases settled (subject cases), and respondents sought to resolve the matter of attorneys' fees for those cases. In appeal No. 2, petitioner appeals from an order in which the court determined that, with respect to the subject cases, it would be inequitable to apportion fees pursuant to the terms of the Agreement and, as a result, used its discretion to apportion fees in a manner different from the formula set forth in the Agreement.

Petitioner thereafter moved, inter alia, for leave to reargue "that part of th[e] [p]roceeding relating to" the order in appeal No. 2, contending that the attorneys' fees should be apportioned pursuant to the terms of the Agreement. In appeal No. 1, petitioner appeals from an order that, among other things, granted leave to reargue and, upon reargument, adhered to its earlier determination.

As a preliminary matter, we conclude that appeal No. 2 should be dismissed inasmuch as the order in appeal No. 1 superseded the order in appeal No. 2 insofar as it granted leave to reargue and then, on reargument, adhered to its original decision (*see Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1375 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]; *Bruno v Gosy*, 48 AD3d 1147, 1148 [4th Dept 2008]; *see generally Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]). We further conclude that, contrary to respondents' assertion, the order in appeal No. 1 is properly appealable (*see* CPLR 5701 [a] [2] [viii]; *Matter of Jean G.S.*, 59 AD3d 998, 998 [4th Dept 2009]; *Abacus Fed. Sav. Bank v Lim*, 8 AD3d 12, 14 [1st Dept 2004]; *Nation's Bank Mtge. Corp. v Jones*, 242 AD2d 979, 979 [4th Dept 1997]).

We agree with petitioner that the court erred in refusing to enforce the terms of the Agreement. Petitioner correctly contends that the Agreement did not violate rule 1.5 (g) of the Rules of Professional Conduct (22 NYCRR 1200.0) inasmuch as that rule "does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.5 [h]; *see Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644, 645 [2d Dept 2005]; *Hendler & Murray v Lambert*, 147 AD2d 444, 446 [2d Dept 1989], *lv denied* 74 NY2d 603 [1989]). Here, the Agreement at issue is not a fee-splitting agreement under Rule 1.5 (g) but, rather, an employment or separation agreement under Rule 1.5 (h). Such employment or separation agreements "should be construed, wherever possible, in favor of [their] legality" (*Hendler & Murray*, 147 AD2d at 446) and where, as here, they are clear and unambiguous on their face, they must be " 'enforced according to the plain meaning of [their] terms' " (*Samuel v Druckman & Sinel, LLP*, 12 NY3d 205, 210 [2009], *rearg denied* 12 NY3d 899 [2009]).

We further agree with petitioner that the Agreement did not violate rule 5.6 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0; *cf. Cohen v Lord, Day & Lord*, 75 NY2d 95, 98 [1989]).

Although the Agreement did have some financial disincentives for respondents to continue working on the cases that were transferred from petitioner, "agreements involving financial disincentives are not per se illegal" (*Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 385 [1993]). In *Cohen*, the "significant monetary penalty" imposed on a withdrawing partner who competed with the law firm was deemed "an impermissible restriction on the practice of law" (75 NY2d at 98).

Here, however, we conclude that the terms of the Agreement relating to the division of contingency fee awards did not have the effect of "improperly deter[ring] competition" (*Denburg*, 82 NY2d at 381; *see generally Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 156 [1995]).

Based on the existence of a valid and enforceable separation agreement, we conclude that the court erred in apportioning the fees pursuant to the factors outlined in cases where there was no such agreement (*see e.g. Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 458 [1989]; *Wodecki v Vinogradov*, 125 AD3d 645, 646 [2d Dept 2015]; *Podbielski v KMO 361 Realty Assoc.*, 6 AD3d 597, 598 [2d Dept 2004]). We therefore modify the order in appeal No. 1 by granting that part of the petition seeking the division of contingent attorneys' fees in the subject cases pursuant to the terms of the Agreement, and we remit the matter to Supreme Court to apportion fees pursuant to those terms.

Based on our determination, we do not reach petitioner's remaining contentions.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

688

CA 20-01303

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

IN THE MATTER OF WILLIAM MATTAR, P.C.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD HALL, IV, AND DOLCE PANEPINTO P.C.,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

SULLIVAN LAW PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PETITIONER-APPELLANT.

AUGELLO AND MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered June 10, 2020. The order allocated attorneys' fees between the parties.

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

Same memorandum as in *Matter of William Mattar, P.C. v Hall* ([appeal No. 1] — AD3d — [Nov. 19, 2021] [4th Dept 2021]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

729

CA 20-01222

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

BL DOE 2, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROCHESTER CITY SCHOOL DISTRICT, DEPARTMENT OF LAW, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered August 28, 2020. The order denied the motion of defendant Rochester City School District to dismiss the complaint against it.

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

Memorandum: The Rochester City School District (defendant) appeals from an order denying its motion to dismiss the complaint against it. " 'It is the obligation of the appellant to assemble a proper record on appeal. The record must contain all of the relevant papers that were before the Supreme Court' " (*Fink v Al-Sar Realty Corp.*, 175 AD3d 1820, 1820 [4th Dept 2019]; *see* CPLR 5017 [b]; 5526; *Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). Here, defendant's appeal must be dismissed based on defendant's failure to include in the record the complaint, which it seeks to dismiss in its motion (*see Fink*, 175 AD3d at 1821).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

730

CA 20-01223

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

BL DOE 3, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE FEMALE ACADEMY OF THE SACRED HEART,
ET AL., DEFENDANTS,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROCHESTER CITY SCHOOL DISTRICT, DEPARTMENT OF LAW, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered August 28, 2020. The order, insofar as appealed from, denied the motion of defendant Rochester City School District to dismiss the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Rochester City School District in part and dismissing the fourth and fifth causes of action against that defendant, and as modified the order 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 1972 to 1973 by a teacher while attending East High School in the Rochester City School District (defendant). Defendant appeals from an order that, inter alia, denied its pre-answer motion to dismiss the complaint against it. We note at the outset that defendant does not challenge on appeal Supreme Court's denial of that part of its motion seeking dismissal of plaintiff's first cause of action against it for negligence; therefore any challenge to that part of the order is deemed abandoned (*see Armstrong v United Frontier Mut. Ins. Co.*, 181 AD3d 1332, 1333 [4th Dept 2020]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We agree with defendant that the court erred in denying that part of its motion seeking dismissal of plaintiff's fourth and fifth causes of action against it alleging violations of Title IX and 42 USC § 1983, respectively, on statute of limitations grounds (*see* CPLR 3211

[a] [5]), and we therefore modify the order accordingly. In reviewing a pre-answer motion to dismiss pursuant to CPLR 3211, "we must 'accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Collins v Davirro*, 160 AD3d 1343, 1343 [4th Dept 2018], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Further, " '[o]n a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired' " (*id.* at 1343-1344).

"The federal civil rights statutes do not provide for a specific statute of limitations, establish rules regarding the tolling of the limitations period, or prescribe the effect of tolling" (*Chardon v Fumero Soto*, 462 US 650, 655 [1983]). Thus, "courts entertaining claims brought under 42 U.S.C. § 1983 [and Title IX] should borrow the state statute of limitations for personal injury actions" (*Owens v Okure*, 488 US 235, 236 [1989]; *see Wilson v Garcia*, 471 US 261, 275-276 [1985]; *Curto v Edmundson*, 392 F3d 502, 504 [2d Cir 2004], *cert denied* 545 US 1133 [2005]; *see generally* 42 USC § 1988 [a]). Where a state "has one or more statutes of limitations for certain enumerated intentional torts, and a residual statute for all other personal injury actions[,] . . . the residual or general personal injury statute of limitations applies" (*Owens*, 488 US at 236). Here, defendant correctly contends, and plaintiff does not dispute, that New York's three-year statute of limitations for non-specified personal injury claims applies to the federal causes of action asserted here (*see* CPLR 214 [5]; *Owens*, 488 US at 251; *Curto*, 392 F3d at 504).

Inasmuch as defendant met its initial burden on the motion, the burden shifted to plaintiff "to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether . . . plaintiff actually commenced the action within the applicable limitations period" (*US Bank N.A. v Brown*, 186 AD3d 1038, 1039 [4th Dept 2020] [internal quotation marks omitted]). Plaintiff contends that CPLR 214-g, which revives certain civil claims and causes of action for damages suffered as a result of childhood sexual abuse that would otherwise be barred by a statute of limitations, must be borrowed along with CPLR 214 (5) in determining whether her federal causes of action are timely. Plaintiff is correct that, "once a federal court borrows a state statute of limitations, it generally should also borrow the related provisions, pertaining to tolling, *revival* and so forth, as interpreted under state law, unless such an unmodified borrowing would be inconsistent with a strong federal policy underlying the federal cause of action" (*Williams v Walsh*, 558 F2d 667, 674 [2d Cir 1977] [emphasis added]; *see Hardin v Straub*, 490 US 536, 538-539 [1989]; *Board of Regents v Tomanio*, 446 US 478, 484-486 [1980]). The reason therefore is because "the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application" (*Johnson v Railway Express Agency*, 421 US 454, 464 [1975]).

We nonetheless conclude that CPLR 214-g is not a revival statute

related to the residual personal injury statute of limitations applicable to plaintiff's section 1983 cause of action (*see* CPLR 214 [5]; *see generally Owens*, 488 US at 249-250). In so concluding, we note that section 1983 itself "creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere" (*City of Oklahoma City v Tuttle*, 471 US 808, 816 [1985]; *see Sykes v James*, 13 F3d 515, 519 [2d Cir 1993], *cert denied* 512 US 1240 [1994]). Inasmuch as a section 1983 claim can encompass "[a] catalog of . . . constitutional claims . . . [involving] numerous and diverse topics and subtopics" (*Wilson*, 471 US at 273), the United States Supreme Court has concluded that practical considerations warrant "a simple, broad characterization of all [section] 1983 claims" (*id.* at 272) and instructed that the choice of the state statute of limitations to be applied to a section 1983 claim should not "depend upon the particular facts or the precise legal theory of each claim" (*id.* at 274; *see Owens*, 488 US at 249-250).

Here, unlike a statutory tolling provision based on infancy or incarceration (*see e.g. Hardin*, 490 US at 543), we cannot determine whether CPLR 214-g is a revival statute related to plaintiff's section 1983 cause of action unless we impermissibly consider "the particular facts or the precise legal theory of [plaintiff's section 1983 cause of action]" (*Wilson*, 471 US at 274; *see Owens*, 488 US at 240). We therefore conclude that plaintiff's section 1983 cause of action should have been dismissed as time barred. Further, inasmuch as courts have applied the rationale of *Wilson* and *Owens* to other federal civil rights claims, including Title IX claims (*see Curto*, 392 F3d at 504; *see also Twersky v Yeshiva Univ.*, 579 Fed Appx 7, 9 [2d Cir 2014], *cert denied* 575 US 935 [2015]), and plaintiff offers no argument to the contrary, we conclude that plaintiff's Title IX cause of action should also have been dismissed as time-barred. In light of our conclusion, defendant's alternative contention that those causes of action should have been dismissed under CPLR 3211 (a) (7) is academic.

Contrary to defendant's contention, the court properly denied that part of its motion seeking dismissal against it of plaintiff's common-law failure to report cause of action pursuant to CPLR 3211 (a) (7). "It is well settled that a school owes a common-law duty to adequately supervise its students" (*Stephenson v City of New York*, 19 NY3d 1031, 1033 [2012]; *see Matter of Kimberly S.M. v Bradford Cent. School*, 226 AD2d 85, 87 [4th Dept 1996]), which requires that the school " 'exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances' " (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). "The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians" (*id.*; *see also Kimberly S.M.*, 226 AD2d at 87-88). Here, plaintiff alleges in the complaint that instances of sexual abuse by the teacher occurred on school grounds during school hours when defendant was "in a position of *in loco parentis*" to her (*cf. Kimberly S.M.*, 226 AD2d at 88). Plaintiff further alleges that defendant knew or should have known that the teacher was sexually abusing minor students and that

defendant's failure to notify "law enforcement or another appropriate governmental agency" resulted in her injuries.

To the extent that those allegations were "bare legal conclusions without factual support" (*Medical Care of W. N. Y. v Allstate Ins. Co.*, 175 AD3d 878, 879 [4th Dept 2019]), the court was permitted to "consider affidavits submitted by . . . plaintiff to remedy any defects in the complaint" (*Leon*, 84 NY2d at 88). Here, in opposition to defendant's motion, plaintiff submitted her own affidavit, in which she averred that, in early 1973 while she was still a student, she raised a concern about the teacher with the dean and the principal of defendant's East High School. Further, plaintiff's attorney averred in his own affidavit that he had spoken to several potential witnesses, who were employees of defendant with knowledge of the teacher's interactions with female students, including one who witnessed the teacher inappropriately touching a female student and reported the incident to the East High School administration. The court therefore properly denied that part of defendant's motion seeking dismissal of plaintiff's second cause of action against defendant under CPLR 3211 (a) (7) because plaintiff established that "facts [necessary for her to oppose the motion properly] may exist and that discovery is necessary for a full disclosure" (*Nice v Combustion Eng'g*, 193 AD2d 1088, 1090 [4th Dept 1993]; *see* CPLR 3211 [d]; *Cantor v Levine*, 115 AD2d 453, 454 [2d Dept 1985]).

We reject defendant's contention that plaintiff's common-law failure to report cause of action was subsumed by the statutory reporting requirements of Social Services Law article 6, title 6. "[I]t is a general rule of statutory construction that a clear and specific legislative intent is required to override the common law" (*Hechter v New York Life Ins. Co.*, 46 NY2d 34, 39 [1978]; *see B & F Bldg. Corp. v Liebig*, 76 NY2d 689, 693 [1990]; *PB-7 Doe v Amherst Cent. Sch. Dist.*, 196 AD3d 9, 11 [4th Dept 2021]). Further, "[t]he general rule is and long has been that when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by the statute" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 324 [1983] [internal quotation marks omitted]; *see Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 350 [2011]). Here, there is nothing in the language of Social Services Law § 420 (2), which provides a private right of action against a mandated reporter who willfully fails to fulfill his or her statutory reporting obligation, that expresses a legislative intent to curb or override defendant's common-law duty to " 'exercise such care of [its students] as a parent of ordinary prudence would observe in comparable circumstances' " (*Mirand*, 84 NY2d at 49; *see also Kimberly S.M.*, 226 AD2d at 87).

Finally, for the reasons stated above in connection with plaintiff's common-law failure to report cause of action, we reject defendant's contention that plaintiff's statutory failure to report cause of action against defendant should have been dismissed in its entirety for failure to state a cause of action (*see* CPLR 3211 [a] [7]; [d]; Social Services Law § 420; *Nice*, 193 AD2d at 1090; *Cantor*,

115 AD2d at 454). The court therefore properly denied that part of defendant's motion seeking dismissal of plaintiff's third cause of action against it.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

731

CA 20-01224

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

BL DOE 4, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN D. FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ROCHESTER CITY SCHOOL DISTRICT, DEPARTMENT OF LAW, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered August 28, 2020. The order denied the motion of defendant Rochester City School District to dismiss the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Rochester City School District in part and dismissing the fourth and fifth causes of action against that defendant, and as modified the order 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 1980 to 1981 by a teacher while attending East High School in the Rochester City School District (defendant). Defendant appeals from an order that denied its pre-answer motion to dismiss the complaint against it. We note at the outset that defendant does not challenge on appeal Supreme Court's denial of that part of its motion seeking dismissal of plaintiff's first cause of action against it for negligence; therefore any challenge to that part of the order is deemed abandoned (*see Armstrong v United Frontier Mut. Ins. Co.*, 181 AD3d 1332, 1333 [4th Dept 2020]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We agree with defendant that, for reasons stated in our decision in *BL Doe 3 v The Female Academy of the Sacred Heart* (— AD3d — [Nov. 19, 2021] [4th Dept 2021]), the court erred in denying that part of its motion seeking dismissal of plaintiff's fourth and fifth causes of action against it alleging violations of Title IX and 42 USC § 1983,

respectively, on statute of limitations grounds (*see* CPLR 3211 [a] [5]; *Owens v Okure*, 488 US 235, 249-250 [1989]; *Wilson v Garcia*, 471 US 261, 273-276 [1985]). We therefore modify the order accordingly. In light of our conclusion, defendant's alternative contention that those causes of action should have been dismissed under CPLR 3211 (a) (7) is academic.

Contrary to defendant's contention, the court properly denied that part of its motion seeking dismissal against it of plaintiff's common-law failure to report cause of action pursuant to CPLR 3211 (a) (7). "It is well settled that a school owes a common-law duty to adequately supervise its students" (*Stephenson v City of New York*, 19 NY3d 1031, 1033 [2012]; *see Matter of Kimberly S.M. v Bradford Cent. School*, 226 AD2d 85, 87 [4th Dept 1996]) which requires that the school " 'exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances' " (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). "The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians" (*id.*; *see also Kimberly S.M.*, 226 AD2d at 87-88). Here, plaintiff alleges in the complaint that instances of sexual abuse by the teacher occurred on school grounds during school hours when defendant was "in a position of *in loco parentis*" to her (*cf. Kimberly S.M.*, 226 AD2d at 88). Plaintiff further alleges that defendant knew or should have known that the teacher was sexually abusing minor students and that defendant's failure to notify "law enforcement or another appropriate governmental agency" resulted in her injuries.

To the extent that those allegations are "bare legal conclusions without factual support" (*Medical Care of W. N. Y. v Allstate Ins. Co.*, 175 AD3d 878, 879 [4th Dept 2019]), the court was permitted to "consider affidavits submitted by . . . plaintiff to remedy any defects in the complaint" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Here, in opposition to defendant's motion, plaintiff submitted affidavits from two female former East High School students. One averred that she raised a concern with administrators at East High School about the teacher's inappropriate behavior toward her as early as 1973. The other averred that she informed the East High School principal in June 1981 that the teacher had sexually abused her on multiple occasions and the principal indicated some prior awareness of the teacher's misconduct. Further, plaintiff's attorney averred in his own affidavit that he had spoken to several potential witnesses, who were employees of defendant with knowledge of the teacher's inappropriate interactions with female students, including one who witnessed the teacher inappropriately touching a female student and reported the incident to the East High School administration. The court therefore properly denied that part of defendant's motion seeking dismissal of plaintiff's second cause of action against defendant under CPLR 3211 (a) (7) because plaintiff established that "facts [necessary for her to oppose the motion properly] may exist and that discovery is necessary for a full disclosure" (*Nice v Combustion Eng'g*, 193 AD2d 1088, 1090 [4th Dept 1993]; *see* CPLR 3211 [d]; *Cantor v Levine*, 115 AD2d 453, 454 [2d Dept 1985]).

We reject defendant's contention that plaintiff's common-law failure to report cause of action was subsumed by the statutory reporting requirements of Social Services Law article 6, title 6, for reasons stated in our decision in *BL Doe 3* (— AD3d at —). Finally, for the reasons stated above in connection with plaintiff's common-law failure to report cause of action, we reject defendant's contention that plaintiff's statutory failure to report cause of action should have been dismissed against defendant for failure to state a cause of action (*see* CPLR 3211 [a] [7]; [d]; Social Services Law § 420; *Nice*, 193 AD2d at 1090; *Cantor*, 115 AD2d at 454). The court therefore properly denied that part of defendant's motion seeking dismissal of plaintiff's third cause of action against it.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

732

CA 20-01225

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

BL DOE 5, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN D. FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

ROCHESTER CITY SCHOOL DISTRICT, DEPARTMENT OF LAW, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered August 28, 2020. The order denied the motion of defendant Rochester City School District to dismiss the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Rochester City School District in part and dismissing the second and third causes of action against that defendant, and as modified the order 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 while attending West High School in the Rochester City School District (defendant). Defendant appeals from an order that denied its pre-answer motion to dismiss the complaint against it. We note at the outset that defendant does not challenge on appeal Supreme Court's denial of that part of its motion seeking dismissal of plaintiff's first cause of action against it for negligence; therefore any challenge to that part of the order is deemed abandoned (*see Armstrong v United Frontier Mut. Ins. Co.*, 181 AD3d 1332, 1333 [4th Dept 2020]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We agree with defendant that, for reasons stated in our decision in *BL Doe 3 v The Female Academy of the Sacred Heart* (— AD3d — [Nov. 19, 2021] [4th Dept 2021]), the court erred in denying that part of its motion seeking dismissal of plaintiff's third cause of action

against it alleging a violation of 42 USC § 1983 on statute of limitations grounds (*see* CPLR 3211 [a] [5]; *Owens v Okure*, 488 US 235, 249-250 [1989]; *Wilson v Garcia*, 471 US 261, 273-276 [1985]). We therefore modify the order accordingly. In light of our conclusion, defendant's alternative contention that this cause of action should have been dismissed under CPLR 3211 (a) (7) is academic.

We further agree with defendant that the court erred in denying that part of its motion seeking dismissal against it of plaintiff's common-law failure to report cause of action pursuant to CPLR 3211 (a) (7) (*see generally Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *Matter of Kimberly S.M. v Bradford Cent. School*, 226 AD2d 85, 87-88 [4th Dept 1996]), and we further modify the order accordingly. In reviewing the pre-answer motion to dismiss pursuant to CPLR 3211, "we must 'accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Collins v Davirro*, 160 AD3d 1343, 1343 [4th Dept 2018], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The allegations in a complaint, however, 'cannot be vague and conclusory . . . , and [b]are legal conclusions will not suffice' " (*Choromanskis v Chestnut Homeowners Assn., Inc.*, 147 AD3d 1477, 1478 [4th Dept 2017]; *see Simkin v Blank*, 19 NY3d 46, 52 [2012]). Further, "[i]n assessing a motion under CPLR 3211 (a) (7), . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Leon*, 84 NY2d at 88; *see Burton v Sciano*, 110 AD3d 1435, 1436 [4th Dept 2013]).

A school's common-law duty to adequately supervise its students "derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians" (*Mirand*, 84 NY2d at 49; *see also Kimberly S.M.*, 226 AD2d at 87-88). Here, the allegations in the complaint regarding the common-law failure to report cause of action against defendant consist of "bare legal conclusions without factual support [that] are insufficient to withstand a motion to dismiss" (*Medical Care of W. N. Y. v Allstate Ins. Co.*, 175 AD3d 878, 879 [4th Dept 2019]). Plaintiff's common-law failure to report cause of action is based on defendant's alleged knowledge of and failure to report "Fleming's [s]exual [a]buse of [p]laintiff and other minor students." In opposition to defendant's motion, plaintiff submitted an affidavit wherein she averred that she had been sexually abused, not by Fleming, but by a different West High School teacher while off of school grounds and outside of school hours. Inasmuch as that incident took place "well beyond the supervisory responsibility of [defendant]," defendant "owed no common-law duty to report the suspected case of child sexual abuse to anyone" (*Kimberly S.M.*, 226 AD2d at 88). The court therefore erred in denying that part of defendant's motion seeking dismissal of plaintiff's second cause of action against it.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

733

CA 20-01226

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

BL DOE 7, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN D. FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.
(APPEAL NO. 5.)

ROCHESTER CITY SCHOOL DISTRICT, DEPARTMENT OF LAW, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered August 28, 2020. The order denied the motion of defendant Rochester City School District to dismiss the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Rochester City School District in part and dismissing the fourth and fifth causes of action against that defendant, and as modified the order 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 1979 to 1981 by a teacher while attending East High School in the Rochester City School District (defendant). Defendant appeals from an order that denied its pre-answer motion to dismiss the complaint against it. We note at the outset that defendant does not challenge on appeal Supreme Court's denial of that part of its motion seeking dismissal of plaintiff's first cause of action against it for negligence; therefore any challenge to that part of the order is deemed abandoned (*see Armstrong v United Frontier Mut. Ins. Co.*, 181 AD3d 1332, 1333 [4th Dept 2020]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We agree with defendant that, for reasons stated in our decision in *BL Doe 3 v The Female Academy of the Sacred Heart* (— AD3d — [Nov. 19, 2021] [4th Dept 2021]), the court erred in denying that part of its motion seeking dismissal of plaintiff's fourth and fifth causes of action against it alleging violations of Title IX and 42 USC § 1983,

respectively, on statute of limitations grounds (*see* CPLR 3211 [a] [5]; *Owens v Okure*, 488 US 235, 249-250 [1989]; *Wilson v Garcia*, 471 US 261, 273-276 [1985]). We therefore modify the order accordingly. In light of our conclusion, defendant's alternative contention that those causes of action should have been dismissed under CPLR 3211 (a) (7) is academic.

Contrary to defendant's contention, the court properly denied that part of its motion seeking dismissal against it of plaintiff's common-law failure to report cause of action pursuant to CPLR 3211 (a) (7). "It is well settled that a school owes a common-law duty to adequately supervise its students" (*Stephenson v City of New York*, 19 NY3d 1031, 1033 [2012]; *see Matter of Kimberly S.M. v Bradford Cent. School*, 226 AD2d 85, 87 [4th Dept 1996]), which requires that the school " 'exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances' " (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). "The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians" (*id.*; *see also Kimberly S.M.*, 226 AD2d at 87-88). Here, plaintiff alleges in the complaint that instances of sexual abuse by the teacher occurred on school grounds during school hours when defendant was "in a position of *in loco parentis*" to her (*cf. Kimberly S.M.*, 226 AD2d at 88). Plaintiff further alleges that defendant knew or should have known that the teacher was sexually abusing minor students and defendant's failure to notify "law enforcement or another appropriate governmental agency" resulted in her injuries.

To the extent that those allegations are "bare legal conclusions without factual support" (*Medical Care of W. N. Y. v Allstate Ins. Co.*, 175 AD3d 878, 879 [4th Dept 2019]), the court was permitted to "consider affidavits submitted by . . . plaintiff to remedy any defects in the complaint" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Here, in opposition to defendant's motion, plaintiff submitted affidavits from two female former East High School students. One averred that she raised a concern with administrators at East High School about the teacher's inappropriate behavior toward her as early as 1973. The other averred that she informed the East High School principal in June 1981 that the teacher had sexually abused her on multiple occasions and the principal indicated some prior awareness of the teacher's misconduct. Further, plaintiff's attorney averred in his own affidavit that he had personally spoken to several potential witnesses, who were employees of defendant with knowledge of the teacher's inappropriate interactions with female students, including one who witnessed the teacher inappropriately touching a female student and reported the incident to the East High School administration. The court therefore properly denied that part of defendant's motion seeking dismissal of plaintiff's second cause of action against defendant under CPLR 3211 (a) (7) because plaintiff established that "facts [necessary for her to oppose the motion properly] may exist and that discovery is necessary for a full disclosure" (*Nice v Combustion Eng'g*, 193 AD2d 1088, 1090 [4th Dept 1993]; *see* CPLR 3211 [d]; *Cantor v Levine*, 115 AD2d 453, 454 [2d Dept 1985]).

We reject defendant's contention that plaintiff's common-law failure to report cause of action was subsumed by the statutory reporting requirements of Social Services Law article 6, title 6, for reasons stated in our decision in *BL Doe 3* (— AD3d at —). Finally, for the reasons stated above in connection with plaintiff's common-law failure to report cause of action, we reject defendant's contention that plaintiff's statutory failure to report cause of action should have been dismissed for failure to state a cause of action (*see* CPLR 3211 [a] [7]; [d]; Social Services Law § 420; *Nice*, 193 AD2d at 1090; *Cantor*, 115 AD2d at 454). The court therefore properly denied that part of defendant's motion seeking dismissal of plaintiff's third cause of action against it.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

735

CA 20-01228

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

VICTORIA VISIKO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN D. FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.
(APPEAL NO. 6.)

ROCHESTER CITY SCHOOL DISTRICT, DEPARTMENT OF LAW, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered August 28, 2020. The order denied the motion of defendant Rochester City School District to dismiss the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Rochester City School District in part and dismissing the fourth and fifth causes of action against that defendant, and as modified the order 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 1974 to 1977 by a teacher while attending East High School in the Rochester City School District (defendant). Defendant appeals from an order that denied its pre-answer motion to dismiss the complaint against it. We note at the outset that defendant does not challenge on appeal Supreme Court's denial of that part of its motion seeking dismissal of plaintiff's first cause of action against it for negligence; therefore any challenge to that part of the order is deemed abandoned (*see Armstrong v United Frontier Mut. Ins. Co.*, 181 AD3d 1332, 1333 [4th Dept 2020]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We agree with defendant that, for reasons stated in our decision in *BL Doe 3 v The Female Academy of the Sacred Heart* (— AD3d — [Nov. 19, 2021] [4th Dept 2021]), the court erred in denying that part of its motion seeking dismissal of plaintiff's fourth and fifth causes of action against it alleging violations of Title IX and 42 USC § 1983,

respectively, on statute of limitations grounds (*see* CPLR 3211 [a] [5]; *Owens v Okure*, 488 US 235, 249-250 [1989]; *Wilson v Garcia*, 471 US 261, 273-276 [1985]). We therefore modify the order accordingly. In light of our conclusion, defendant's alternative contention that those causes of action should have been dismissed under CPLR 3211 (a) (7) is academic.

Contrary to defendant's contention, the court properly denied that part of its motion seeking dismissal against it of plaintiff's common-law failure to report cause of action pursuant to CPLR 3211 (a) (7). "It is well settled that a school owes a common-law duty to adequately supervise its students" (*Stephenson v City of New York*, 19 NY3d 1031, 1033 [2012]; *see Matter of Kimberly S.M. v Bradford Cent. School*, 226 AD2d 85, 87 [4th Dept 1996]), which requires that the school " 'exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances' " (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). "The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians" (*id.*; *see also Kimberly S.M.*, 226 AD2d at 87-88). Here, plaintiff alleges in the complaint that instances of sexual abuse by the teacher occurred on school grounds during school hours (*cf. Kimberly S.M.*, 226 AD2d at 88). Plaintiff further alleges that defendant knew or should have known that the teacher was sexually abusing minor students and that defendant's failure to notify "law enforcement or another appropriate governmental agency" resulted in her injuries.

To the extent that those allegations are "bare legal conclusions without factual support" (*Medical Care of W. N. Y. v Allstate Ins. Co.*, 175 AD3d 878, 879 [4th Dept 2019]), the court was permitted to "consider affidavits submitted by . . . plaintiff to remedy any defects in the complaint" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Here, in opposition to defendant's motion, plaintiff submitted affidavits from two female former East High School students. One averred that she raised a concern with administrators at East High School about the teacher's inappropriate behavior toward her as early as 1973. The other averred that she informed the East High School principal in June 1981 that the teacher had sexually abused her on multiple occasions and the principal indicated some prior awareness of the teacher's misconduct. Further, plaintiff's attorney averred in his own affidavit that he had spoken to several potential witnesses, who were employees of defendant with knowledge of the teacher's inappropriate interactions with female students, including one who witnessed the teacher inappropriately touching a female student and reported the incident to the East High School administration. The court therefore properly denied that part of defendant's motion seeking dismissal of plaintiff's second cause of action against defendant under CPLR 3211 (a) (7) because plaintiff established that "facts [necessary for her to oppose the motion properly] may exist and that discovery is necessary for a full disclosure" (*Nice v Combustion Eng'g*, 193 AD2d 1088, 1090 [4th Dept 1993]; *see* CPLR 3211 [d]; *Cantor v Levine*, 115 AD2d 453, 454 [2d Dept 1985]).

We reject defendant's contention that plaintiff's common-law

failure to report cause of action was subsumed by the statutory reporting requirements of Social Services Law article 6, title 6, for reasons stated in our decision in *BL Doe 3* (— AD3d at —). Finally, for the reasons stated above in connection with plaintiff's common-law failure to report cause of action, we reject defendant's contention that plaintiff's statutory failure to report cause of action should have been dismissed against defendant for failure to state a cause of action (*see* CPLR 3211 [a] [7]; [d]; Social Services Law § 420; *Nice*, 193 AD2d at 1090; *Cantor*, 115 AD2d at 454). The court therefore properly denied that part of defendant's motion seeking dismissal of plaintiff's third cause of action against it.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

740.1

TP 21-00169

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

IN THE MATTER OF THOMAS EDWARDS, PETITIONER,

V MEMORANDUM AND ORDER

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

THOMAS EDWARDS, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Erin P. Gall, J.], entered January 13, 2021) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated inmate rules 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]) and 104.12 (7 NYCRR 270.2 [B] [5] [iii] [demonstration]). Contrary to petitioner's contention, the misbehavior report, hearing testimony, and confidential information constitute substantial evidence supporting the determination that he violated those inmate rules (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *Matter of Watson v Annucci*, 173 AD3d 1606, 1606 [4th Dept 2019]). Petitioner's denials raised, at most, an issue of credibility for resolution by the Hearing Officer (*see Foster*, 76 NY2d at 966). We have reviewed petitioner's remaining contentions and conclude that none warrants a different result.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

740

CA 21-00252

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

ELIZABETH BRITT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NORTHERN DEVELOPMENT II, LLC, RYCO MANAGEMENT, LLC, AND DOUGLAS PATNODE ENTERPRISES, DEFENDANTS-RESPONDENTS.

CELLINO LAW, LLP, ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

VAHEY GETZ, LLP, ROCHESTER (JARED K. COOK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NORTHERN DEVELOPMENT II, LLC AND RYCO MANAGEMENT, LLC.

LAW OFFICE OF JOHN WALLACE, BUFFALO (ALYSON C. CULLITON OF COUNSEL), FOR DEFENDANT-RESPONDENT DOUGLAS PATNODE ENTERPRISES.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William K. Taylor, J.), entered August 27, 2020. The order and judgment granted the motions of defendants for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion of defendants Northern Development II, LLC and Ryco Management, LLC in part and reinstating the amended complaint against those defendants insofar as the amended complaint alleges that they had constructive notice of the allegedly dangerous condition and created that condition, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell on ice in a parking lot owned by defendant Northern Development II, LLC and managed by defendant Ryco Management, LLC (collectively, Ryco defendants). Defendant Douglas Patnode Enterprises (Patnode) had contracted with the Ryco defendants to provide snow plowing services. Patnode moved for summary judgment dismissing, inter alia, the amended complaint against it, and the Ryco defendants moved for summary judgment dismissing the amended complaint against them. Supreme Court granted both motions.

Contrary to plaintiff's contention, the court did not err in determining that Patnode owed no duty to plaintiff and thus properly

granted that part of Patnode's motion seeking summary judgment dismissing the amended complaint against it. "As a general rule, a contractual obligation, standing alone, does not give rise to tort liability in favor of a third party" (*Lorquet v Timoney Tech. Inc.*, 188 AD3d 1584, 1585 [4th Dept 2020] [internal quotation marks omitted]). There is an exception to that general rule, however, "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or instrument of harm' " (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), thereby "creat[ing] an unreasonable risk of harm to others, or increas[ing] that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). Here, even assuming, arguendo, that the allegations in the pleadings are sufficient to require Patnode to negate the possible applicability of that exception in establishing its prima facie entitlement to summary judgment, we conclude that Patnode met its initial burden of establishing that it did not launch a force or instrument of harm by creating or exacerbating a dangerous condition (*see Lingenfelter v Delevan Terrace Assoc.*, 149 AD3d 1522, 1523 [4th Dept 2017]; *see generally Morris v Ontario County*, 152 AD3d 1185, 1187 [4th Dept 2017]). In opposition thereto, plaintiff failed to raise a triable issue of fact. "[B]y merely plowing the snow, as required by the contract, [Patnode's] actions could not be said to have created or exacerbated a dangerous condition" (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361 [2007] [internal quotation marks omitted]; *see Lingenfelter*, 149 AD3d at 1523; *cf. Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1403 [4th Dept 2018]).

As to the motion of the Ryco defendants, "[i]t is well settled that defendants seeking summary judgment dismissing a complaint in a premises liability case have the initial burden of establishing that [they] 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]). Contrary to plaintiff's contention, the Ryco defendants met their initial burden of establishing that they did not have actual notice of any dangerous condition "by submitting evidence that [they] did not receive any complaints concerning the area where plaintiff fell and [were] 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]). In opposition, plaintiff failed to raise a triable issue of fact with respect to actual notice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, we reject plaintiff's contention that the court erred in granting the Ryco defendants' motion with respect to the claim that they had actual notice of the icy condition.

We agree with plaintiff, however, that the court erred in granting those parts of the Ryco defendants' motion seeking summary judgment dismissing the amended complaint against them insofar as the amended complaint alleges that they had constructive notice of the

allegedly dangerous condition and that they created that condition, and we therefore modify the order and judgment accordingly. With respect to constructive notice, it is well settled that 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, the Ryco defendants' own submissions raise a triable issue of fact whether they had actual knowledge of a recurring dangerous condition in the parking lot in front of the entrance where plaintiff fell, thereby placing them on constructive notice (*see Phillips v Henry B'S, Inc.*, 85 AD3d 1665, 1666-1667 [4th Dept 2011]; *see also Monnin v Clover Group, Inc.*, 187 AD3d 1512, 1513-1514 [4th Dept 2020]; *Campone v Pisciotta Servs., Inc.*, 87 AD3d 1104, 1105 [2d Dept 2011]).

The Ryco defendants also failed to establish as a matter of law that they did not create the allegedly dangerous condition. The Ryco defendants submitted the deposition testimony of their property manager, who testified that the Ryco defendants directed Patnode to deposit plowed snow in an area of higher elevation than the parking lot and that every winter and spring, when the plowed snow melted, it flowed toward the entrance where plaintiff fell and pooled in the depressions in the parking lot. Viewing that testimony and the Ryco defendants' 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 the Ryco defendants' own submissions "failed to eliminate the existence of a triable issue of fact as to whether the ice on which . . . plaintiff allegedly slipped and fell was formed when snow piles created by the [Ryco] defendant[s'] snow removal efforts melted and refroze" (*Nicosia v Bucky Demelas & Son Landscape Contrs., Inc.*, 194 AD3d 826, 828 [2d Dept 2021]; *see Eisenberg v Town of Clarkstown*, 172 AD3d 683, 684-685 [2d Dept 2019]; *see also Hannigan v Staples, Inc.*, 137 AD3d 1546, 1549 [3d Dept 2016]). Because the Ryco defendants failed to meet their initial burden on their motion with respect to the claims that they had constructive notice of the allegedly dangerous condition and created that condition, the motion should have been denied to that extent regardless of the sufficiency of plaintiff's opposing submissions (*see 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: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

756

CA 20-01232

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

IN THE MATTER OF THE GUARDIANSHIP OF WHITNEY BONERB AND IN THE MATTER OF THE WHITNEY BONERB CREDIT SHELTER SUPPLEMENTAL NEEDS TRUST

JAMES J. BONERB, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SUZETTE BONERB, RESPONDENT-APPELLANT, LISA J. ALLEN, ESQ., AS CO-TRUSTEE OF THE WHITNEY BONERB SUPPLEMENTAL NEEDS TRUST, CHANEL T. MCCARTHY, ESQ., AS GUARDIAN AD LITEM FOR WHITNEY BONERB AND JENNIFER G. FLANNERY, ESQ., ERIE COUNTY PUBLIC ADMINISTRATOR, AS TEMPORARY CO-GUARDIAN OF THE PERSON AND TEMPORARY CO-TRUSTEE OF THE WHITNEY BONERB SUPPLEMENTAL NEEDS TRUST, RESPONDENTS-RESPONDENTS.

KAVINOKY COOK LLP, BUFFALO (LAURENCE K. RUBIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

MCCARTHY WILLIAMS PLLC, BUFFALO (CHANEL T. MCCARTHY OF COUNSEL), FOR RESPONDENT-RESPONDENT CHANEL T. MCCARTHY, ESQ., AS GUARDIAN AD LITEM FOR WHITNEY BONERB.

BARCLAY DAMON LLP, SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR RESPONDENT-RESPONDENT JENNIFER G. FLANNERY, ESQ., ERIE COUNTY PUBLIC ADMINISTRATOR, AS TEMPORARY CO-GUARDIAN OF THE PERSON AND TEMPORARY CO-TRUSTEE OF THE WHITNEY BONERB SUPPLEMENTAL NEEDS TRUST.

Appeal from a decree (denominated order) of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered August 24, 2020. The decree granted both petitions.

It is hereby ORDERED that the decree so appealed from is unanimously modified on the law by vacating those parts granting the petitions and removing respondent Suzette Bonerb as co-guardian of the person of Whitney Bonerb and co-trustee of the Whitney Bonerb Credit Shelter Supplemental Needs Trust, and as modified the decree is affirmed without costs and the matter is remitted to Surrogate's Court, Erie County, for further proceedings.

Memorandum: Petitioner and Suzette Bonerb (respondent) were previously appointed co-guardians of their adult child, Whitney

Bonerb, and co-trustees of the Whitney Bonerb Credit Shelter Supplemental Needs Trust (Trust). Petitioner commenced these proceedings with petitions seeking to remove respondent as co-guardian and co-trustee on the ground that respondent was ineligible to be appointed to those fiduciary positions under section 711 of the Surrogate Court Procedure Act, and respondent moved, inter alia, to dismiss the petitions. Respondent appeals from a decree that denied her motions and granted the petitions.

We reject respondent's contention that Surrogate's Court erred in denying her motions to dismiss the petitions (*see generally* SCPA 711 [1]; 719 [6], [10]). To the extent that her motions are based on the contention the Surrogate was required to dismiss the petitions because respondent had obtained a certificate of relief from disabilities, we note that the mere issuance of a certificate does not require dismissal of the petitions. To the contrary, "[a] certificate of relief from disabilities shall not . . . in any way prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege" (Correction Law § 701 [3]). Thus, the certificate does not prevent the Surrogate "from revoking [respondent's appointments] in the exercise of its discretion (*see* Correction Law § 701 [3]); it merely preclude[s] the automatic revocation of" those appointments (*Matter of Plantone v State of N.Y. Dept. of State, Div. of Licensing Servs.*, 251 AD2d 1049, 1049 [4th Dept 1998]; *see Matter of Ogundu v State of N.Y. Dept. of Health, State Bd. for Professional Med. Conduct*, 188 AD3d 1469, 1471 [3d Dept 2020]). Respondent's further contention that the doctrine of collateral estoppel bars petitioner from relying on the felony conviction was not raised in her motions and thus is not properly before us (*see Jones v Town of Carroll*, 158 AD3d 1325, 1328 [4th Dept 2018], *lv dismissed* 31 NY3d 1064 [2018]; *Matter of Hall*, 275 AD2d 979, 979 [4th Dept 2000]).

We agree with respondent, however, that the Surrogate erred in granting the petitions without a hearing. Insofar as relevant here, the Surrogate "may make a decree suspending, modifying or revoking letters issued to a fiduciary from the court or removing a lifetime trustee or modifying or suspending the powers of a lifetime trustee without a petition or the issuance of process . . . [w]here he [or she] has been convicted of a felony" (SCPA 719 [6]), or "[w]here any of the facts provided in [section] 711 are brought to the attention of the court" (SCPA 719 [10]). Nevertheless, "[t]he Surrogate may remove without a hearing only where the misconduct is established by undisputed facts or concessions [or] where the fiduciary's in-court conduct causes such facts to be within the court's knowledge" (*Matter of Duke*, 87 NY2d 465, 472 [1996]). Additionally, "revoking a fiduciary's letters . . . pursuant to SCPA 719 will constitute an abuse of discretion 'where the facts are disputed, where conflicting inferences may be drawn therefrom, . . . or where there are claimed mitigating facts that, if established, would render summary removal an inappropriate remedy' " (*Matter of Mercer*, 119 AD3d 689, 691-692 [2d Dept 2014], quoting *Duke*, 87 NY2d at 473; *see Matter of Steward*, 193

AD3d 940, 942 [2d Dept 2021]; *Matter of Kaufman*, 137 AD3d 1034, 1035 [2d Dept 2016], *lv denied* 28 NY3d 908 [2016]). Here, respondent conceded that she had been convicted of a felony, but established that she disclosed that fact in the applications for appointments and that she later obtained a certificate of relief from disabilities with respect to that felony (*see* Correction Law § 701). Furthermore, she contended that she had been advised by counsel that she was eligible to be appointed a fiduciary at the time when she signed the statement to that effect. Consequently, the Surrogate must make a credibility determination concerning those issues, and then exercise her discretion concerning whether respondent should be removed from her appointments (*cf. Matter of Weinraub*, 66 AD3d 691, 691-692 [2d Dept 2009]; *see generally Duke*, 87 NY2d at 473). We therefore modify the decree by vacating those parts granting the petitions and removing respondent Suzette Bonerb as co-guardian of the person of Whitney Bonerb and co-trustee of the Whitney Bonerb Credit Shelter Supplemental Needs Trust, and we remit the matter to Surrogate's Court for further proceedings consistent with this decision.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

760

CA 20-01253

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

ANAHITA ALIASGARIAN, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 126890.)
(APPEAL NO. 1.)

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered October 16, 2019. The order granted defendant's motion for a directed verdict and dismissed the claim.

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: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

761

CA 20-01626

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

ANAHITA ALIASGARIAN, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 126890.)
(APPEAL NO. 2.)

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from a judgment of the Court of Claims (J. David Sampson, J.), entered October 28, 2019. The judgment dismissed the claim.

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

Memorandum: Claimant commenced this action seeking damages for injuries that she sustained when she was struck from behind by a bicycle. The accident occurred in the Town of Amherst at approximately 10:00 p.m. as claimant was walking on a sidewalk along a road that passes under I-290. Claimant asserted causes of action for negligence and public nuisance, based on allegations that the dark and unlit underpass constituted a dangerous condition. During a nonjury trial, the Court of Claims granted the motion of defendant, State of New York (State), for a directed verdict. Claimant now appeals from a judgment dismissing the claim, and we affirm.

Contrary to claimant's contention, the court did not err in granting the State's motion. " 'It is well settled that a directed verdict is appropriate where the . . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party' " (*Bolin v Goodman*, 160 AD3d 1350, 1351 [4th Dept 2018] [internal quotation marks omitted]). Initially, we agree with claimant that the State is not entitled to qualified immunity because, in view of the New York State Department of Transportation's Policy on Highway Lighting, which was admitted into evidence, there is a rational process by which the trier of fact could find that there was "no reasonable basis" for the State's decision to not install lighting in the underpass (*Friedman v State of New York*, 67 NY2d 271, 284 [1986]; *see generally Bolin*, 160

AD3d at 1351).

We nevertheless conclude, however, that the State is entitled to dismissal of the claim under the ordinary rules of negligence, which are applicable in the absence of a qualified immunity defense (*see Brown v State of New York*, 31 NY3d 514, 519 [2018]; *Turturro v City of New York*, 28 NY3d 469, 479 [2016]). It is well established that, under the ordinary rules of negligence, the State breaches its nondelegable duty to keep its roadways reasonably safe " 'when [it] is made aware of a dangerous highway condition and does not take action to remedy it' " (*Brown*, 31 NY3d at 519, quoting *Friedman*, 67 NY2d at 283). Such a breach "proximately causes harm if it is a substantial factor in the [claimant's] injury" (*id.*). Here, the trial record is devoid of evidence that the State had actual or constructive notice of the allegedly dangerous condition. Likewise, there is no evidence in the trial record regarding how the accident occurred or whether the lighting conditions in the underpass were a substantial factor in the accident and thus were a proximate cause of claimant's injuries (*see generally Brown*, 31 NY3d at 519). We therefore conclude that there is no rational process by which the factfinder could base a finding in favor of claimant with respect to her negligence cause of action, and thus the court did not err in granting the motion with respect to that cause of action. We further conclude that the court did not err in granting the State's motion with respect to the public nuisance cause of action inasmuch as the public nuisance cause of action was premised upon the State's alleged negligence, which claimant failed to establish (*see Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 569 [1977], *rearg denied* 42 NY2d 1102 [1977]).

Finally, contrary to the further contention of claimant, the court did not abuse its discretion by refusing to admit in evidence certain photographs that purportedly showed the lighting conditions in the underpass on the night of the accident, inasmuch as claimant's testimony was equivocal with respect to whether the photographs fairly and accurately represented the condition of the underpass (*see McGruder v Gray*, 265 AD2d 822, 822 [4th Dept 1999]; *cf. Loundsbury v Yeomans*, 139 AD3d 1230, 1232 [3d Dept 2016]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

797

KA 19-00669

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LASHAWN LEWIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. KULESUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 8, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). We reject the contention of defendant in her main and pro se supplemental briefs that she was denied her state constitutional due process rights based upon the 12-year preindictment delay in this case (*see generally People v Singer*, 44 NY2d 241, 253 [1978]). In determining that the People met their burden of establishing good cause for the delay in prosecuting defendant (*see generally People v Decker*, 13 NY3d 12, 14 [2009]; *Singer*, 44 NY2d at 254), Supreme Court properly applied the factors set forth in *People v Taranovich* (37 NY2d 442 [1975]), i.e., "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*id*. at 445). Although the length of the delay in this case weighs in defendant's favor, "it is well established that the extent of the delay, standing alone, is not sufficient to warrant a reversal" (*People v McFadden*, 148 AD3d 1769, 1771 [4th Dept 2017], *lv denied* 29 NY3d 1093 [2017]; *see People v Chatt*, 77 AD3d 1285, 1285 [4th Dept 2010], *lv denied* 17 NY3d 793 [2011]). Here, the People established at the *Singer* hearing that the District Attorney's Office brought charges after prosecutors uncovered a statement made by a crucial witness informing the police that defendant admitted committing the crime. The delay was in no part

caused by any bad faith on the part of the People but, rather, was attributable to the mishandling of the witness's statement by the police department. Under these circumstances, we conclude that the People provided an " 'acceptable excuse or justification' for the delay" (*McFadden*, 148 AD3d at 1771; *see People v Gaston*, 104 AD3d 1206, 1206 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]). Furthermore, it is undisputed that the underlying charge is a serious offense and that defendant was not incarcerated during the delay, and "there is no indication that the defense was significantly impaired by the delay" (*Decker*, 13 NY3d at 15; *see People v Rogers*, 103 AD3d 1150, 1151 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]).

Defendant further contends in her main brief that the court erred in refusing to suppress statements that she made to the police in 2017 and certain evidence obtained thereafter on the ground that such statements and other evidence were obtained in violation of her indelible right to counsel. We reject that contention. Initially, as the People correctly concede, defendant's indelible right to counsel attached in 2005 when an attorney appeared in the case on defendant's behalf (*see generally People v Grice*, 100 NY2d 318, 321 [2003]). "The mere passage of time is insufficient to eradicate the attorney-client relationship" (*People v Felder*, 301 AD2d 458, 459 [1st Dept 2003]), and it was the burden of the police "to determine whether the attorney-client relationship had terminated" when they spoke to defendant in 2017 (*People v West*, 81 NY2d 370, 380 [1993]). Here, the People established at the *Huntley* hearing that the police met that burden inasmuch as the attorney who appeared in the case in 2005 told the District Attorney's Office and a homicide detective that he was no longer representing defendant, and defendant informed the police prior to making the statements in question that she was not represented by counsel (*see People v Thorsen*, 20 AD3d 595, 597 [3d Dept 2005], *lv denied* 5 NY3d 810 [2005], *reconsideration denied* 5 NY3d 857 [2005]; *cf. Felder*, 301 AD2d at 459).

Contrary to defendant's additional contention in her main brief, we conclude that the court did not abuse its discretion in denying her request for a *Frye* hearing on the admissibility of the testimony of a blood spatter analysis expert (*see People v Barnes*, 267 AD2d 1020, 1021 [4th Dept 1999], *lv denied* 95 NY2d 832 [2000]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude, contrary to defendant's contention in her main and pro se supplemental briefs, that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We further conclude, contrary to defendant's contention in her main brief, that defendant's sentence is not unduly harsh or severe.

We have considered the remaining contentions in defendant's main and pro se supplemental briefs and conclude that they are either

unpreserved or without merit.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

806

CA 21-00319

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

IN THE MATTER OF CAYUGA NATION AND CLINT HALFTOWN,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF SENECA FALLS, RESPONDENT-RESPONDENT.

BARCLAY DAMON LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR PETITIONERS-APPELLANTS.

BOYLAN CODE, LLP, ROCHESTER (DAVID K. HOU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered February 9, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondent to dismiss the petition and dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the second cause of action and as modified the judgment is affirmed without costs and respondent is granted 20 days after service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination by respondent, Town of Seneca Falls (Town), to enact Local Law No. 3 of 2020 (Local Law), which, inter alia, prohibited vehicles from being parked on a county road in the vicinity of a farm stand owned and operated by petitioner Cayuga Nation (Nation). The Town thereafter moved to dismiss the petition on the ground that each of the three causes of action therein failed to state a cause of action (*see* CPLR 3211 [a] [7]). Supreme Court granted the motion, and petitioners now appeal. We conclude that the court erred in granting the motion with respect to the second cause of action.

The first cause of action asserts that the Town lacked jurisdiction to enact parking regulations on a county road (*see* CPLR 7803 [2]). Contrary to petitioners' contention with respect to that cause of action, Vehicle and Traffic Law § 1660 (a) (18) grants local municipalities the "authority" to enact parking regulations on county roadways (*Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 675 [1999], *rearg denied* 93 NY2d 1042 [1999]; *see generally Kovalsky v*

Village of Yaphank, 235 AD2d 459, 460 [2d Dept 1997]; 2005 Ops Atty Gen No. 2005-3, citing, inter alia, Vehicle and Traffic Law §§ 1640 [a] [6]; 1660). We thus conclude that the first cause of action fails to state a cause of action and that the court properly granted the motion with respect to that cause of action.

In the second cause of action, petitioners alleged that the determination to enact the Local Law was arbitrary and capricious because, inter alia, it was discriminatory and the Town did not "consider the comments, statements, and concerns the Nation properly raised" prior to the hearing on the Local Law. We agree with petitioners that the allegations in the pleading and the reasonable inferences to be drawn therefrom establish that petitioners have a viable second cause of action pursuant to CPLR 7803 (3), i.e., that the Town's determination to enact the Local Law was arbitrary and capricious (*see generally Matter of Anderson v Town of Clarence*, 275 AD2d 930, 930-931 [4th Dept 2000]). We therefore modify the judgment accordingly.

In the third cause of action, petitioners alleged that the determination to enact the Local Law was not supported by substantial evidence (*see* CPLR 7803 [4]). The substantial evidence standard is relevant only where a determination is made "as a result of a hearing held, and at which evidence was taken" (*id.*). Here, it cannot be disputed that there was no hearing "at which evidence was taken" (*id.*). We thus conclude that the third cause of action fails to state a cause of action.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

809

CA 20-01066

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

MAGIC CIRCLE FILMS INTERNATIONAL, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ENTERTAINMENT ONE U.S. LP, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

CAMARDO LAW FIRM, P.C., AUBURN (JOSEPH A. CAMARDO, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DANIEL J. AARON, P.C., NEW YORK CITY (DANIEL J. AARON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered January 28, 2020. The order, among other things, denied that part of the cross motion of plaintiff seeking leave to amend the amended complaint.

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

Memorandum: Plaintiff commenced this action alleging that it was the owner of certain musical compositions and sound recordings, and that it sustained damages because defendant unlawfully sold or distributed those works. In appeal No. 1, plaintiff appeals from an order that, inter alia, denied that part of its cross motion seeking leave to amend the amended complaint. In appeal No. 2, plaintiff appeals from an order that, insofar as appealed from, granted defendant's motion to dismiss the amended complaint. We affirm in each appeal.

With respect to appeal No. 1, it is well settled that "[l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Forcucci v Board of Educ. of Hamburg Cent. Sch. Dist.*, 151 AD3d 1660, 1661 [4th Dept 2017] [internal quotation marks omitted]; *see* CPLR 3025 [b]). Contrary to plaintiff's contention, we conclude that the amendments sought by plaintiff are patently lacking in merit and, therefore, Supreme Court did not abuse its discretion in denying that part of the cross motion seeking leave to amend the amended complaint (*see generally Broyles v Town of Evans*, 147 AD3d 1496, 1497 [4th Dept 2017]). Plaintiff sought to add a cause of action for breach of contract, but there is no contractual relationship between

plaintiff and defendant (*see Arroyo v Central Islip UFSD*, 173 AD3d 814, 816 [2d Dept 2019]; *see generally Alloy Advisory, LLC v 503 W. 33rd St. Assoc., Inc.*, 195 AD3d 436, 436 [1st Dept 2021]). Plaintiff also sought to add a cause of action for money had and received, which "sounds in quasi contract and arises when, in the absence of an agreement, one party possesses money [that belongs to another and] that in equity and good conscience it ought not retain" (*Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018] [internal quotation marks omitted]; *see Lebovits v Bassman*, 120 AD3d 1198, 1199 [2d Dept 2014]). Here, however, plaintiff's claim was not "materially different from a claim for copyright infringement" (*Forest Park Pictures v Universal Tel. Network, Inc.*, 683 F3d 424, 432 [2d Cir 2012]), and the Federal Copyright Act (17 USC § 101 *et seq.*) "confers exclusive jurisdiction upon the [f]ederal courts for the resolution of copyright disputes" (*Jordan v Aarismaa*, 245 AD2d 616, 617 [3d Dept 1997]; *see* 17 USC § 301 [a]). We therefore conclude that plaintiff's proposed cause of action for money had and received is patently lacking in merit inasmuch as it is preempted by the Copyright Act (*see Saint-Amour v Richmond Org., Inc.*, 388 F Supp 3d 277, 291-292 [SD NY 2019]; *We Shall Overcome Found. v Richmond Org., Inc.*, 221 F Supp 3d 396, 411-412 [SD NY 2016]).

With respect to appeal No. 2, plaintiff contends that the court erred in granting defendant's motion, claiming that the causes of action asserted in the amended complaint are not preempted by federal copyright law. In the amended complaint, plaintiff asserted causes of action for unfair competition, unjust enrichment, and injunctive relief. We conclude that, despite plaintiff's characterizations of its causes of action, there is "no doubt that the rights plaintiff[] ha[s] asserted are the equivalent of rights concerning use and reproduction of property protected by the [f]ederal copyright laws" (*Editorial Photocolor Archives v Granger Collection*, 61 NY2d 517, 520 [1984]; *see generally Briarpatch Ltd., L.P. v Phoenix Pictures, Inc.*, 373 F3d 296, 305-306 [2d Cir 2004], *cert denied* 544 US 949 [2005]). Although plaintiff contends that the amended complaint should not have been dismissed because "[a]ctions arising out of contractual relations rather than rights created under the Federal Copyright Act are not [f]ederally preempted" (*Jordan*, 245 AD2d at 617; *see Bryant v Broadcast Music, Inc.*, 27 AD3d 683, 684 [2d Dept 2006]), that contention is without merit inasmuch as the amended complaint does not allege a contractual relationship between plaintiff and defendant. Based upon the foregoing, we conclude that the causes of action in the amended complaint are preempted, and therefore the court properly granted defendant's motion and dismissed the amended complaint (*see Maurizio v Rendal*, 222 AD2d 281, 281 [1st Dept 1995]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

810

CA 21-00084

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

MAGIC CIRCLE FILMS INTERNATIONAL, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ENTERTAINMENT ONE U.S. LP, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

CAMARDO LAW FIRM, P.C., AUBURN (JOSEPH A. CAMARDO, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DANIEL J. AARON, P.C., NEW YORK CITY (DANIEL J. AARON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered July 12, 2019. The order, among other things, granted the motion of defendant to dismiss the amended complaint.

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

Same memorandum as in *Magic Circle Films Intl. LLC v Entertainment One U.S. LP* ([appeal No. 1] — AD3d — [Nov. 19, 2021] [4th Dept 2021]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

817

KA 19-01444

PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEE WILLIAMS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered April 2, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree and unlawful fleeing a police officer in a motor vehicle in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed a sentence of incarceration is unanimously dismissed and the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and unlawful fleeing a police officer in a motor vehicle in the third degree (§ 270.25), defendant contends that County Court erred in refusing to suppress evidence obtained from his vehicle because officers performed what defendant contends was an invalid inventory search (*see e.g. People v Gomez*, 13 NY3d 6, 10-11 [2009]). We disagree.

Contrary to defendant's suggestion, the court did not conclude that the search of the vehicle was authorized as an inventory search. Instead, the court correctly determined that the search of defendant's vehicle was authorized pursuant to the automobile exception to the warrant requirement, i.e., an exception that permits officers to " 'search a vehicle without a warrant when they have probable cause to believe that evidence or contraband will be found there' " (*People v Johnson*, 159 AD3d 1382, 1383 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018]; *see People v Henderson*, 57 AD3d 562, 564 [2d Dept 2008], *lv denied* 12 NY3d 925 [2009]). Probable cause to search a vehicle under the automobile exception may be obtained by, inter alia, the observation of contraband inside the vehicle in plain view (*see People v Simpson*, 176 AD3d 1113, 1113 [2d Dept 2019], *lv denied* 34 NY3d 1162

[2020]; *cf. People v Johnson*, 183 AD3d 1273, 1275 [4th Dept 2020]; *see generally People v King*, 193 AD2d 1075, 1075-1076 [4th Dept 1993], *lv denied* 82 NY2d 721 [1993]). Under these circumstances, the arresting officers obtained probable cause to search the vehicle upon the observation by one of the officers of what he identified as either heroin, Fentanyl, or a mixture of both in plain view on the driver's side floor and on the center console.

Defendant's challenge to the length of his sentence of incarceration is moot because he has already served that term (*see People v Kelley*, 186 AD3d 1103, 1103 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]) and we dismiss that part of defendant's appeal (*see People v Laney*, 117 AD3d 1481, 1482 [4th Dept 2014]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

818

KA 18-01993

PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY C. WILLIAMS, DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, J.), rendered September 13, 2018. The judgment convicted defendant upon a jury verdict of criminal sexual act in the first degree, attempted rape in the third degree, rape in the third degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal sexual act in the first degree (Penal Law § 130.50 [2]). We affirm.

Weight of the evidence review "involves a 'two-step approach' wherein a [reviewing] court must (1) 'determine whether, based on all the credible evidence, an acquittal would not have been unreasonable'; and[, if yes,] (2) 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*People v Sanchez*, 32 NY3d 1021, 1023 [2018]; *see People v Delamota*, 18 NY3d 107, 116-117 [2011]). We thus reject defendant's contention that a guilty verdict is automatically against the weight of the evidence whenever an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). We also reject defendant's ineffective assistance of counsel claim (*see People v Tetro*, 181 AD3d 1286, 1288 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]; *People v Vincenty*, 138 AD3d 428, 428-429 [1st Dept 2016], *lv denied* 27 NY3d 1156 [2016]; *People v Martinez*, 35 AD3d 156, 157 [1st Dept 2006], *lv denied* 8 NY3d 924 [2007]). The sentence is not unduly

harsh or severe. Defendant's remaining contentions are unpreserved.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

827

CA 20-01557

PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

RICHARD KELLEY AND JESSICA KELLEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

EPISCOPAL CHURCH HOME AND AFFILIATES, INC.,
LECESSE CONSTRUCTION SERVICES, LLC, AND WHIRLPOOL
CORPORATION, DEFENDANTS-APPELLANTS.

EPISCOPAL CHURCH HOME AND AFFILIATES, INC. AND
LECESSE CONSTRUCTION SERVICES, LLC, THIRD-PARTY
PLAINTIFFS-RESPONDENTS,

V

WHIRLPOOL CORPORATION, THIRD-PARTY
DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (NANCY A. LONG OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS EPISCOPAL CHURCH HOME AND AFFILIATES, INC. AND LECESSE CONSTRUCTION SERVICES, LLC.

RAWLE & HENDERSON LLP, NEW YORK CITY (MICHAEL ZHU OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY DEFENDANT-APPELLANT WHIRLPOOL CORPORATION.

LOSI & GANGI, BUFFALO (PATRICK J. BROWN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered November 5, 2020. The order, among other things, granted plaintiffs' motion for partial summary judgment pursuant to Labor Law § 240 (1).

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries that Richard Kelley (plaintiff) sustained on a construction site while delivering and installing appliances. Plaintiff and a coworker were hauling the appliances on handcarts up a flight of stairs, with the coworker at a higher elevation than plaintiff. When the coworker's back gave out,

the coworker let go of his handcart, resulting in the cart and appliances falling down the stairs and striking plaintiff. Plaintiffs moved for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action. Defendants-third-party plaintiffs Episcopal Church Home and Affliates, Inc. (Episcopal), the owner of the property, and Lecesse Construction Services, LLC (Lecesse), the general contractor on the project, moved for summary judgment dismissing the amended complaint against them and for summary judgment on their claims for common-law and contractual indemnification against defendant-third-party defendant Whirlpool Corporation (Whirlpool). Lecesee had entered into a master subcontract agreement (MSA) with Whirlpool to supply and install appliances on the project, and Whirlpool in turn subcontracted with plaintiff's employer to deliver and install those appliances. Whirlpool cross-moved for, among other things, summary judgment dismissing the amended complaint and cross claims against it. Supreme Court, inter alia, granted plaintiffs' motion, denied those parts of the motion of Episcopal and Lecesse and the cross motion of Whirlpool with respect to the Labor Law § 240 (1) cause of action against them, and granted the motion of Episcopal and Lecesse with respect to their contractual indemnification claim against Whirlpool. Whirlpool now appeals, and Episcopal and Lecesse cross-appeal.

Contrary to the contentions of Whirlpool on its appeal and Episcopal and Lecesse on their cross appeal, we conclude that the court properly granted plaintiffs' motion for partial summary judgment on liability under Labor Law § 240 (1). Plaintiffs met their initial burden on the motion by establishing as a matter of law that plaintiff's "injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). In opposition, Whirlpool, Episcopal and Lecesse failed to raise a triable issue of fact. Although Whirlpool submitted an affidavit from an expert biomechanist, who opined that no additional safety devices were needed, the expert's opinion was based only on what is typical or common in the delivery and installation of appliances, and "evidence of industry practice is immaterial" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]; *see Hamilton v Kushnir Realty Co.*, 51 AD3d 864, 865 [2d Dept 2008], *lv denied* 15 NY3d 705 [2010]). The expert's opinion therefore lacks probative force and is insufficient to create a triable issue of fact (*see Romano v Stanley*, 90 NY2d 444, 451-452 [1997]; *Kropp v Town of Shandaken*, 91 AD3d 1087, 1089 n 2 [3d Dept 2012]).

We also reject the contention of Whirlpool on its appeal that the court erred in granting the motion of Episcopal and Lecesse with respect to the claim for contractual indemnification. It is well settled that "the right to contractual indemnification depends upon the specific language of the contract" (*Allington v Templeton Found.*, 167 AD3d 1437, 1441 [4th Dept 2018] [internal quotation marks omitted]). Here, section 6.7 of the MSA, as modified by the standard modifications to the MSA, required that Whirlpool indemnify Episcopal and Lecesse for liabilities and expenses incurred in the performance of work under the MSA "to the extent of Whirlpool's negligence or

fault and/or the negligence or fault of any other party for whom Whirlpool is responsible." Based on our determination that Whirlpool and its subcontractor failed to provide adequate safety devices to protect plaintiff here, we agree with Episcopal and Lecesse that they established as a matter of law that the accident was the fault of Whirlpool or a party for whom it was responsible.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

828

CA 21-00304

PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

GLENDA S. CHRISTIAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BROOKDALE SENIOR LIVING COMMUNITIES, INC., ET AL.
DEFENDANTS,
AND THOMAS KAPINOS, JR., DOING BUSINESS AS PRECISION
FLOORING, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 28, 2020. The order, insofar as appealed from, denied the motion of defendant Thomas Kapinos, Jr., doing business as Precision Flooring, for leave to serve an amended answer.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she purportedly sustained as a result of a trip and fall accident occurring in a nursing home where she was working as a licensed practical nurse. Thomas Kapinos, Jr., doing business as Precision Flooring (defendant) thereafter moved for leave to serve an amended answer that would add an affirmative defense and counterclaim alleging that, "[u]pon information and belief, plaintiff's filing of this lawsuit was frivolous, given the lack of merit based on the underlying facts of the claim, and . . . plaintiff's fraud and related misconduct with respect to the same. Further, based on same, defendant requests sanctions, costs and disbursement for this action." Defendant now appeals from that part of an order denying his motion. We affirm.

"Although leave to amend a pleading should be freely granted (*see* CPLR 3025 [b]), it may be denied where the proposed amendment is palpably insufficient or patently devoid of merit" (*Matter of DeCarr v Zoning Bd. of Appeals for Town of Verona*, 154 AD3d 1311, 1314 [4th Dept 2017] [internal quotation marks omitted]; *see Pink v Ricci*, 100 AD3d 1446, 1448-1449 [4th Dept 2012]; *J.K. Tobin Constr. Co., Inc. v David J. Hardy Constr. Co., Inc.*, 64 AD3d 1206, 1209 [4th Dept 2009]),

and "the decision whether to grant leave to amend a [pleading] is committed to the sound discretion of the court" (*Pink*, 100 AD3d at 1449 [internal quotation marks omitted]; *see Duszynski v Allstate Ins. Co.*, 107 AD3d 1448, 1449 [4th Dept 2013]; *Carro v Lyons Falls Pulp & Paper, Inc.*, 56 AD3d 1276, 1277 [4th Dept 2008]). Here, we conclude that Supreme Court did not abuse its discretion in declining to grant leave to amend the answer inasmuch as the proposed amendment is palpably insufficient or patently devoid of merit.

Indeed, there is no legal basis for the proposed counterclaim insofar as it sought damages as sanctions for allegedly frivolous conduct because "New York does not recognize a separate cause of action or counterclaim seeking the imposition of sanctions" (*Adirondack Bank v Midstate Foam & Equip., Inc.*, 159 AD3d 1354, 1357 [4th Dept 2018]; *see generally Young v Crosby*, 87 AD3d 1308, 1309 [4th Dept 2011]; *Schwartz v Sayah*, 72 AD3d 790, 792 [2d Dept 2010]).

We conclude that the proposed defense and counterclaim for fraud is palpably insufficient inasmuch as CPLR 3016 (b) requires that, where a defense or counterclaim is based on fraud, "the circumstances constituting the wrong shall be stated in detail," and here the alleged fraud was not pleaded with sufficient specificity (*see Ibarrondo v Evans,* 191 AD3d 602, 603 [1st Dept 2021]*; see generally Friedland Realty, Inc. v 416 W, LLC*, 120 AD3d 1185, 1187 [2d Dept 2014]; *Nicholas A. Cutaia, Inc. v Buyer's Bazaar*, 224 AD2d 952, 953 [4th Dept 1996]). In any event, the record here established that the defense and counterclaim for fraud were also "patently devoid of merit" (*DeCarr*, 154 AD3d at 1314 [internal quotation marks omitted]).

Defendant's remaining contentions are academic in light of our determination.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

832

CA 20-01339

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

AGAPITO ABREU, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FROCIONE PROPERTIES, LLC, DELI-BOY, INC., BIG APPLE DELI PRODUCTS, INC., INSLEY-MCENTEE EQUIPMENT CO. INC., K-D STEEL FABRICATING, DOING BUSINESS AS INSLEY-MCENTEE EQUIPMENT CO. INC., RIDG-U-RAK, INC., FOOD TECH, INC., EMCOR GROUP, INC., OGDEN CENTER DEVELOPMENT CORP., DEFENDANTS-RESPONDENTS.

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

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FROCIONE PROPERTIES, LLC, DELI-BOY, INC., AND BIG APPLE DELI PRODUCTS, INC.

GOLDBERG SEGALLA LLP, BUFFALO (RAUL MARTINEZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS INSLEY-MCENTEE EQUIPMENT CO. INC. AND K-D STEEL FABRICATING, DOING BUSINESS AS INSLEY-MCENTEE EQUIPMENT CO. INC.

LAW OFFICES OF JOHN WALLACE, HARTFORD, CONNECTICUT (NANCY A. LONG OF COUNSEL), FOR DEFENDANT-RESPONDENT RIDG-U-RAK, INC.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (THOMAS E. REIDY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FOOD TECH, INC. AND EMCOR GROUP, INC.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW C. LENAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT OGDEN CENTER DEVELOPMENT CORP.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William K. Taylor, J.), entered September 10, 2020. The order and judgment granted those parts of the motions of defendants seeking summary judgment dismissing the second amended complaint.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he sustained while

working on the construction of a food distribution warehouse. Plaintiff and a coworker were installing a pallet rack shelving system when unassembled segments of the rack tipped over onto his legs. Supreme Court, inter alia, granted those parts of the motions of defendants seeking summary judgment dismissing the second amended complaint against them. We affirm.

We note at the outset that plaintiff does not challenge those parts of the order and judgment granting defendants' motions with respect to the Labor Law § 240 (1) claim and granting the motions of defendants Frocione Properties, LLC, Deli-Boy, Inc., Big Apple Deli Products, Inc., Insley-McEntee Equipment Co. Inc., K-D Steel Fabricating, doing business as Insley-McEntee Equipment Co. Inc., and Ridg-U-Rak, Inc. with respect to the Labor Law § 200 and common-law negligence claims. Thus, plaintiff has abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We reject plaintiff's contention that the court erred in granting defendants' motions with respect to the Labor Law § 241 (6) claim. "A plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific, positive command, and is applicable to the facts of the case" (*Shaw v Scepter, Inc.*, 187 AD3d 1662, 1665 [4th Dept 2020] [internal quotation marks omitted]). On appeal, plaintiff challenges the court's determination with respect to only one section of the Industrial Code, i.e., 12 NYCRR 23-2.1 (a) (1), which relates to "[s]torage of material and equipment," and requires, inter alia, that "[m]aterial piles shall be stable under all conditions" (*see Slowe v Lecesse Constr. Servs., LLC*, 192 AD3d 1645, 1646 [4th Dept 2021]). Here, defendants established as a matter of law that 12 NYCRR 23-2.1 (a) (1) is inapplicable because, at the time of the accident, the rack segments that caused plaintiff's injuries were in use and were not in storage (*see Miles v Buffalo State Alumni Assn., Inc.*, 121 AD3d 1573, 1574-1575 [4th Dept 2014]; *Zamajtys v Cholewa*, 84 AD3d 1360, 1362 [2d Dept 2011]).

Contrary to plaintiff's further contention, the court properly granted those parts of the motions of defendants Food Tech, Inc. (Food Tech), EMCOR Group, Inc., and Ogden Center Development Corp. (Ogden) seeking dismissal of the Labor Law § 200 and common-law negligence claims against them. Those defendants established as a matter of law that the accident resulted from the manner in which the work was performed, not from any dangerous condition on the premises (*see Gillis v Brown*, 133 AD3d 1374, 1376 [4th Dept 2015]; *Zimmer v Town of Lancaster Indus. Dev. Agency*, 125 AD3d 1315, 1316-1317 [4th Dept 2015]) and that "they did not *actually* direct or control" the work of installing the racks (*Bausenwein v Allison*, 126 AD3d 1466, 1468 [4th Dept 2015]; *see Anderson v National Grid USA Serv. Co.*, 166 AD3d 1513, 1514 [4th Dept 2018]; *see generally Hargrave v LeChase Constr. Servs., LLC*, 115 AD3d 1270, 1271-1272 [4th Dept 2014]). Although there was deposition testimony that representatives of Food Tech and Ogden may have exercised general supervision of the work site as a whole, it is well settled that the "right to generally supervise the work, stop the

contractor's work if a safety violation is noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence" (*Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088, 1092 [2d Dept 2016] [internal quotation marks omitted]; *see Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 1476 [4th Dept 2011], *lv dismissed in part and denied in part* 17 NY3d 843 [2011]; *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1581-1582 [4th Dept 2010]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

837

KA 19-01978

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH KING, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered October 12, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, those parts of the omnibus motion seeking to suppress physical evidence and statements are granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Onondaga County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment that convicted him, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]). We agree with defendant that Supreme Court erred in refusing to suppress physical evidence recovered from his person after police officers approached a vehicle in which he was a passenger, as well as statements he made to police. Where, as here, "police officers approach a vehicle that is already parked and stationary, the only level of suspicion necessary to justify that approach is an articulable, credible reason for doing so, not necessarily indicative of criminality" (*People v Witt*, 129 AD3d 1449, 1450 [4th Dept 2015], *lv denied* 26 NY3d 937 [2015]; *see People v Ocasio*, 85 NY2d 982, 985 [1995]). The approach, however, "must be predicated on more than a hunch, whim, caprice or idle curiosity" (*Ocasio*, 85 NY2d at 985). Here, the officer testified at the suppression hearing that he and his partner approached the vehicle because the apartment complex at which it was parked was in a high crime area and because the vehicle was not running and had three occupants. The hearing record is devoid, however, of evidence that the officer was "aware of or observed conduct which provided a particularized reason to request information" from the occupants of

the vehicle (*People v McIntosh*, 96 NY2d 521, 527 [2001]). We therefore conclude that the officers lacked the requisite articulable, credible reason for approaching the vehicle (*see id.*; *People v Rutledge*, 21 AD3d 1125, 1126 [2d Dept 2005], *lv denied* 6 NY3d 758 [2005]). Inasmuch as the police action was not justified in its inception (*see People v De Bour*, 40 NY2d 210, 215 [1976]), the physical evidence seized from defendant, as well as defendant's subsequent statements to the officers, must be suppressed (*see People v Mobley*, 120 AD3d 916, 919 [4th Dept 2014]). As a result, defendant's guilty plea must be vacated and the indictment must be dismissed (*see People v Williams*, 191 AD3d 1495, 1498 [4th Dept 2021]; *Mobley*, 120 AD3d at 919). We therefore remit the matter to Supreme Court for proceedings pursuant to CPL 470.45.

In light of our determination herein, we need not address defendant's remaining contentions.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

840

CAF 20-01550

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

IN THE MATTER OF CHELSEA M. CLARK, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JACKSON S. CLARK, RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Jefferson County (Donald P. VanStry, R.), entered September 15, 2020 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and physical 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, among other things, modified a prior order of custody and parenting time by awarding petitioner mother sole legal and physical custody of the subject children.

Initially, we note that there is no dispute that there was a sufficient change in circumstances since the prior order, and thus the issue before us is whether Family Court properly determined that the best interests of the children would be served by a change in custody (*see Matter of Kakwaya v Twinamatsiko*, 159 AD3d 1590, 1591 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). In making such a determination, the court "must consider all factors that could impact the best interests of the child[ren], including the existing custody arrangement, the current home environment, the financial status of the parties, [and] the ability of each parent to provide for the child[ren]'s emotional and intellectual development" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]). " 'A court's custody determination, including its evaluation of [the children's] best interests, is entitled to great deference and will not be disturbed

[as long as] it is supported by a sound and substantial basis in the record' " (*Cunningham v Cunningham*, 137 AD3d 1704, 1705 [4th Dept 2016]; *see Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744 [4th Dept 2010]). Here, we conclude that, contrary to the father's contention, the court's custody determination has a sound and substantial basis in the record. The court's determination is supported by, inter alia, evidence concerning the respective home environments of the parents, as well as each parent's respective financial stability and employment status.

We reject the father's further contention that he was denied effective assistance of counsel at the hearing when his counsel elicited what the father contends was unduly prejudicial testimony. Contrary to the father's contention, the testimony in question was relevant to the best interests analysis, and the father did not meet his burden of " 'demonstrat[ing] 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 Matter of Brandon B. [Scott B.]*, 93 AD3d 1212, 1213 [4th Dept 2012], *lv denied* 19 NY3d 805 [2012]).

We have reviewed the father's remaining contentions and conclude that they are either unpreserved or without merit.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

856

KA 17-01723

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESEAN FOUCHA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD 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 (Thomas R. Morse, A.J.), rendered August 26, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second 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: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of stolen property in the fourth degree (§ 165.45 [5]), defendant contends that County Court erred in instructing the jury on the automobile presumption set forth in Penal Law § 265.15 (3). Inasmuch as defendant did not oppose the requested instruction or object to the instruction as given, he failed to preserve that contention for our review (*see People v Ealey*, 176 AD3d 735, 735 [2d Dept 2019], *lv denied* 34 NY3d 1077 [2019]; *see also People v Boyd*, 59 AD3d 1001, 1002 [4th Dept 2009], *lv denied* 12 NY3d 814 [2009]). Considering that the automobile presumption set forth in section 265.15 (2), which is not subject to the exceptions applicable to section 265.15 (3), was clearly appropriate here because the vehicle defendant was operating was stolen, 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]).

To the extent that defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to object to the instruction, we conclude that defendant did not meet his burden of showing " 'the absence of strategic or other legitimate explanations for counsel's challenged [in]action[]' " (*People v Lopez-Mendoza*, 33 NY3d 565, 572 [2019]; *see People v Rivera*, 71 NY2d

705, 709 [1988]). Indeed, defense counsel may have had a strategic reason for not objecting to the given instruction inasmuch as the language of the more appropriate presumption in Penal Law § 265.15 (2) " 'might not have been entirely helpful to the defense' " (*People v Colon*, 196 AD3d 1043, 1047 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]).

Contrary to defendant's further contentions, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, upon viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, defendant contends that the court erred in refusing to adjudicate him a youthful offender, and he asks this Court to exercise its interest of justice jurisdiction to adjudicate him a youthful offender. Defendant was convicted of an armed felony offense and thus could have been deemed an eligible youth had the court found certain mitigating circumstances or determined that his role in the crime was relatively minor (*see* CPL 720.10 [3] [i], [ii]; *People v Meridy*, 196 AD3d 1, 6-7 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]). In declining to adjudicate defendant a youthful offender, the court set forth its reasoning, concluding that there were no mitigating factors bearing on manner in which the crime was committed and that, although defendant was not the sole participant in the crime, his participation was not relatively minor. Under the circumstances, we conclude that the court did not abuse its discretion in declining to adjudicate defendant to be a youthful offender (*see People v Jones*, 166 AD3d 1479, 1480 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]; *People v Dukes*, 156 AD3d 1443, 1443 [4th Dept 2017], *lv denied* 31 NY3d 983 [2018]; *see generally People v Middlebrooks*, 25 NY3d 516, 526-527 [2015]), and we perceive no basis for this Court to exercise our interest of justice jurisdiction to adjudicate defendant to be a youthful offender (*see People v Quinones*, 140 AD3d 1693, 1694 [4th Dept 2016], *lv denied* 28 NY3d 935 [2016]; *People v Lewis*, 128 AD3d 1400, 1400-1401 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]; *see generally People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

884

KA 20-00315

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS RODRIGUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered September 26, 2019. The judgment convicted defendant upon a plea of guilty of aggravated criminal contempt.

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

Memorandum: Defendant appeals from a judgment convicting him upon a guilty plea of aggravated criminal contempt (Penal Law § 215.52 [1]). As defendant contends and the People correctly concede, defendant's purported waiver of the right to appeal is invalid. During the plea colloquy, County Court " 'conflated the right to appeal with those rights automatically forfeited by the guilty plea' " (*People v Chambers*, 176 AD3d 1600, 1600 [4th Dept 2019], *lv denied* 34 NY3d 1076 [2019]; *see People v Mothersell*, 167 AD3d 1580, 1581 [4th Dept 2018]) and, therefore, the record does not establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]). Moreover, the court's explanation that the waiver would foreclose *any* review by a higher court "utterly 'mischaracterized the nature of the right [to appeal that] defendant was being asked to cede' " (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Youngs*, 183 AD3d 1228, 1229 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]).

By failing to move to withdraw the plea or vacate the judgment of conviction, defendant failed to preserve for our review his contention that his plea was involuntary because he did not demonstrate, in a narrative fashion, his understanding of the criminal acts relevant to the charge for which he pleaded guilty (*see People v Williams*, 118 AD3d 1429, 1430 [4th Dept 2014]). This case does not fall within the

rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]).

Defendant failed to preserve for our review his contention that the presentence report was incomplete and inadequate (*see People v Morrow*, 167 AD3d 1516, 1517-1518 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]; *People v Bradford*, 126 AD3d 1374, 1374 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We reject defendant's further contention that he received ineffective assistance of counsel based on defense counsel's failure to object to the presentence report (*see People v Jones*, 148 AD3d 1807, 1808 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *see generally People v Rivera*, 71 NY2d 705, 709 [1988]).

Defendant also failed to preserve for our review his contention that the People failed to comply with the procedural requirements of CPL 400.21 when he was sentenced as a second felony offender (*see People v Guillory*, 98 AD3d 835, 835 [4th Dept 2012], *lv denied* 20 NY3d 932 [2012]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, we reject defendant's contention that the court abused its discretion in issuing a no-contact order of protection in favor of the victim, rather than a no-offensive-contact order (*see People v Miller*, 183 AD3d 1268, 1269 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]; *People v Monacelli*, 299 AD2d 916, 916 [4th Dept 2002], *lv denied* 99 NY2d 617 [2003]; *cf. People v Jenkins*, 184 AD3d 1150, 1151 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

890

CA 20-01483

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

MICHELLE H., INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF AJ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO EDGE, LLC, BNYP PROPERTIES, LLC, BNYP MAINTENANCE, LLC, BNYP, LLC, DEFENDANTS-RESPONDENTS, KEY PROPERTY CONSULTING, INC., ET AL., DEFENDANTS.

FEROLETO LAW, BUFFALO (JOHN FEROLETO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (JOSEPH H. EMMINGER, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT BUFFALO EDGE, LLC.

BOUVIER LAW, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-RESPONDENT BNYP PROPERTIES, LLC.

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

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered October 13, 2020. The order, among other things, granted the motions of defendants Buffalo Edge, LLC, and BNYP Properties, LLC, and the cross motion of defendants BNYP Maintenance, LLC, and BNYP, LLC, seeking, inter alia, summary judgment dismissing plaintiff's complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motions of defendants Buffalo Edge, LLC and BNYP Properties, LLC and the cross motion of defendants BNYP Maintenance, LLC and BNYP, LLC and reinstating the complaint and cross claims against those defendants, and as modified the order is affirmed without costs.

Memorandum: In this negligence action, plaintiff appeals from an order that denied her cross motion for partial summary judgment and that granted the respective motions and cross motion of Buffalo Edge, LLC, BNYP Properties, LLC, BNYP Maintenance, LLC, and BNYP, LLC (collectively, defendants) for summary judgment dismissing, inter alia, the complaint against them. Contrary to plaintiff's contention, her cross motion was properly denied (*see generally Beatty v Williams*,

227 AD2d 912, 912 [4th Dept 1996]). We agree with plaintiff, however, that defendants failed to meet their initial burdens on their respective motions and cross motion insofar as they sought summary judgment dismissing the complaint against them (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to Supreme Court's determination, "[i]t is well established that a party cannot obtain summary judgment 'by pointing to gaps in its opponent's proof' " (*Frank v Price Chopper Operating Co.*, 275 AD2d 940, 941 [4th Dept 2000]). We therefore modify the order accordingly. The indemnification-related arguments by Buffalo Edge, LLC are not properly before us (*see Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 408 [1st Dept 2020]) and should be addressed in the first instance by the motion court.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

892

CA 21-00525

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

HEIDI G. EDWARDS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRUCE W. EDWARDS, DEFENDANT-APPELLANT.

EISENHUT & EISENHUT, UTICA (CLIFFORD C. EISENHUT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered October 8, 2020. The order directed the distribution of the remaining funds in the Edwards Farm Escrow Account.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph except insofar as it distributes $126,822.25 to the sale and escrow agents and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: In this post-divorce action, plaintiff wife moved for an order approving an accounting of funds held in an escrow account and the proposed distribution thereof. The escrow account held the net proceeds from the sale of a farm owned and operated by the parties during the marriage. According to a prior court order, the proceeds of that account were to be equally distributed between the parties subject to any credits due to each party. Supreme Court granted the motion in part by approving the accounting of the escrow funds and granting plaintiff certain credits. Defendant husband appeals.

We agree with defendant that the court erred in deciding the value of plaintiff's credits without a full evidentiary hearing permitting the parties to offer proof of valuation (*see Michalek v Michalek*, 180 AD2d 890, 891 [3d Dept 1992]; *Norgauer v Norgauer*, 126 AD2d 957, 957-958 [4th Dept 1987]). Plaintiff offered no direct proof of the value of the relevant assets, and defendant was not afforded an opportunity to cross-examine the court-appointed appraiser or review the appraisals (*see Banker v Banker*, 56 AD3d 1105, 1107-1108 [3d Dept 2008]). The court's decision also failed to articulate the factors it considered or the reasons for its determination to partially grant certain credits to plaintiff and deny others (*see* Domestic Relations

Law § 236 [B] [5] [g]; *Antinora v Antinora*, 125 AD3d 1336, 1339 [4th Dept 2015]; *Hansen v Hansen*, 229 AD2d 960, 961 [4th Dept 1996]). We therefore modify the order by vacating the second ordering paragraph except insofar as it distributes $126,822.25 to the sale and escrow agents, and we remit the matter to Supreme Court for a hearing and appropriate findings of fact and conclusions of law with respect to the parties' entitlement to credits.

Defendant's remaining contention that service of certain submissions was improper is not properly before us inasmuch as it is raised for the first time in his reply brief (*see Scully v Scully*, 104 AD3d 1137, 1138 [4th Dept 2013]). Likewise, defendant's contention that he should be credited for certain temporary maintenance payments is raised for the first time on appeal and is, therefore, not properly before us (*see Ferrante v Ferrante*, 186 AD3d 566, 570 [2d Dept 2020]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

903

KA 17-00511

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BOBBY GOOD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered January 17, 2017. The judgment convicted defendant after a nonjury trial of attempted assault in the first degree (four counts), aggravated family offense, criminal contempt in the first degree, reckless endangerment in the second degree (four counts), endangering the welfare of a child (three counts) and arson 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 nonjury verdict of, inter alia, four counts of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). During the trial, Supreme Court admitted in evidence certain portions of a recorded 911 call pursuant to the present sense impression exception to the hearsay rule. Defendant's contention that the court erred in admitting certain statements made during the 911 call is not preserved for our review inasmuch as defendant failed to object with sufficient specificity to the admission of those statements (*see* CPL 470.05 [2]; *People v Rosas*, 306 AD2d 91, 92 [1st Dept 2003], *lv denied* 100 NY2d 645 [2003]; *see generally People v Vidal*, 26 NY2d 249, 254 [1970]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the evidence is legally insufficient to support his conviction of four counts of attempted assault in the first degree. We reject that contention. With respect to the three counts based on allegations that defendant committed attempted assault through the use of fire, defendant contends that the People's evidence failed to establish he intended to cause serious physical injury to the victims. Defendant's intent may be inferred

from his conduct and the surrounding circumstances (*see generally People v Badger*, 90 AD3d 1531, 1532 [4th Dept 2011], *lv denied* 18 NY3d 991 [2011]). Here, defendant's intent to cause serious physical injury can be inferred from the evidence that defendant doused his intended victims in lighter fluid, told them they all were going to die and sparked a flame with a lighter (*see People v Addison*, 184 AD3d 1099, 1100 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]). With respect to the count based on allegations that defendant committed attempted assault in the first degree with the use of a knife, the People presented evidence that defendant moved towards the victim while swinging a knife back and forth with his arms outstretched, lunged at her from a few feet away, and stated "we are all going to die." We conclude that such evidence is legally sufficient to establish defendant's use of a dangerous instrument with the intent to cause serious physical injury to another person (*see* Penal Law § 120.10 [1]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime of attempted assault in the first degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict with respect to the four counts of attempted assault in the first degree is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that, in determining the sentence to be imposed, the court penalized him for exercising his right to a trial (*see People v Jackson*, 162 AD3d 1567, 1567-1568 [4th Dept 2018], *lv denied* 32 NY3d 938 [2018]; *People v Stubinger*, 87 AD3d 1316, 1317 [4th Dept 2011], *lv denied* 18 NY3d 862 [2011]). In any event, that contention is without merit (*see Jackson*, 162 AD3d at 1568). Finally, defendant's sentence is not unduly harsh or severe.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

904

KA 18-01568

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW W. FARLEY, DEFENDANT-APPELLANT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 30, 2018. The judgment convicted defendant upon a jury verdict of robbery in the first degree (two counts), robbery in the second degree (two counts) and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [4]). Contrary to defendant's contention, we conclude that Supreme Court did not abuse its discretion in fashioning a *Sandoval* compromise (*see People v Cotton*, 184 AD3d 1145, 1146 [4th Dept 2020], *lv denied* 35 NY3d 1112 [2020]; *see generally People v Sandoval*, 34 NY2d 371, 374-375 [1974]). The court ruled that it would allow the prosecutor to ask defendant whether he had been convicted of a felony and the length of the sentence imposed. The court, however, precluded the prosecutor from asking about the underlying facts of the felony offense. The ruling reflects "an appropriate balance between the probative value of the defendant's prior crimes on the issue of his credibility and the risk of possible prejudice" (*People v Carmichael*, 171 AD3d 1084, 1085 [4th Dept 2019], *lv denied* 34 NY3d 979 [2019]; *see People v Tarver*, 292 AD2d 110, 116-117 [3d Dept 2002], *lv denied* 98 NY2d 702 [2002]; *People v Zamora*, 211 AD2d 834, 834-835 [2d Dept 1995], *lv denied* 85 NY2d 945 [1995]).

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

Defendant failed to preserve for our review his contention that the integrity of the grand jury proceedings was impaired because the People introduced a statement by defendant that was later suppressed, and because the People did not provide the grand jury with a voluntariness instruction with respect to the statement (*see People v Rodriguez*, 195 AD3d 1237, 1238 [3d Dept 2021]; *People v Gutierrez*, 96 AD3d 1455, 1455 [4th Dept 2012], *lv denied* 19 NY3d 997 [2012]). We decline to exercise our power to review the issue as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that he was arrested without probable cause, and, therefore, all of his subsequent statements to police should have been suppressed. We conclude, however, that "by failing to seek a ruling on that part of his omnibus motion seeking to suppress his statements [as the product of an unlawful arrest] and by failing to object to the admission in evidence of his statements at trial," defendant has abandoned his contention (*People v Smith*, 187 AD3d 1652, 1653 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021] [internal quotation marks omitted]; *see People v Contreras*, 154 AD3d 1320, 1321 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]).

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

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

912

CA 20-01123

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

LG 46 DOE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES B. JACKSON, DEFENDANT-RESPONDENT.

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

Appeal from an amended order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered August 3, 2020. The amended order, insofar as appealed from, deferred that part of plaintiff's motion seeking a determination of damages against defendant.

It is hereby ORDERED that the amended order insofar as appealed from is unanimously reversed in the exercise of discretion without costs, the second ordering paragraph is vacated, the motion is granted in its entirety and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action pursuant to the Child Victims Act seeking damages for personal injuries he sustained as a result of sexual abuse allegedly perpetrated in the 1990s by defendant, who was purportedly then employed as a staff member at Young Men's Christian Association Buffalo Niagara (YMCA Buffalo Niagara). Plaintiff asserted a cause of action against defendant for his alleged intentional conduct that constituted sexual offenses under Penal Law article 130. Plaintiff also commenced a separate action against, inter alia, YMCA Buffalo Niagara. Defendant, despite being personally served, failed to answer. Plaintiff thereafter moved pursuant to CPLR 3215 for a judgment determining that defendant was in default and directing a determination of damages against defendant. There was no opposition to plaintiff's motion.

Supreme Court determined that plaintiff had established his entitlement to a default judgment against defendant. The court further stated, however, that plaintiff had commenced a separate action based on the same factual allegations and seeking to recover for the same injuries against YMCA Buffalo Niagara, which had appeared therein. The court thus granted plaintiff's motion insofar as it sought a determination that defendant was in default. The court, however, effectively denied that part of the motion seeking a determination of damages by staying entry of a default judgment, pursuant to CPLR 3215 (d), until the time of trial or other disposition of the separate action against YMCA Buffalo Niagara, at

which time damages would be determined. Plaintiff now appeals from the amended order to that extent.

Plaintiff first contends that the court erred in denying his motion in part because, pursuant to CPLR 3215 (d), deferring the entry of judgment and the determination of damages is authorized only upon application of the party seeking a default judgment, and here plaintiff made no such application. We reject that contention for reasons stated in our decision in *Doe v Jasinski* (195 AD3d 1399, 1401-1402 [4th Dept 2021]).

Plaintiff next contends that CPLR 3215 (d) limits a court's authority to defer entry of judgment and a damages determination to cases involving multiple defendants in a single action, rather than multiple defendants across separate actions. Even assuming—based on the statutory text of CPLR 3215 (d) as well as "the spirit and purpose of the legislation" (*Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010] [internal quotation marks omitted]; *see Altman v 285 W. Fourth LLC*, 31 NY3d 178, 185 [2018], *rearg denied* 31 NY3d 1136 [2018]), which includes judicial economy as an important feature (*see Jasinski*, 195 AD3d at 1403; Sponsor's Mem, Bill Jacket, L 1992, ch 255 at 5; Assembly Mem in Support, Bill Jacket, L 1992, ch 255 at 6; Letter from Assembly Introducer to Counsel to Governor, June 17, 1992, Bill Jacket, L 1992, ch 255 at 8)—that a court may, under appropriate circumstances, defer entry of judgment and a determination of damages against a defaulting defendant until resolution of a separately-commenced companion action against non-defaulting defendants, we nonetheless agree with plaintiff's further contention that the court's decision to do so here constitutes an improvident exercise of its discretion (*see Jasinski*, 195 AD3d at 1402-1403; *see also Doe v Friel*, 195 AD3d 1409, 1409 [4th Dept 2021]). We therefore substitute our own discretion "even in the absence of abuse [of discretion]" (*Brady v Ottaway Newspapers*, 63 NY2d 1031, 1032 [1984]; *see Jasinski*, 195 AD3d at 1402; *see also Friel*, 195 AD3d at 1409).

Here, plaintiff may suffer significant prejudice by further delay of a determination of damages against defendant. "As with stays generally, a postponement of a damages determination 'can easily be a drastic remedy, on the simple basis that justice delayed is justice denied' " (*Jasinski*, 195 AD3d at 1403, quoting Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C2201:7). In that regard, we agree with plaintiff that "further delay undermines the purpose of the Child Victims Act, which is to 'finally allow justice for past and future survivors of child sexual abuse, help the public identify hidden child predators through civil litigation discovery, and shift the significant and lasting costs of child sexual abuse to the responsible parties' " (*id.*, quoting Senate Introducer's Mem in Support, Bill Jacket, L 2019, ch 11 at 8). Given the schedule of the separate action and the accompanying "uncertainty as to when plaintiff's claims may be resolved against [YMCA Buffalo Niagara], additional delay may hinder [plaintiff's] efforts to prove damages against defendant and secure a final judgment, particularly considering defendant's age and the prospect that defendant's assets may be dissipated in the interim" (*id.*). By contrast, we note that

the court did not identify any prejudice to YMCA Buffalo Niagara (*cf. id.* at 1400, 1402-1403). "Although judicial economy, which is an important consideration under CPLR 3215 (d) . . . , may favor a single damages proceeding involving both the defaulting and non-defaulting defendants," we conclude here that "such consideration does not outweigh the significant prejudice that may inure to plaintiff" (*id.* at 1403).

We therefore reverse the amended order insofar as appealed from in the exercise of discretion, vacate the second ordering paragraph, and grant the motion in its entirety, and we remit the matter to Supreme Court for a determination of damages pursuant to CPLR 3215 (b).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

926

KA 17-01694

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEONARD E. HAHN, IV, ALSO KNOWN AS LEONARD E. HAHN, JR., ALSO KNOWN AS LEONARD HAHN, IV, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered May 12, 2017. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of rape in the first degree (Penal Law § 130.35 [3]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude his challenges to the youthful offender determination or to the severity of the sentence (*see People v Wilson*, 197 AD3d 1006, 1007 [4th Dept 2021]; *People v Kingdollar*, 196 AD3d 1146, 1147 [4th Dept 2021]), we conclude that defendant's challenges are without merit. County Court did not abuse its discretion in refusing to afford defendant youthful offender status (*see People v Spencer*, 197 AD3d 1004, 1005 [4th Dept 2021]; *People v Koons*, 187 AD3d 1638, 1638 [4th Dept 2020]) and we decline to exercise our discretion in the interest of justice to grant him that status (*see Spencer*, 197 AD3d at 1005). Further, the sentence is not unduly harsh or severe.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

928

KA 19-00888

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS CABALLERO, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered March 6, 2019. The judgment convicted defendant upon a nonjury verdict of predatory sexual assault against a child and criminal sexual act in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed for predatory sexual assault against a child under count one of the indictment to an indeterminate term of incarceration of 15 years to life and by reducing the sentence imposed for criminal sexual act in the first degree under count two of the indictment to a determinate term of incarceration of 15 years followed by five years of postrelease supervision, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a nonjury trial (Buscaglia, A.J.) of predatory sexual assault against a child (Penal Law § 130.96) and criminal sexual act in the first degree (§ 130.50 [1]), defendant contends that Supreme Court (Buscaglia, A.J.) erred in refusing to suppress his statements and DNA evidence obtained during the course of two police interviews. We reject that contention.

Contrary to defendant's contention, he was not illegally arrested before either of his interviews with police officers and as a result the court did not err in refusing to suppress his statements or the DNA evidence resulting from defendant's offer to provide a DNA sample. "[N]ot every forcible detention constitutes an arrest" (*People v Drake*, 93 AD3d 1158, 1159 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]; *see People v Hicks*, 68 NY2d 234, 239-240 [1986]). Indeed, "officers may handcuff a detainee out of concern for officer safety" (*People v Wiggins*, 126 AD3d 1369, 1370 [4th Dept 2015]; *see People v*

Griffin, 188 AD3d 1701, 1703 [4th Dept 2020], *lv denied* 36 NY3d 1050 [2021], *cert denied* — US —, 141 S Ct 2358 [2021]).

Before the first interview, defendant attempted to evade police by hiding under a bed in his residence. Although he was forcibly removed from underneath the bed and handcuffed by an officer who had been granted permission to search the residence, the evidence at the suppression hearing established that the Spanish-speaking defendant was informed, through translation by the female occupants of the residence, that he was not being arrested, that he was merely wanted for questioning, that he had the right to refuse to accompany the officer, and that he would be brought home following the interview. In addition, the handcuffs were removed when defendant was brought to the interview room at police headquarters, and he was offered a ride home following that initial interview. At the time of the second interview, defendant was again informed, via translation by his girlfriend, of the circumstances of the interview, and he and his girlfriend voluntarily accompanied police officers to police headquarters. Neither individual was handcuffed. We note that defendant repeatedly denied any wrongdoing and did not make any incriminating statements during either interview. In our view, a reasonable person, innocent of any crime, would not have thought he or she was under arrest prior to either interview (*see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]).

Contrary to defendant's contention with respect to the first interview, we conclude that, " '[g]iven defendant's continuing consent [to accompany the police], and the circumstances that, at the [police station], defendant was neither handcuffed nor kept in a cell, the handcuffing of defendant for security reasons during the car trip did not constitute an arrest' " (*People v Bridgefourth*, 13 AD3d 1165, 1166 [4th Dept 2004], *lv denied* 4 NY3d 828 [2005], *reconsideration denied* 5 NY3d 760 [2005]; *cf. People v Finch*, 137 AD3d 1653, 1654-1655 [4th Dept 2016]; *see generally People v Allen*, 73 NY2d 378, 379-380 [1989]). Moreover, the physical removal of defendant from underneath the bed and the use of handcuffs before the first interview was warranted based on the "threat that defendant might take additional evasive action" (*People v McDonald*, 173 AD3d 1633, 1634 [4th Dept 2019], *lv denied* 34 NY3d 934 [2019]).

Defendant further contends that, given his difficulty in understanding the English language, the People failed to establish that he voluntarily waived his *Miranda* rights and, as a result, failed to establish that his statements and his offer to provide DNA evidence were voluntary. We reject that contention. " '[A] statement given freely and voluntarily' is admissible in evidence" (*People v Boyd*, 192 AD3d 1659, 1660 [4th Dept 2021], quoting *Miranda v Arizona*, 384 US 436, 478 [1966]). To meet their initial burden when seeking to admit in evidence statements by a defendant who has limited English language proficiency, "[t]he People must establish that the defendant grasped that he or she did not have to speak to the interrogator; that any statement might be used to the subject's disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued" (*People v Jin Cheng Lin*, 26 NY3d 701,

726 [2016] [internal quotation marks omitted]; *see People v Hinojoso-Soto*, 161 AD3d 1541, 1542 [4th Dept 2018], *lv denied* 32 NY3d 938 [2018]).

Here, the People met their initial burden by introducing evidence establishing that bilingual police officers provided *Miranda* warnings in Spanish, and that defendant participated in the lengthy interviews without exhibiting any difficulty in comprehending or responding (*see Hinojoso-Soto*, 161 AD3d at 1542). Thereafter, "the burden of persuasion with respect to suppression shifted to defendant" (*id.* [internal quotation marks omitted]), who failed to establish any basis from which to conclude that his statements and DNA sample were not voluntarily given. Thus, viewing the totality of the circumstances (*see People v Deitz*, 148 AD3d 1653, 1653 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]), we conclude that the court did not err in determining that defendant's waiver of his *Miranda* rights was voluntary (*see Boyd*, 192 AD3d at 1660-1661).

To the extent that defendant challenges the use of bilingual police officers as translators due to an alleged conflict of interest, that particular contention is not preserved for our review (*see People v Valverde*, 13 AD3d 658, 659 [2d Dept 2004], *lv denied* 4 NY3d 836 [2005]). In any event, it lacks merit (*see People v Esquerdo*, 71 AD3d 1424, 1425 [4th Dept 2010], *lv denied* 14 NY3d 887 [2010]; *Valverde*, 13 AD3d at 659).

Defendant further contends that the court (Eagan, A.J.) erred in permitting the People to introduce certain *Molineux* evidence concerning prior acts of sexual misconduct perpetrated by defendant against the victim. We likewise reject that contention. "Evidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity" (*People v Dorm*, 12 NY3d 16, 19 [2009]). Here, the victim's testimony concerning the uncharged acts was properly admitted "to complete the narrative of the events charged in the indictment . . . and [to] provide[] necessary background information" (*People v Workman*, 56 AD3d 1155, 1156 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009] [internal quotation marks omitted]; *see People v Feliciano*, 196 AD3d 1030, 1031 [4th Dept 2021]). It also served to place "the charged conduct in context" (*Dorm*, 12 NY3d at 19; *see People v Leeson*, 12 NY3d 823, 827 [2009]).

Contrary to defendant's contention, "the probative value of that evidence outweighed its potential for prejudice" (*Feliciano*, 196 AD3d at 1031; *see generally People v Alvino*, 71 NY2d 233, 242 [1987]), especially given the presumption in a bench trial that the court has considered only competent evidence in reaching its verdict (*see People v Dyson*, 169 AD3d 917, 918 [2d Dept 2019], *lv denied* 33 NY3d 975 [2019]; *see also People v Malone*, 196 AD3d 1054, 1055 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]; *see generally People v Moreno*, 70 NY2d 403, 406 [1987]).

Viewing the evidence in the light most favorable to the People

(*see People v Williams*, 84 NY2d 925, 926 [1994]), we conclude that it is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "[I]ssues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the [factfinder]" (*People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]; *see People v Smith*, 145 AD3d 1628, 1629 [4th Dept 2016], *lv denied* 31 NY3d 1017 [2018]). To the extent that defendant contends that the victim's testimony is incredible as a matter of law, we reject that contention. "Testimony will be deemed incredible as a matter of law only where it is 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Smith*, 73 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]). The victim's testimony does not meet that standard.

We agree with defendant, however, that the sentence is unduly harsh and severe, particularly in light of defendant's minimal and remote criminal history and the circumstances of the offense. Thus, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence imposed for predatory sexual assault against a child under count one of the indictment to an indeterminate term of incarceration of 15 years to life and by reducing the sentence imposed for criminal sexual act in the first degree under count two of the indictment to a determinate term of incarceration of 15 years, to be followed by the five years of postrelease supervision imposed by the court (*see* CPL 470.15 [6] [b]; *People v Delgado*, 80 NY2d 780, 783 [1992]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

937.1

KA 17-00066

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADALBERTO MARRERO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered December 1, 2016. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]) in connection with the shooting death of the victim. We affirm.

Defendant contends that County Court erred in refusing to suppress his statements to the police because the police officer who interrogated him effectively neutralized the *Miranda* warnings by downplaying certain rights embodied in those warnings. We reject that contention. "[I]n determining whether police officers adequately conveyed the [*Miranda*] warnings, . . . [t]he inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his or [her rights] as required by *Miranda*" (*People v Mateo*, 194 AD3d 1342, 1343 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021] [internal quotation marks omitted]; *see Florida v Powell*, 559 US 50, 60 [2010]; *People v Dunbar*, 24 NY3d 304, 315 [2014], *cert denied* 575 US 1005 [2015]). Although a statement made "by a questioning officer with the intent to undercut the meaning of [the] *Miranda* warnings . . . is a basis for suppression" where it "deprive[s] [a defendant] of an effective explanation of [his or her] rights" (*Mateo*, 194 AD3d at 1343 [internal quotation marks omitted]), we conclude that, under the circumstances of this case, the police officer's statement suggesting that one *Miranda* right was more important than the others did not render the

warnings ineffective inasmuch as his reading still reasonably apprised defendant of his rights (*see People v Spoor*, 148 AD3d 1795, 1797 [4th Dept 2017], *lv denied* 29 NY3d 1134 [2017]; *People v Bakerx*, 114 AD3d 1244, 1247 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]).

Defendant also contends that the court should have suppressed his statements because, during the interrogation, a police officer asserted that "now [was] the time" for defendant to provide an explanation for the shooting and that such an explanation would benefit defendant. We agree. "Properly administered *Miranda* rights can be rendered inadequate and ineffective when they are contradicted by statements suggesting that there is a price for asserting the rights to remain silent or to counsel, such as foregoing 'a valuable opportunity to speak with an assistant district attorney, to have [the] case[ ] investigated or to assert alibi defenses' " (*People v Muller*, 155 AD3d 1091, 1092 [3d Dept 2017], *lv denied* 30 NY3d 1118 [2018], quoting *Dunbar*, 24 NY3d at 316). The police officer's statement here improperly implied to defendant that the interrogation would be his "only opportunity to speak" (*Dunbar*, 24 NY3d at 316 [internal quotation marks omitted]), and his advice that providing an explanation would benefit defendant effectively "implied that . . . defendant['s] words would be used to help [him], thus undoing the heart of the warning that anything [he] said could and would be used against [him]" (*id.*; *see People v Alfonso*, 142 AD3d 1180, 1181 [2d Dept 2016], *lv denied* 29 NY3d 946 [2017]).

We also agree with defendant that the court erred in refusing to suppress certain statements because defendant unambiguously invoked his right to remain silent, which the police thereafter failed to scrupulously honor. "If a person who is subject to police interrogation indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease" (*People v Colon*, 185 AD3d 1510, 1511 [4th Dept 2020], *lv denied* 35 NY3d 1093 [2020] [internal quotation marks omitted]). The assertion of the right to remain silent " 'must be unequivocal and unqualified' " (*People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *see People v Morton*, 231 AD2d 927, 928 [4th Dept 1996], *lv denied* 89 NY2d 944 [1997]). "Whether a defendant's assertion of that right was unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding [that assertion,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant" (*Colon*, 185 AD3d at 1511-1512 [internal quotation marks omitted]). "Once invoked, the right to remain silent must be scrupulously honored" (*id.* at 1512 [internal quotation marks omitted]).

Here, about 20 minutes into the interrogation, defendant expressly stated that he did not "want to talk about more of this[, i.e., the shooting]. That's it." We conclude that defendant thereby unequivocally invoked his right to remain silent (*see People v Brown*, 266 AD2d 838, 838 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999]) inasmuch as "[n]o reasonable police officer could have interpreted

that statement as anything other than a desire not to talk to the police" (*Colon*, 185 AD3d at 1512). Defendant's responses to the police officers when they resumed the interrogation did not negate his prior unequivocal invocation of his right to remain silent because the police officers failed to reread the *Miranda* warnings to defendant before resuming the interrogation and therefore failed to scrupulously honor his right to remain silent (*see People v Wisdom*, 164 AD3d 928, 929 [2d Dept 2018], *lv denied* 32 NY3d 1211 [2019]; *Brown*, 266 AD2d at 838; *see generally People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]).

Nevertheless, we conclude that any error in failing to suppress defendant's statements is harmless inasmuch as the evidence of guilt is overwhelming and there is no reasonable possibility that the jury would have acquitted defendant if his statements had been suppressed (*see People v Brown*, 120 AD3d 954, 955 [4th Dept 2014], *lv denied* 24 NY3d 1118 [2015]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). The People provided compellingly consistent eyewitness testimony identifying defendant as the person who shot and killed the victim. Video footage of the shooting, although not of the highest quality, also generally corroborated the eyewitness accounts of what transpired leading up to and including the shooting. Further, defendant's intent to kill the victim was readily inferable from the circumstances established by the eyewitness testimony and the videos—i.e., that defendant shot the fleeing victim several times at close range (*see People v Vrooman*, 115 AD3d 1189, 1191 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014]; *People v Geddes*, 49 AD3d 1255, 1256 [4th Dept 2008], *lv denied* 10 NY3d 863 [2008]).

We also reject defendant's contention that the court erred in denying his request to instruct the jury on the defense of extreme emotional disturbance (*see* Penal Law § 125.25 [1] [a]). "The defense of extreme emotional disturbance requires evidence of a subjective element, that defendant acted under an extreme emotional disturbance, and an objective element, that there was a reasonable explanation or excuse for the emotional disturbance" (*People v Ashline*, 124 AD3d 1258, 1260 [4th Dept 2015], *lv denied* 27 NY3d 1128 [2016] [internal quotation marks omitted]; *see generally People v Roche*, 98 NY2d 70, 75-76 [2002]). Here, with respect to the subjective element, the evidence, even viewed in the light most favorable to defendant, establishes only that defendant acted out of anger, which is not tantamount to an extreme emotional disturbance precipitating a true loss of control (*see People v Walker*, 64 NY2d 741, 743 [1984], *rearg dismissed* 65 NY2d 924 [1985]; *see generally People v White*, 79 NY2d 900, 903-904 [1992]). Additionally, although defendant, in support of the assertion that he experienced an extreme emotional disturbance, adduced some evidence establishing that the medications he was taking could result in the impairment of judgment or irrational decision-making, the record is bereft of evidence that those medications actually caused him to experience such symptoms at the time of the shooting (*see People v Smith*, 1 NY3d 610, 612 [2004]; *People v Almeida*, 128 AD3d 1451, 1452 [4th Dept 2015], *lv denied* 26 NY3d 1006 [2015]).

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

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

946

KA 20-01640

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. MORSEMAN, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Steuben County Court (Chauncey J. Watches, J.), rendered November 25, 2020. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [4]), defendant contends that his plea was involuntarily entered for a variety of reasons, and that his waiver of the right to appeal is invalid. Inasmuch as a challenge to the voluntariness of a plea survives even a valid waiver of the right to appeal (*see People v Seeman*, 188 AD3d 1670, 1670 [4th Dept 2020]), there is no reason for us to address the validity of the waiver in this case. Because defendant did not move to withdraw his plea or to vacate the judgment of conviction, however, his challenge to the voluntariness of his plea is unpreserved for our review (*see People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]), and this case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666-667 [1988]). In any event, we conclude that none of defendant's specific contentions concerning the voluntariness of his plea has merit.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

957

KA 19-01383

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER E. HERRON, DEFENDANT-APPELLANT.

ADAM H. VAN BUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Terrence M. Parker, J.), rendered June 4, 2019. The judgment convicted defendant upon a plea of guilty of burglary in the second degree (two counts), criminal possession of stolen property in the fourth degree (four counts), criminal possession of a weapon in the second degree, criminal possession of stolen property in the fifth degree, possession of burglar's tools, criminal possession of a controlled substance in the seventh degree, criminally using drug paraphernalia in the second degree (three counts), criminally possessing a hypodermic instrument (two counts), unlawful growing of cannabis, criminal possession of marihuana in the fourth degree, criminal mischief in the third degree, reckless endangerment in the second degree, criminal tampering in the third degree and criminal nuisance in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Allegany County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his *Alford* plea of, inter alia, two counts of burglary in the second degree (Penal Law § 140.25 [2]) and one count of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]), defendant contends that County Court abused its discretion in refusing to recuse itself. We reject that contention. " '[U]nless disqualification is required under Judiciary Law § 14, a judge's decision on a recusal motion is one of discretion' " (*People v Hazzard*, 129 AD3d 1598, 1598 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]), and "when recusal is sought based upon 'impropriety as distinguished from legal disqualification, the judge . . . is the sole arbiter' " (*People v Moreno*, 70 NY2d 403, 406 [1987]). Here, defendant did not allege a disqualification, he made no showing that the court displayed actual bias (*see People v McCray*, 121 AD3d 1549, 1551 [4th Dept 2014], *lv denied* 25 NY3d 1204 [2015]), and we conclude that the court did not abuse its discretion in denying defendant's request.

Defendant contends that the plea was not voluntarily entered because the record does not contain sufficient evidence of his actual

guilt to support an *Alford* plea. By failing to move to withdraw the plea or vacate the judgment of conviction on the ground that the record lacked the requisite " 'strong evidence of actual guilt,' " however, defendant failed to preserve his contention for our review, and this case does not fall within the narrow exception to the preservation requirement (*People v Elliott*, 107 AD3d 1466, 1466 [4th Dept 2013], *lv denied* 22 NY3d 996 [2013]; *see People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, we conclude that "the record establishes that defendant's *Alford* plea was the product of a voluntary and rational choice, and the record . . . contains strong evidence of actual guilt" (*Elliott*, 107 AD3d at 1466 [internal quotation marks omitted]).

Defendant's contention that the People failed to establish that the weapon he was convicted of possessing was operable is a challenge to the legal sufficiency of the evidence before the grand jury, which does not survive the guilty plea (*see People v Gillett*, 105 AD3d 1444, 1445 [4th Dept 2013]; *People v Lawrence*, 273 AD2d 805, 805 [4th Dept 2000], *lv denied* 95 NY2d 867 [2000]).

Defendant's contention that the court erred in failing to conduct a proper inquiry into his request for substitution of counsel lacks merit. The record establishes that the court made the requisite " 'minimal inquiry' " into defendant's reasons for requesting new counsel (*People v Porto*, 16 NY3d 93, 100 [2010]; *see People v Small*, 166 AD3d 1471, 1471 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]), and determined that there was no good cause for substitution of counsel (*see People v French*, 172 AD3d 1909, 1910 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]; *People v Adger*, 83 AD3d 1590, 1592 [4th Dept 2011], *lv denied* 17 NY3d 857 [2011]).

Contrary to defendant's further contention, the court did not err in refusing to suppress the evidence seized as the result of a traffic stop. Preliminarily, we note that defendant does not contest the basis for the initial stop and, in any event, the New York State Trooper who performed the stop had probable cause to stop the vehicle that defendant was driving based on defendant's commission of a traffic violation, i.e., speeding (*see People v Robinson*, 97 NY2d 341, 348-349 [2001]). Defendant's contention that the Trooper detained him for a period of time that exceeded constitutionally permissible limits lacks support in the record, which reflects that the backup Trooper who observed the weapon in defendant's vehicle arrived while the initial Trooper was still writing the speeding ticket and that there was no unnecessary delay in writing that ticket (*see People v Rainey*, 49 AD3d 1337, 1339 [4th Dept 2008], *lv denied* 10 NY3d 963 [2008]). We have considered defendant's remaining contentions concerning the vehicle stop and subsequent actions of the Troopers, and we conclude that they lack merit.

Defendant further contends that the court erred in refusing to suppress the evidence seized from his home pursuant to a search warrant. Contrary to defendant's initial contention, the search warrant is supported by probable cause. "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable

doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]). We agree with defendant that, insofar as the search warrant application was based on information provided by an anonymous informant, that information was insufficient to establish probable cause. The information in the application concerning the informant failed to "satisf[y] the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted" (*People v Flowers*, 59 AD3d 1141, 1142 [4th Dept 2009] [internal quotation marks omitted]). Nevertheless, we conclude that the remaining information in the warrant application provided probable cause for the warrant (*see People v Rhodafox*, 134 AD3d 1581, 1582 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016]; *People v Leary*, 70 AD3d 1394, 1395 [4th Dept 2010], *lv denied* 14 NY3d 889 [2010]) inasmuch as it was sufficient to support a reasonable belief that evidence of the thefts could be found in defendant's residence (*see People v Pinkney*, 90 AD3d 1313, 1315-1316 [3d Dept 2011]; *People v White*, 258 AD2d 677, 678 [2d Dept 1999]; *People v Martin*, 163 AD2d 865, 865 [4th Dept 1990]). That information established that defendant's wife provided several weapons to a Trooper and said that defendant brought them home and that she believed they were stolen property, that those weapons matched the descriptions of property stolen in a recent burglary, and that another witness informed a Trooper that he observed other property inside defendant's home that matched the description of additional stolen property.

We agree with defendant, however, that part of the warrant is overbroad. "The Fourth Amendment to the Constitution provides that no warrants shall issue except those 'particularly describing the place to be searched, and the . . . things to be seized' (US Const 4th Amend). To meet the particularity requirement, the warrant's directive must be 'specific enough to leave no discretion to the executing officer' " (*People v Brown*, 96 NY2d 80, 84 [2001]). Here, the warrant permitted the Troopers to search for, inter alia, "personal papers, . . . alcohol, . . . safes, . . . any communication and computers that are related to criminal activity, any . . . telephone records, cell phones that [may] contain evidence of a crime or illegal activity and any associated documentation related to any criminal activity." Those parts of the warrant were overbroad and any evidence seized pursuant to them should have been suppressed (*see id.*; *People v Carter*, 31 AD3d 1167, 1169 [4th Dept 2006]). Nevertheless, "an overbroad directive in a search warrant does not invalidate the entire search warrant" (*People v Couser*, 303 AD2d 981, 982 [4th Dept 2003]), and we conclude that severance of the overbroad directive is feasible here because "the warrant was largely specific and based on probable cause" (*Brown*, 96 NY2d at 88). We therefore hold the case, reserve decision, and remit the matter to County Court for a hearing to determine what evidence, if any, should be suppressed as the fruit of the invalid portion of the search warrant (*see Couser*, 303 AD2d at 982). We have considered defendant's remaining contentions concerning the search warrant, and we conclude that they do not require

modification or reversal of the judgment.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

958

KA 19-02204

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA STEWART, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered November 7, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: 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*.). We reject defendant's contention that County Court's assessment of 15 points under risk factor 11 for history of drug or alcohol abuse, which was based on the recommendation in the risk assessment instrument prepared by the Board of Examiners of Sex Offenders, is not supported by clear and convincing evidence (*see* § 168-n [3]). Although defendant asserted that his prior drug or alcohol use was recreational, occasional, and did not constitute abuse, his admissions to the Probation Department regarding his daily drinking habits during the time period of the offense established "a pattern of drug or alcohol use in [the] defendant's history" evincing substance abuse (*People v Kowal*, 175 AD3d 1057, 1057 [4th Dept 2019] [internal quotation marks omitted]; *see People v Richardson*, 197 AD3d 878, 879 [4th Dept 2021]; *cf. People v Palmer*, 20 NY3d 373, 378-379 [2013]). Moreover, defendant admitted that he "provided marihuana to the [underage] victim[] . . . during the course of his sexual misconduct" against her and that he smoked marihuana at least once a week during that time period (*People v Caleb*, 170 AD3d 1618, 1619 [4th Dept 2019], *lv denied* 33 NY3d 910 [2019]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

959

KA 19-00535

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LANCE WILLIAMS, DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN 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 (Dennis S. Cohen, J.), rendered May 31, 2018. The judgment convicted defendant upon a jury verdict of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [3]). We affirm.

Contrary to defendant's contention, County Court did not err in refusing to preclude a statement he made immediately following the underlying incident. Defendant made the statement in a loud voice as he was being escorted by correction officers out of the prison's gymnasium during an event attended by the family members of inmates, and it is unclear to whom he was communicating. The statement was not made in response to any questioning by the correction officers. Although it is undisputed that the People failed to provide defendant with a timely CPL 710.30 notice with respect to the challenged statement, no such notice was required here because defendant made the statement to, inter alia, "private parties who were not police agents" (*People v Mirenda*, 23 NY2d 439, 448 [1969]; *see People v Albert*, 171 AD3d 1519, 1520 [4th Dept 2019]; *People v Bryant*, 144 AD3d 1523, 1524 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). Further, defendant's statement was not made subject to CPL 710.30 merely because the statement was "overheard by a [correction] officer" (*People v Pittman*, 160 AD3d 1130, 1130 [3d Dept 2018], *lv denied* 31 NY3d 1151 [2018]; *see People v Umana*, 76 AD3d 1111, 1112 [2d Dept 2010], *lv denied* 15 NY3d 924 [2010]).

Defendant further contends that he was deprived of a fair trial

by prosecutorial misconduct during summation. To the extent that defendant challenges the prosecutor's characterization of his trial testimony as "wild," the contention is not preserved for our review because defendant failed to object to that comment (*see People v Kerce*, 140 AD3d 1659, 1660 [4th Dept 2016], *lv denied* 28 NY3d 1028 [2016]), and we decline to exercise our power to review that part of the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to defendant's challenge to the prosecutor's mischaracterization of a witness's testimony, the court "properly sustained defense counsel's objection to the prosecutor's statement and gave a curative instruction, which the jury is presumed to have followed," thereby alleviating any prejudice caused by the prosecutor's mischaracterization (*People v Flowers*, 151 AD3d 1843, 1844 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). We conclude that the remainder of the comments challenged by defendant "were within the broad bounds of rhetorical comment permissible during summations . . . , and they were either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Ali*, 89 AD3d 1412, 1414 [4th Dept 2011], *lv denied* 18 NY3d 881 [2012] [internal quotation marks omitted]; *see People v Bailey*, 181 AD3d 1172, 1175 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020]). Even assuming, arguendo, that any of the prosecutor's comments exceeded those bounds, we conclude that they "were not so egregious as to deprive defendant of a fair trial" (*Ali*, 89 AD3d at 1414 [internal quotation marks omitted]; *see People v Blackshell*, 178 AD3d 1355, 1356 [4th Dept 2019], *lv denied* 35 NY3d 968 [2020]; *Kerce*, 140 AD3d at 1660).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

960

KA 17-00955

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ESTEBAN OQUENDO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, JEFFREY WICKS, PLLC (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 28, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Contrary to defendant's contention, we conclude that Supreme Court did not abuse its discretion in permitting the People to introduce evidence that his codefendant was in possession of a loaded gun inasmuch as the probative value of the evidence was not " 'substantially outweighed by the potential for prejudice' " (*People v Harris*, 26 NY3d 1, 5 [2015], quoting *People v Mateo*, 2 NY3d 383, 425 [2004], *cert denied* 542 US 946 [2004]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

The sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contention and conclude that it is without merit.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

963

KA 15-00768

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROY D. HARRIGER, DEFENDANT-APPELLANT.

RICHARD L. SULLIVAN, BUFFALO, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION, FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered April 6, 2015. The judgment convicted defendant upon a jury verdict of course of sexual conduct against a child in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]). Contrary to defendant's contention, he was not denied effective assistance of counsel when defense counsel elicited evidence of uncharged acts of sexual abuse and other prior bad acts. Defendant failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's" actions (*People v Nicholson*, 26 NY3d 813, 831 [2016]; *see generally People v Benevento*, 91 NY2d 708, 712-713 [1998]). Given the nature of this case, including the lack of any viable defense beyond attacking the credibility of the People's witnesses, we conclude that defense counsel's attempt to cast doubt on the allegations of the witnesses by making those allegations seem almost too incredible to be true "reflects a reasonable and legitimate strategy under the circumstances and evidence presented" (*Benevento*, 91 NY2d at 713). Although defendant contends that there was no possible "upside" to the strategy pursued by defense counsel at trial, we note that the jury acquitted defendant on the count of the indictment relating to one of the three complainants. It cannot therefore be said that defense counsel's strategy was wholly unsuccessful. Viewing the evidence, the law and the circumstances of this case as a whole and as of the time of the representation, including the fact that defendant was acquitted of a charge relating to a third alleged victim, we conclude that defendant was afforded meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant further contends that the verdict with respect to count four of the indictment is against the weight of the evidence. We reject that contention. 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 conclude that the verdict on that count is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, the appellate court must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005], quoting *Bleakley*, 69 NY2d at 495; *see People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014]). We perceive no basis in the record for us to substitute our credibility determinations for those of the jury.

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

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

965

CAF 19-01349

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

IN THE MATTER OF WAYNE COUNTY SUPPORT COLLECTION UNIT, ON BEHALF OF LAURIE FABI, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY WILLIAMS, SR., RESPONDENT-APPELLANT.

ROY G. FRANKS, MARION, FOR RESPONDENT-APPELLANT.

ALEX CAMERON, LYONS, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered May 23, 2019 in a proceeding pursuant to Family Court Act article 4. The order, among other things, determined that respondent willfully violated an order of child support.

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 4, respondent father appeals from an order that, inter alia, determined that he willfully violated an order of child support and sentenced him to six months in jail. Contrary to the father's contention, Family Court did not abuse its discretion in denying his second request for substitute counsel. Although "[a]n indigent person facing incarceration for violation of a court order has a right to the assignment of counsel" under the Family Court Act (*Circe v Circe*, 289 AD2d 620, 621 [3d Dept 2001]; *see* Family Ct Act § 262 [a] [vi]), that right "is not absolute, and a party seeking the appointment of substitute counsel must establish that good cause for release existed necessitating dismissal of assigned counsel" (*Matter of Anthony J.A. [Jason A.A.]*, 180 AD3d 1376, 1378 [4th Dept 2020], *lv denied* 35 NY3d 902 [2020] [internal quotation marks omitted]; *see Matter of Destiny V. [Mark V.]*, 107 AD3d 1468, 1469 [4th Dept 2013]). Here, the father failed to establish good cause (*see Matter of Wiley v Musabyemariya*, 118 AD3d 898, 900-901 [2d Dept 2014], *lv denied* 24 NY3d 907 [2014]). We have reviewed the father's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

970

CA 21-00514

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

SUSAN SQUIRES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER SAY, DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN TROP, ROCHESTER (THOMAS P. DURKIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FEROLETO LAW, BUFFALO (CARRIE A. ZIMBARDI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Charles N. Zambito, A.J.), entered March 12, 2021. The order denied the motion of defendant to strike the complaint or, in the alternative, to preclude plaintiff from offering evidence at trial that her injuries are permanent.

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

Memorandum: In this action to recover damages for personal injuries allegedly sustained by plaintiff as the result of a motor vehicle collision, defendant appeals from an order that denied her motion to strike the complaint or, in the alternative, to preclude plaintiff from offering evidence at trial that her injuries are permanent, based on plaintiff's alleged failure to provide disclosure. "The nature and degree of a sanction to be imposed on a motion pursuant to CPLR 3126 is within the discretion of the court, and the striking of a pleading is appropriate only upon a clear showing that a party's failure to comply with a discovery demand or order is willful, contumacious, or in bad faith" (*Mosey v County of Erie*, 117 AD3d 1381, 1384 [4th Dept 2014]; *see Windnagle v Tarnacki*, 184 AD3d 1178, 1179 [4th Dept 2020]). We agree with Supreme Court that plaintiff's conduct during discovery did not rise to the level of willful or bad faith behavior so as to warrant the sanctions sought. We therefore conclude that the court did not abuse its discretion in denying defendant's motion pursuant to CPLR 3126 (*see Windnagle*, 184 AD3d at 1179-1180; *Pinnock v Mercy Med. Ctr.*, 180 AD3d 1086, 1087 [2d Dept 2020]; *cf. Campbell v Obear*, 26 AD3d 877, 877 [4th Dept 2006]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

979

KA 19-00934

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PRISCILLA GUMPTON, DEFENDANT-APPELLANT.

DAVID R. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Charles N. Zambito, A.J.), rendered December 13, 2018. The judgment convicted defendant, upon her plea of guilty, of attempted promoting prison contraband in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Orleans County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [1]). Because defendant's challenge to the voluntariness of her plea would survive even a valid waiver of the right to appeal, we need not address the validity of that waiver (*see People v Judy*, 191 AD3d 1454, 1455 [4th Dept 2021], *lv denied* 36 NY3d 1121 [2021]). We agree with defendant that County Court erred in denying her motion to withdraw her plea without a hearing because the record—specifically, defense counsel's affidavit swearing that defendant's plea was coerced—"raises a legitimate question as to the voluntariness of the plea" (*People v Brown*, 14 NY3d 113, 116 [2010]; *see People v Hall*, 138 AD3d 1407, 1407-1408 [4th Dept 2016]). We therefore hold the case, reserve decision, and remit the matter to County Court to appoint new defense counsel and to rule on defendant's motion to withdraw her plea following an evidentiary hearing.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

994

KA 17-00495

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE A. PARSONS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 9, 2017. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [1]), defendant contends that his plea colloquy does not set forth the elements of the crime to ensure that he knowingly entered his plea. We note that defendant does not challenge the validity of his waiver of the right to appeal. Defendant's contention " 'is actually a challenge to the factual sufficiency of the plea allocution,' " which is encompassed by his valid waiver of the right to appeal (*People v Rodriguez*, 173 AD3d 1840, 1841 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]; *see People v Burtes*, 151 AD3d 1806, 1807 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]).

Moreover, even assuming, arguendo, that the waiver of the right to appeal is invalid (*see generally People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020]), we conclude that defendant's "challenge to the factual sufficiency of the plea allocution . . . is not preserved for our review inasmuch as defendant did not move to withdraw his plea or to vacate the judgment of conviction" (*People v Pryce*, 148 AD3d 1625, 1625-1626 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *see People v Turner*, 175 AD3d 1783, 1784 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]), and this case does not fall within the narrow exception to the preservation rule set

forth in *People v Lopez* (71 NY2d 662, 666 [1988]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

996

KA 15-00884

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KHALEEF REED, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered January 30, 2015. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) in connection with a shooting death. Contrary to defendant's contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition to other evidence presented by the People, an eyewitness identified defendant as the shooter, and DNA evidence linked defendant to a hat recovered from the crime scene.

Defendant further contends that County Court erred in admitting a 911 call in evidence because the call contained inadmissible hearsay and also violated his constitutional rights to due process and confrontation. We conclude, however, that defendant's contention is not preserved for our review because, during the jury charge, "the court provided a curative instruction that, in the absence of an objection or a motion for a mistrial, 'must be deemed to have corrected the error to the defendant's satisfaction' " (*People v Szatanek*, 169 AD3d 1448, 1449 [4th Dept 2019], *lv denied* 33 NY3d 981 [2019], quoting *People v Heide*, 84 NY2d 943, 944 [1994]; *see People v Johnston*, 192 AD3d 1516, 1521 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]). Finally, we reject defendant's contention that he was denied effective assistance of counsel based upon defense counsel's failure either to object when the People offered the 911 call in evidence or

to ask the court to strike the call from evidence after it was played for the jury. Although defendant did not receive error-free representation, "[t]he test is reasonable competence, not perfect representation" (*People v Oathout*, 21 NY3d 127, 128 [2013] [internal quotation marks omitted]). Viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Stumbo*, 155 AD3d 1604, 1605-1606 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

997

KA 16-01243

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY C. HOLMES, ALSO KNOWN AS ANTHONY HOLMES, JR., ALSO KNOWN AS TONY HOLMES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, JEFFREY WICKS, PLLC (JEFFREY WICKS 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 (Thomas R. Morse, A.J.), rendered June 1, 2016. The judgment convicted defendant after a nonjury trial of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that the evidence is legally insufficient to disprove the defense of temporary and innocent possession, and that the verdict is against the weight of the evidence. We reject those contentions. "[P]ossession of a weapon may be innocent and not criminal" (*People v Holes*, 118 AD3d 1466, 1467 [4th Dept 2014] [internal quotation marks omitted]; *see People v Almodovar*, 62 NY2d 126, 130 [1984]). "Innocent possession of a weapon is possession that is temporary and not for an unlawful purpose" (*Holes*, 118 AD3d at 1467 [internal quotation marks omitted]; *see Almodovar*, 62 NY2d at 130). "Temporary and lawful possession may be established where there is 'a legal excuse for having the weapon . . . as well as facts tending to establish that, once possession has been obtained, the weapon ha[s] not been used in a dangerous manner' " (*People v Curry*, 85 AD3d 1209, 1211 [3d Dept 2011], *lv denied* 17 NY3d 815 [2011], quoting *People v Williams*, 50 NY2d 1043, 1045 [1980]). When a temporary and lawful possession defense is raised, it is incumbent on the People to disprove it beyond a reasonable doubt (*see Holes*, 118 AD3d at 1467).

Viewing the evidence in the light most favorable to the People

(*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that "there is a valid line of reasoning and permissible inferences from which a rational [factfinder] could have found that the People disproved the defense" of temporary and lawful possession beyond a reasonable doubt (*People v Allen*, 36 NY3d 1033, 1034 [2021]; *see People v Alls*, 117 AD3d 1190, 1191-1192 [3d Dept 2014]; *People v Lucas*, 94 AD3d 1441, 1441 [4th Dept 2012], *lv denied* 19 NY3d 964 [2012]). Among other things, defendant admitted that he possessed a weapon and fired it twice. In addition, viewing the evidence in light of the elements of the crime in this nonjury trial (*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]). Defendant testified that he took possession of the weapon from another during an altercation, which in some circumstances may establish temporary and lawful possession (*see Almodovar*, 62 NY2d at 130; *People v Hicks*, 110 AD3d 1488, 1488 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]; *Curry*, 85 AD3d at 1211; *People v Gonzalez*, 262 AD2d 1061, 1061 [4th Dept 1999], *lv denied* 93 NY2d 1018 [1999]). Other testimony, however, and rational inferences that may be drawn therefrom, established that defendant did not recover the weapon from anyone prior to the shooting, and County Court's determination to reject defendant's testimony to the contrary is in accord with the weight of the evidence (*see People v Pierre*, 194 AD3d 580, 580-581 [1st Dept 2021], *lv denied* 37 NY3d 974 [2021]). In addition, the court was justified in concluding beyond a reasonable doubt that defendant used the weapon in a dangerous manner and that his possession of the weapon was not innocent (*see id.* at 581; *see generally Williams*, 50 NY2d at 1045).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

998

KA 18-02376

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BIANCA L. CARBONE, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Charles N. Zambito, A.J.), rendered October 4, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [1]). Defendant contends that her plea was involuntary because the factual allocution cast significant doubt on her guilt with respect to the dangerous contraband element of the crime, and County Court erred in accepting the plea without making further inquiry to ensure that the plea was voluntary. Although that contention would survive even a valid waiver of the right to appeal (*see People v Thomas*, 34 NY3d 545, 558 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Seaberg*, 74 NY2d 1, 10 [1989]), by failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve her contention for our review (*see People v Lopez*, 71 NY2d 662, 665 [1988]; *People v Paternostro*, 188 AD3d 1675, 1676 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]). We conclude that this case does not fall within the rare exception to the preservation requirement (*see Lopez*, 71 NY2d at 666). Contrary to defendant's contention, nothing in the plea colloquy "clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea," and the court therefore had no duty to conduct further inquiry with respect to the plea (*id.*).

We do not consider the additional challenge to the voluntariness of the plea raised by defendant in her brief inasmuch as her appellate

counsel withdrew that contention (*see People v Pedro*, 134 AD3d 1396, 1397 [4th Dept 2015]).

Even assuming, arguendo, that defendant's purported waiver of the right to appeal is invalid and thus does not bar her challenge to the factual sufficiency of the plea, defendant nonetheless failed to preserve that challenge for our review, and this case does not fall within the rare exception to the preservation requirement (*see People v Judd*, 111 AD3d 1421, 1422 [4th Dept 2013], *lv denied* 23 NY3d 1039 [2014]; *see generally Lopez*, 71 NY2d at 666). In any event, defendant's challenge lacks merit. "Where[,] [as here], a defendant enters a negotiated plea to a lesser crime than one with which [she] is charged, no factual basis for the plea is required" (*People v Johnson*, 23 NY3d 973, 975 [2014]). Moreover, it is well established that a defendant who pleads guilty need not "acknowledge[] committing every element of the pleaded-to offense . . . or provide[] a factual exposition for each element of the pleaded-to offense" (*People v Seeber*, 4 NY3d 780, 781 [2005]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

1002

CAF 19-01696

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

IN THE MATTER OF JASON PAUL ALLISON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LAURA ANN SEELEY-SICK, RESPONDENT-APPELLANT.

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

WENDY S. SISSON, GENESEO, FOR PETITIONER-RESPONDENT.

EDWARD F. MURPHY, III, HAMMONDSPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Livingston County (Dennis S. Cohen, J.), entered August 20, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject children.

It is hereby ORDERED that said appeal from the order insofar as it concerns visitation is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this Family Court Act article 6 proceeding, respondent mother appeals from an order (August 2019 order) of Family Court (Cohen, J.) that, inter alia, granted petitioner father's petitions seeking, in effect, to modify a prior amended order (prior order) entered on consent by awarding him sole custody of the subject children, with supervised visitation to the mother.

Initially, we take judicial notice of the fact that, subsequent to the issuance of the August 2019 order on appeal, Family Court (Van Allen, J.) issued an order in December 2020 modifying the mother's visitation to supervised visitation in a therapeutic setting, but stating that all other provisions of the August 2019 order that were not modified by the December 2020 order remained in effect. We conclude that the part of the mother's appeal challenging the supervised visitation provision is moot (*see Matter of Brooks v Greene*, 153 AD3d 1621, 1622 [4th Dept 2017]), and we therefore dismiss the appeal from the August 2019 order insofar as it concerns visitation. However, contrary to the contention of the Attorney for the Child, that part of the mother's appeal challenging the determination to grant the father sole custody is not moot (*see Matter of Fowler v Rothman*, — AD3d —, —, 2021 NY Slip Op 05436, *1 [4th Dept

2021]; *Brooks*, 153 AD3d at 1622).

With respect to the merits, we reject the mother's contention that the court (Cohen, J.) abused its discretion in refusing to recuse itself. "Absent a legal disqualification, . . . a [j]udge is generally the sole arbiter of recusal" (*Matter of Murphy*, 82 NY2d 491, 495 [1993]; *see People v Glynn*, 21 NY3d 614, 618 [2013]; *Tripi v Alabiso*, 189 AD3d 2060, 2061 [4th Dept 2020]), and it is well established that a court's recusal decision will not be overturned absent an abuse of discretion (*see People v Moreno*, 70 NY2d 403, 405-406 [1987]; *Matter of McLaughlin v McLaughlin*, 104 AD3d 1315, 1316 [4th Dept 2013]). Contrary to the mother's contention, the court's knowledge of the prior acts of domestic violence of the mother's husband against his former wife stemmed not from an extrajudicial source, but from a prior judicial proceeding over which the court presided (*see Glynn*, 21 NY3d at 619; *Matter of Christopher D.S. [Richard E.S.]*, 136 AD3d 1285, 1286 [4th Dept 2016]; *see generally* 22 NYCRR 100.3 [E] [1] [a] [ii]). "Although some of the comments [about the mother's husband] would have been better left unsaid, nothing in the record reveals that any bias on the court's part unjustly affected the result to the detriment of the [mother] or that the court [had] a predetermined outcome of the case in mind during the hearing" (*Matter of Cameron ZZ. v Ashton B.*, 183 AD3d 1076, 1081 [3d Dept 2020], *lv denied* 35 NY3d 913 [2020] [internal quotation marks omitted]; *see Matter of Roseman v Sierant*, 142 AD3d 1323, 1325 [4th Dept 2016]). We perceive no abuse of discretion by the court in denying the mother's recusal motion (*see Tripi*, 189 AD3d at 2061; *Christopher D.S.*, 136 AD3d at 1286; *McLaughlin*, 104 AD3d at 1316).

The mother further contends that the father failed to establish a change in circumstances sufficient to warrant an inquiry into whether a modification of the prior order is in the best interests of the children. The mother, however, waived that contention " 'inasmuch as [she] alleged in her own . . . petition[s] that there had been such a change in circumstances' " (*Fowler*, — AD3d at —, 2021 NY Slip Op 05436, *1). In any event, while we agree with the mother that, although the court "failed to make an express finding that there was a change in circumstances, we have the authority to review the record to ascertain whether the requisite change in circumstances existed" (*Matter of Allen v Boswell*, 149 AD3d 1528, 1528 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017] [internal quotation marks omitted]; *see Matter of Grabowski v Smith*, 182 AD3d 1002, 1003 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]), we reject her contention that the father failed to meet his burden. The father established the requisite change in circumstances based on, inter alia, "the deterioration of the parties' relationship and ability to work together to co-parent the children" (*Fowler*, — AD3d at —, 2021 NY Slip Op 05436, *1; *see Grabowski*, 182 AD3d at 1003; *Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]), the mother's violation of the prior order (*see Grabowski*, 182 AD3d at 1003; *Murray v Murray*, 179 AD3d 1546, 1546-1547 [4th Dept 2020]), and the exposure of the children to domestic violence at the mother's home subsequent to the entry of the prior order (*see Allen*, 149 AD3d at 1528-1529).

Finally, contrary to the mother's contention, we conclude that a sound and substantial basis exists in the record to support the court's determination that an award of sole custody to the father is in the best interests of the children (*see Matter of Schram v Nine*, 193 AD3d 1361, 1361-1362 [4th Dept 2021], *lv denied* 37 NY3d 905 [2021]; *Grabowski*, 182 AD3d at 1003; *Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

1004

CA 20-01378

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

IN THE MATTER OF ALI AL-SINJARI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

OMAR AL-SINJARI, RESPONDENT-RESPONDENT.

HASHMI LAW FIRM, ROCHESTER (KAMRAN F. HASHMI OF COUNSEL), FOR PETITIONER-APPELLANT.

SHULTS & SHULTS, HORNELL (DAVID A. SHULTS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Steuben County (Kevin M. Nasca, J.), entered September 1, 2020. The judgment and order dismissed the petition and vacated a temporary restraining order.

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

Memorandum: In this proceeding pursuant to General Obligations Law § 5-1510, petitioner appeals from a judgment and order that, inter alia, dismissed the petition. We affirm. Although petitioner contends that he is entitled to an accounting under section 5-1510 (1), his contention is not properly before us because the petition does not request an accounting under that subdivision (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). We have reviewed petitioner's remaining contentions and conclude that none warrants reversal or modification of the judgment and order.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

1014

KA 20-01516

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

AMBER S. PITCHER, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Jefferson County Court (David A. Renzi, J.), entered September 30, 2020. The order granted that part of defendant's omnibus motion seeking to suppress the tangible evidence seized from her residence.

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

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking suppression of tangible evidence seized pursuant to a search warrant. Contrary to the People's contention, County Court properly concluded that the warrant was not based on probable cause. "It is well settled that a search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur" (*People v Moxley*, 137 AD3d 1655, 1656 [4th Dept 2016]; *see generally People v Mercado*, 68 NY2d 874, 875-876 [1986], *cert denied* 479 US 1095 [1987]), and where there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched (*see People v Bigelow*, 66 NY2d 417, 423 [1985]). "[P]robable cause may be supplied, in whole or in part, [by] hearsay information, provided [that] it satisfies the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted" (*People v Flowers*, 59 AD3d 1141, 1142 [4th Dept 2009] [internal quotation marks omitted]). Furthermore, when reviewing a search warrant to determine whether it was supported by probable cause, "the critical facts and circumstances for the reviewing court are those which were made known to the issuing Magistrate at the time the warrant application was determined" (*People v Nieves*, 36 NY2d 396, 402 [1975]).

Here, the majority of the information provided in support of the warrant application was in an affidavit prepared by a detective, and that affidavit "does not 'permit a reasonable inference that it was

based upon [the detective]'s personal knowledge' " (*People v Bartholomew*, 132 AD3d 1279, 1281 [4th Dept 2015]; *cf. People v Perez*, 298 AD2d 935, 936 [4th Dept 2002], *lv denied* 99 NY2d 562 [2002]). Additionally, with respect to the parts of the warrant application that were based on hearsay information, the application failed to meet the *Aguilar-Spinelli* test with respect to the sources of that information. Although the detective indicated that he obtained some of that hearsay information from other officers, he did not name the officers and they did not provide affidavits or any basis for their knowledge, thus that information was not sufficiently reliable (*see People v Augustus*, 163 AD3d 981, 982-983 [2d Dept 2018]; *cf. People v Slater*, 141 AD3d 677, 677-678 [2d Dept 2016], *lv denied* 28 NY3d 1031 [2016]; *People v Williams*, 127 AD3d 612, 612 [1st Dept 2015], *lv denied* 27 NY3d 1009 [2016]). Other hearsay information was purportedly received from two confidential informants, but it is well settled that, "once an appropriate challenge by the defense has been raised, the People are required to produce the police informant for an *in camera* inquiry unless they can demonstrate that the informant is unavailable and cannot be produced through the exercise of due diligence" (*People v Adrion*, 82 NY2d 628, 634 [1993]; *see generally People v Edwards*, 95 NY2d 486, 493 [2000]). Here, after defendant raised the requisite challenge, those two informants did not appear to testify at a *Darden* hearing (*cf. People v Steinmetz*, 177 AD3d 1292, 1293 [4th Dept 2019], *lv denied* 34 NY3d 1133 [2020]; *People v Mercer*, 38 AD3d 1367, 1368 [4th Dept 2007], *lv denied* 9 NY3d 879 [2007]), and the People failed to make "a threshold showing that the informant[s are] 'unavailable and cannot be produced through the exercise of due diligence' " (*People v Givans*, 170 AD3d 1638, 1640 [4th Dept 2019]; *see generally Adrion*, 82 NY2d at 634). The People therefore failed to establish the basis of the information allegedly provided by those informants. Contrary to the People's further contention, although a third confidential informant who submitted an affidavit in support of the warrant testified at the *Darden* hearing, the information that informant provided did not establish the requisite probable cause to support the warrant (*cf. People v Middleton*, 283 AD2d 663, 665 [3d Dept 2001]).

Additionally, although the People are correct that the court erred in referencing CPL 120.10 (2) during its analysis of the evidence submitted in support of the warrant, rather than CPL 690.15, that error did not affect the court's determination that some of the evidence submitted in support of the warrant was inadmissible and that, viewed as a whole, it failed to provide probable cause to issue the warrant.

We have considered the People's remaining contentions, and we conclude that none warrants reversal or modification of the order.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court

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

1020

KAH 21-00063

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
TASHEEN ROBINSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

THE LEGAL AID BUREAU OF BUFFALO INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered August 20, 2020 in a habeas corpus proceeding. 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 petition for a writ of habeas corpus. The appeal has been rendered moot by petitioner's release from custody (*see People ex rel. Phillips v New York State Dept. of Corr. & Community Supervision*, 196 AD3d 1070, 1070 [4th Dept 2021]; *People ex rel. Houston v Annucci*, 141 AD3d 1111, 1111 [4th Dept 2016]), and the exception to the mootness doctrine does not apply in this case (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). While this Court has the power to convert the habeas corpus proceeding into a CPLR article 78 proceeding, we decline to do so under the circumstances of this case (*see generally People ex rel. Stokes v New York State Div. of Parole*, 144 AD3d 1550, 1551 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]).

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court