SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 4, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED AUGUST 4, 2022

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

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CA 21-00451
PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

WILLIAM MCGIRR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBIN SHIFFLET, DEFENDANT-RESPONDENT.

CAMPBELL & ASSOCIATES, HAMBURG (JASON M. TELAAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (KEITH N. BOND OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered March 25, 2021. The order, inter alia, granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint insofar as it alleges that defendant is vicariously liable for the negligence of her independent contractor and insofar as plaintiff relies on the doctrine of res ipsa loquitur, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when, while renting defendant’s cottage for a week, a portion of the deck abutting the cottage separated from the house, causing the deck to sink and plaintiff to fall. Plaintiff appeals from an order that, inter alia, granted the motion of defendant for summary judgment dismissing the complaint.

We reject plaintiff’s contention that defendant failed to meet her initial burden on her motion of establishing that she did not create or have constructive notice of the allegedly dangerous condition. It is well established that “[a] landowner is liable for a dangerous or defective condition on his or her property when the landowner created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it” (*Eagan v Page 1 Props., LLC*, 171 AD3d 1452, 1453 [4th Dept 2019] [internal quotation marks omitted]). Here, defendant established that she did not create the allegedly dangerous condition through the submission of, inter alia, her own deposition testimony and the deposition testimony of the contractor that she hired to replace the deck after its collapse. Defendant also established that she did not have constructive notice

of the allegedly defective condition. "[C]onstructive notice, in contrast to actual notice, requires that the defect be visible and apparent and ha[ve] existed for a sufficient period of time prior to the accident to permit a defendant to discover it and take corrective action" (*Mister v Mister*, 188 AD3d 1334, 1335 [3d Dept 2020] [internal quotation marks omitted]; *see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]). "When, however, a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed" (*Arevalo v Abitabile*, 148 AD3d 658, 659 [2d Dept 2017] [internal quotation marks omitted]; *see Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 475 [2d Dept 2004]). Here, defendant's submissions established, inter alia, that there was nothing to arouse her suspicion as to the defective condition that would have triggered a duty to inspect (*see Pommerenck v Nason*, 79 AD3d 1716, 1717 [4th Dept 2010]; *see generally Anderson v Justice*, 96 AD3d 1446, 1447 [4th Dept 2012]). We further conclude that, contrary to plaintiff's contention, he failed to raise a triable issue of fact in opposition to the motion with respect to his allegations that defendant created or had constructive notice of the allegedly dangerous condition (*see Brink v Anthony J. Costello & Son Dev., LLC*, 66 AD3d 1451, 1452-1453 [4th Dept 2009]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Nevertheless, we agree with plaintiff that he raised a triable issue of fact with respect to the doctrine of res ipsa loquitur (*see generally Brink*, 66 AD3d at 1452-1453; *Champagne v Peck*, 59 AD3d 1130, 1131 [4th Dept 2009]). In New York, in order to establish liability under that doctrine, the plaintiff must establish that the event was: "(1) of a kind which ordinarily does not occur in the absence of someone's negligence; (2) . . . caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) . . . not . . . due to any voluntary action or contribution on the part of the plaintiff" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986] [internal quotation marks omitted]; *see Zapata v Yugo J & V, LLC*, 183 AD3d 956, 957-958 [3d Dept 2020]). "The exclusive control requirement . . . is that the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it" (*Dermatossian*, 67 NY2d at 227 [internal quotation marks omitted]). "The purpose is simply to eliminate within reason all explanations for the injury other than the defendant's negligence" (*id.*). With respect to the first and third elements, "common experience informs us that a deck being put to its regular and intended use does not ordinarily collapse in the absence of negligence" and, here, "plaintiff[] [was not] contributorily negligent in causing the collapse" (*Zapata*, 183 AD3d at 958). With respect to the second element, the deck had been under the control of defendant since it was built approximately nine years prior to the accident, and defendant testified at her deposition that she and her husband, who acted as the property manager, were the only ones responsible for maintaining and inspecting the property. Thus, plaintiff raised a triable issue of fact whether defendant exercised "exclusive control over the deck such that the elements of the doctrine of res ipsa loquitur were satisfied" (*id.* at 959; *see*

Marinaro v Reynolds, 152 AD3d 659, 661-662 [2d Dept 2017]; *Herbst v Lakewood Shores Condominium Assn.*, 112 AD3d 1373, 1374-1375 [4th Dept 2013]). We therefore modify the order accordingly.

We further agree with plaintiff that defendant failed to meet her initial burden on her motion with respect to plaintiff's claim that defendant is vicariously liable for the negligence of the independent contractor who built the deck (*cf. Dragotta v Southampton Hosp.*, 39 AD3d 697, 699 [2d Dept 2007]; *see generally Pinnock v Mercy Med. Ctr.*, 180 AD3d 1088, 1092-1093 [2d Dept 2020]; *Robinson v Downs*, 39 AD3d 1250, 1252 [4th Dept 2007]). "Generally, a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" (*Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008] [internal quotation marks omitted]). The "most commonly accepted rationale" for that rule is that "one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor" (*Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]). There are, of course, exceptions to the general rule. "A party may be vicariously liable for the negligence of an independent contractor in performing [n]on-delegable duties . . . arising out of some relation toward the public or the particular plaintiff" (*Dziedzic v Wirth*, 162 AD3d 1749, 1749 [4th Dept 2018] [internal quotation marks omitted]; *see Brothers*, 11 NY3d at 258). To determine whether a nondelegable duty exists, the court must conduct "a *sui generis* inquiry" because the court's conclusion rests on policy considerations (*Brothers*, 11 NY3d at 258). Although "[t]here are no clearly defined criteria for identifying duties that are nondelegable[,] . . . [t]he most often cited formulation is that a duty will be deemed nondelegable when the responsibility is so important to the community that the employer should not be permitted to transfer it to another" (*Kleeman*, 81 NY2d at 275 [internal quotation marks omitted]; *see Feliberty v Damon*, 72 NY2d 112, 119 [1988]). Here, we conclude that defendant owes a nondelegable duty to the public to maintain the premises in reasonably safe condition (*see Tobola v 123 Washington, LLC*, 195 AD3d 456, 457 [1st Dept 2021]; *Atkinson v Golub Corp. Co.*, 278 AD2d 905, 906 [4th Dept 2000]; *June v Zikakis Chevrolet*, 199 AD2d 907, 909 [3d Dept 1993]), and thus that defendant failed to establish as matter of law that she may not be held liable for the actions of her independent contractor (*cf. Dziedzic*, 162 AD3d at 1749; *see generally Brothers*, 11 NY3d at 258). We therefore further modify the order accordingly.

We have considered plaintiff's remaining contentions and conclude that they do not warrant further modification or reversal of the order.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

236
CA 21-00813
PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF JOHN W. EISENHAUER AND
KATHLEEN ANNE MCGLYNN EISENHAUER,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WATERTOWN CITY SCHOOL DISTRICT, WATERTOWN
CITY SCHOOL DISTRICT BOARD OF EDUCATION,
CITY OF WATERTOWN AND ROSWELL P. FLOWER
MEMORIAL LIBRARY,
RESPONDENTS-DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

TABNER, RYAN & KENIRY, LLP, ALBANY (WILLIAM F. RYAN, JR., OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS WATERTOWN CITY SCHOOL DISTRICT AND WATERTOWN CITY SCHOOL DISTRICT BOARD OF EDUCATION.

SLYE LAW OFFICES, P.C., WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT CITY OF WATERTOWN.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (ELLEN M. BACH OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT ROSWELL P. FLOWER MEMORIAL LIBRARY.

Appeal from an amended judgment (denominated amended order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered May 17, 2021 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The amended judgment, inter alia, dismissed the "[a]rticle 78 challenge".

It is hereby ORDERED that the amended judgment so appealed from is unanimously modified on the law by granting judgment in favor of respondents-defendants Watertown City School District, Watertown City School District Board of Education, and Roswell P. Flower Memorial Library on the second cause of action as follows:

> It is ADJUDGED and DECLARED that Proposition 1 is not null and void,

and as modified the amended judgment is affirmed without costs.

Memorandum: Petitioners-plaintiffs (petitioners) are homeowners

who live within the boundary of respondent-defendant Watertown City School District (School District) but outside the boundary of respondent-defendant City of Watertown (City). Petitioners commenced this hybrid CPLR article 78 proceeding and declaratory judgment action against respondents-defendants (respondents) seeking, inter alia, to annul the results of the 2020 School District election to the extent that the voters approved Proposition 1, which imposed a new tax on real property within the School District for the purpose of raising money annually for respondent-defendant Roswell P. Flower Memorial Library (Library), a public library situated within the borders of the City. Prior to 2020, the Library was funded solely by the City. Proposition 1 was approved for the ballot by the School District and the Watertown City School District Board of Education (collectively, School District respondents); it was thereafter approved by voters, and the election was certified by the School District respondents.

Petitioners alleged in their petition-complaint (petition) that, inter alia, Proposition 1 is invalid and was improperly enacted in violation of the Library's authorizing legislation, the Education Law, article IX of the New York State Constitution, and the due process and equal protection clauses of the United States Constitution. The City, the Library, and the School District respondents each moved to dismiss the petition against them. Petitioners now appeal from an amended judgment that, in effect, granted respondents' respective motions and determined, as relevant here, that the City is not a proper party; that petitioners failed to exhaust their administrative remedies with respect to their claims that Proposition 1 was enacted in violation of the Library's authorizing legislation and the Education Law; and that, in any event, petitioners' challenges to the validity of Proposition 1 lacked merit.

We reject petitioners' contention that Supreme Court erred in granting the City's motion. The City established that petitioners failed to allege that it had any involvement in the approval, certification, or passage of Proposition 1 and that petitioners sought no specific relief against the City. Thus, the City established that it is not a proper party to the action (*see generally* CPLR 1001; *Matter of Schulz v Town of Hopewell Zoning Bd. of Appeals*, 163 AD3d 1477, 1478 [4th Dept 2018]).

Addressing next the motions of the Library and the School District respondents, we agree with petitioners that the court erred in determining that petitioners were required to exhaust their administrative remedies with respect to their claims that Proposition 1 was enacted in violation of the Library's authorizing legislation and the Education Law. In support of their contention that petitioners were required to exhaust administrative remedies, the Library and the School District respondents relied on Education Law § 2037, which provides that all "disputes concerning the *validity* of *any* . . . *election* . . . shall be referred to the commissioner of education for determination and . . . [t]he commissioner may in his [or her] discretion order a new . . . election" (emphasis added). Here, however, the validity of the election was not at issue. Rather, as relevant here, petitioners challenge the legality of the School

District respondents' approval and certification of Proposition 1 and the validity of the proposition itself. We conclude that petitioners' claims involve pure questions of statutory analysis for which the exhaustion of administrative remedies is not required (*see Matter of Between the Bread II v Urbach*, 234 AD2d 724, 724 [3d Dept 1996]).

Nonetheless, we conclude that the court properly granted the motions of the Library and the School District respondents on the ground that petitioners' claims lack merit. Contrary to petitioners' contention, Proposition 1, which taxes City and non-City property to raise additional funds for the Library, does not violate the Library's authorizing legislation, chapter 620 of the Laws of 1901. Although the authorizing legislation requires the City to provide the Library with at least $5,000 annually, it does not foreclose other entities from providing the Library with additional funding (*see* L 1901, ch 620). Contrary to petitioners' further contention, we conclude that Proposition 1 does not violate the Education Law. Article 5 of the Education Law amply provides the School District respondents with the authority to levy, collect, and appropriate taxes to fund a public library and to submit a proposition to raise money for library purposes to the voters of the School District for approval (*see* §§ 255, 259).

Petitioners also contend that Proposition 1 allows the City to shift a portion of the cost of operating the Library to taxpayers outside the City, thereby violating article IX of the New York State Constitution. We reject that contention. As relevant here, article IX provides that a local government "shall have the power to apportion its cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature" (NY Const, art IX, § 1 [g]). The Library, however, is not a governmental service or function of the City, as demonstrated by the City's lack of control over the Library's expenditures or the decisions made by the Library's Board of Trustees. Indeed, as education corporations, public libraries are generally considered to be "separate and distinct from the municipalit[ies] that created [them]" (*Matter of Executive Cleaning Servs. Corp. v New York State Dept. of Labor*, 193 AD3d 13, 20 n 6 [3d Dept 2021] [internal quotation marks omitted]; *see Matter of Beers v Incorporated Vil. of Floral Park*, 262 AD2d 315, 315-316 [2d Dept 1999]; *see also Buffalo & Erie County Pub. Lib. v County of Erie*, 171 AD2d 369, 372 [4th Dept 1991], *affd* 80 NY2d 938 [1992]).

We also reject petitioners' claim that Proposition 1 offends the equal protection clause of the United States Constitution. Taxing statutes enjoy a presumption of constitutionality in the face of equal protection challenges (*see Trump v Chu*, 65 NY2d 20, 25 [1985], *appeal dismissed* 474 US 915 [1985]). Although certain North Country residents outside the City and the School District may use the Library without directly supporting it by way of tax, that does not render the tax in Proposition 1 an example of the "hostile and oppressive discrimination against" School District taxpayers needed to sustain an equal protection challenge (*id.* [internal quotation marks omitted]). The Education Law has long empowered school districts to levy, collect, and appropriate taxes for the purpose of supporting public

libraries (*see generally* §§ 255, 259), and petitioners failed to demonstrate how Proposition 1 treats them disparately from, for instance, City taxpayers who have supported the Library through their taxes for generations (*see generally Trump*, 65 NY2d at 25).

With respect to petitioners' due process concerns, we note that as eligible voters and School District residents, petitioners were afforded the opportunity to vote in the election in which voters approved Proposition 1. We therefore discern no reason to deviate from the well-settled proposition that the "Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a [government's] exercise of its political powers" (*Gomillion v Lightfoot*, 364 US 339, 343 [1960]).

We have considered petitioners' remaining contention and conclude that it is without merit. Inasmuch as the court failed to declare the rights of the parties in connection with petitioners' second cause of action, seeking a declaration that Proposition 1 is null and void, we modify the amended judgment accordingly by making the requisite declaration (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

237
CA 21-01477
PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF JOHN W. EISENHAUER AND
KATHLEEN ANNE MCGLYNN EISENHAUER,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V ORDER

WATERTOWN CITY SCHOOL DISTRICT, WATERTOWN
CITY SCHOOL DISTRICT BOARD OF EDUCATION,
CITY OF WATERTOWN AND ROSWELL P. FLOWER
MEMORIAL LIBRARY,
RESPONDENTS-DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

TABNER, RYAN & KENIRY, LLP, ALBANY (WILLIAM F. RYAN, JR., OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS WATERTOWN CITY SCHOOL DISTRICT AND WATERTOWN CITY SCHOOL DISTRICT BOARD OF EDUCATION.

SLYE LAW OFFICES, P.C., WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT CITY OF WATERTOWN.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (ELLEN M. BACH OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT ROSWELL P. FLOWER MEMORIAL LIBRARY.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered May 17, 2021 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, inter alia, dismissed the “[a]rticle 78 challange.”

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

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

300

CA 21-01396

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

KOIKE ARONSON, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BEARING DISTRIBUTORS, INC., DOING BUSINESS
AS BDI, DEFENDANT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (RYAN K. CUMMINGS OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

DUANE MORRIS LLP, PHILADELPHIA, PENNSYLVANIA (BRIAN J. SLIPAKOFF, OF
THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Emilio Colaiacovo, J.), entered September 2, 2021. The order granted defendant's motion to dismiss the amended complaint.

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

Memorandum: Plaintiff commenced this breach of warranty action against defendant in Supreme Court, Wyoming County. Defendant moved to dismiss the amended complaint under CPLR 3211 (a) (1) on the ground that the parties' underlying agreement includes a forum selection clause requiring litigation of this action in Cuyahoga County, Ohio (*see* UCC 2-207). The court granted the motion, and plaintiff appeals. We now reverse.

We agree with plaintiff that the court erred in granting defendant's motion. The rationale upon which the court concluded that the forum selection clause had become part of the parties' agreement under UCC 2-207—i.e., that the final form in the transactional chain constituted a counteroffer by defendant that plaintiff fully accepted by performance—was examined and rejected by the Third Department in *Lorbrook Corp. v G & T Indus.* (162 AD2d 69, 74-75 [3d Dept 1990]). We agree with the Third Department's analysis and holding on that issue and conclude that here defendant's order confirmation form was not a counteroffer the terms of which were accepted by plaintiff's performance. Notably, defendant does not distinguish or ask us to reject *Lorbrook Corp.* in any respect.

Defendant offers an alternative ground for affirmance, that the

ostensible forum selection clause constituted a "supplementary term[]" of the parties' implied-in-fact contract under UCC 2-207 (3) by virtue of the parties' longstanding "course of dealing" (UCC 1-303 [b], [d]). However, that alternative ground for affirmance is raised for the first time on appeal and is thus not properly before us (*see Kavanaugh v Kavanaugh*, 200 AD3d 1568, 1575-1576 [4th Dept 2021]; *Estate of Essig v Essig*, 196 AD3d 1055, 1057 [4th Dept 2021]). In any event, the parties' purported course of dealing is reflected only in a self-serving affidavit from defendant's employee, and it well established that affidavits do "not constitute documentary evidence within the meaning of CPLR 3211 (a) (1)" (*Attias v Costiera*, 120 AD3d 1281, 1283 [2d Dept 2014]; *see Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1563 [4th Dept 2021]; *Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017]). Defendant's request for an evidentiary hearing to establish the parties' course of dealing supports our conclusion that its alternative ground for affirmance does not meet the standard for dismissal under CPLR 3211 (a) (1); indeed, a meritorious motion under CPLR 3211 (a) (1) will never require an evidentiary hearing (*see generally 3615-15 Realty I, LLC v Bedford Ave. Assoc. I, LLC*, 120 AD3d 487, 489-490 [2d Dept 2014]; *Furman v Wells Fargo Home Mtge., Inc.*, 105 AD3d 807, 810 [2d Dept 2013]).

Lastly, assuming, arguendo, that the alternative ground for affirmance is supported by the documentary evidence required by CPLR 3211 (a) (1), we nevertheless conclude that defendant's alternative contention lacks merit. Even "[a]ssuming *arguendo* that supplementary terms [under UCC 2-207 (3) could ever] include terms arrived at through a course of dealing" (*PCS Nitrogen Fertilizer, L.P. v Christy Refractories, L.L.C.*, 225 F3d 974, 981 [8th Cir 2000]), it is well established that " '[c]ourse of dealing analysis is not proper . . . where [as here] the only action taken [with respect to the purported supplementary term is] the repeated delivery of a particular form by one of the parties' " (*id.* at 982, quoting *In re CFLC, Inc.*, 166 F3d 1012, 1017 [9th Cir 1999]).

Entered: August 4, 2022 Ann Dillon Flynn
Clerk of the Court

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

301

CA 21-00604

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

JOHN SHAPIRO, DAVID SWEET AND A.A.,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

SYRACUSE UNIVERSITY, DEFENDANT-APPELLANT,
BOARD OF TRUSTEES OF SYRACUSE UNIVERSITY,
DEFENDANT,
CAMP GREYLOCK FOR BOYS, INC., CAMP
GREYLOCK, INC., ALSO KNOWN AS MARHORN, INC.,
MICHAEL MARCUS, AND LUKAS HORN,
DEFENDANTS-RESPONDENTS.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

MANATT, PHELPS & PHILLIPS, LLP, NEW YORK CITY (ANDREW L. MORRISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeals from an order of the Supreme Court, Onondaga County (Patrick F. MacRae, J.), entered March 25, 2021. The order denied in part the motion of defendants Syracuse University and Board of Trustees of Syracuse University to dismiss the amended complaint against them and granted the motion of defendants Camp Greylock, Inc., also known as Marhorn, Inc., Michael Marcus and Lukas Horn insofar as it sought summary judgment dismissing the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendants Camp Greylock, Inc., also known as Marhorn, Inc., Michael Marcus and Lukas Horn insofar as it sought summary judgment dismissing the first and second causes of action of plaintiffs John Shapiro and David Sweet against Camp Greylock, Inc. and reinstating those causes of action to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this personal injury action against defendants pursuant to the Child Victims Act (CVA) (*see* CPLR 214-g). Defendants Syracuse University (SU) and the Board of Trustees of Syracuse University (Board) thereafter made a pre-answer motion to dismiss the amended complaint against them arguing, inter alia, that

the amended complaint failed to state a cause of action. Defendants Camp Greylock, Inc., also known as Marhorn, Inc. (Greylock), Michael Marcus, and Lukas Horn (collectively, Greylock defendants) made a motion seeking, inter alia, summary judgment dismissing the amended complaint against them contending that plaintiffs' claims are time barred and that the Greylock defendants have no liability for any injuries suffered by plaintiffs. The order appealed from, among other things, denied the motion of SU and the Board insofar as the motion sought to dismiss the negligence claim and the negligent hiring, supervision, retention and training cause of action against SU, and granted the motion of the Greylock defendants insofar as it sought summary judgment dismissing the amended complaint against them. SU appeals and, as limited by their brief, plaintiffs appeal from that part of the order granting the Greylock defendants' motion insofar as it sought summary judgment dismissing the first and second causes of action against Greylock.

With respect to SU's appeal, we note that the amended complaint insofar as asserted against SU alleges that plaintiff John Shapiro was sexually abused in 1981 and 1982 by a graduate student of SU who was employed by SU as a resident advisor (employee). At the time of the alleged abuse in 1982, Shapiro was 17 years of age, i.e., the legal age of consent in New York (*see* Penal Law § 130.05 [3] [a]). Although we agree with SU that Shapiro was required to plead factual allegations related to his lack of consent in order to assert an offense under Penal Law article 130 and for the claims in the amended complaint to thereby be "revived" under CPLR 214-g for statute of limitations purposes, we conclude that " '[t]he factual allegations . . . sufficiently establish the complainant's lack of consent within the meaning of Penal Law § 130.05' " (*Druger v Syracuse Univ.*, — AD3d —, —, 2022 NY Slip Op 04463, *1 [4th Dept 2022], quoting *People v Hatton*, 26 NY3d 364, 370 [2015]; *see also* § 130.05 [2] [a]).

Contrary to SU's further contentions, we conclude that the amended complaint states causes of action for negligence and negligent hiring, supervision, retention, and training (*see generally* CPLR 3211 [a] [7]). On a motion to dismiss pursuant to CPLR 3211 (a) (7), we "must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . 'the benefit of every possible favorable inference' " (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]).

With respect to the claim for negligence, SU contends that Shapiro failed to allege that it owed him a duty of care. We reject that contention inasmuch as the allegations of the amended complaint provide a basis to find that SU had a duty to Shapiro (*see Druger*, — AD3d at —, 2022 NY Slip Op 04463 at *1; *see generally Luina v Katharine Gibbs School N.Y., Inc.*, 37 AD3d 555, 556 [2d Dept 2007]; *Ayeni v County of Nassau*, 18 AD3d 409, 410 [2d Dept 2005]; *cf.*

generally Bolster v Ithaca St. Ry. Co., 79 App Div 239, 241 [3d Dept 1903], *affd* 178 NY 554 [1904]).

With respect to the cause of action for negligent hiring, supervision, retention and training, SU contends that Shapiro failed to adequately plead that SU had reason to know of the employee's propensity to commit sexual abuse. "To establish a cause of action based on negligent hiring and supervision, it must be shown that 'the employer knew or should have known of the employee's propensity for the conduct which caused the injury' " (*Jackson v New York Univ. Downtown Hosp.*, 69 AD3d 801, 801 [2d Dept 2010]; *see Tucker v Kalos Health, Inc.*, 202 AD3d 1505, 1506 [4th Dept 2022]). "The employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of the employee" (*D.T. v Sports & Arts in Schs. Found., Inc.*, 193 AD3d 1096, 1096 [2d Dept 2021] [internal quotation marks omitted]; *see Miller v Miller*, 189 AD3d 2089, 2090-2091 [4th Dept 2020]). Contrary to SU's contention, the amended complaint sufficiently alleges that SU knew or should have known about the employee's propensity to sexually abuse young boys (*see Druger*, — AD3d at —, 2022 NY Slip Op 04463 at *2; *cf. Ghaffari v North Rockland Cent. School Dist.*, 23 AD3d 342, 343 [2d Dept 2005]).

With respect to plaintiffs' appeal, the relevant causes of action against Greylock stem from the employee's employment in the 1970s as a camp counselor and coach at Camp Greylock for Boys, a summer camp located in Becket, Massachusetts. Plaintiffs contend that their claims are subject to the CVA revival statute and that Supreme Court therefore erred in granting the Greylock defendants' motion insofar as it sought summary judgment dismissing the first and second causes of action against Greylock on statute of limitations grounds.

CPLR 214-g provides, as relevant here: "Notwithstanding any provision of law which imposes a period of limitation to the contrary . . . , every civil claim or cause of action brought against any party alleging intentional or negligent acts or omissions by a person for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age . . . which is barred as of the effective date of this section because the applicable period of limitation has expired . . . is hereby revived and action thereon may be commenced not earlier than six months after, and not later than two years and six months after the effective date of this section." Inasmuch as there is no "clear expression of intent to the contrary," and inasmuch as the causes of action delineated in CPLR 214-g are "cognizable at common law," we conclude that CPLR 214-g is properly regarded as a statute of limitations (*Clark v Abbott Labs.*, 155 AD2d 35, 40 [4th Dept 1990]; *see Matter of M.C. v State of New York*, 74 Misc 3d 682, 701 [Ct Cl 2022]; *see generally Gallewski v H. Hentz & Co.*, 301 NY 164, 171, 174-175 [1950]).

We further conclude that "the plain language of the introductory clause in CPLR 214-g . . . , which states '[n]otwithstanding any provision of law *which imposes a period of limitation to the contrary*' (emphasis added), is meant to avoid the statute of limitations that would have ordinarily been applicable to the causes of action at issue," i.e., here, the three-year period of limitations applicable to the plaintiffs' causes of action sounding in negligence as set forth in CPLR 214 (5), but does not "override the provisions" of CPLR 202, New York's "borrowing" statute (*S. H. v Diocese of Brooklyn*, 205 AD3d 180, 195 [2d Dept 2022]; *see Besser v E.R. Squibb & Sons*, 146 AD2d 107, 116 [1st Dept 1989], *affd* 75 NY2d 847 [1990]).

Here, it is undisputed that the claims against Greylock arise from sexual abuse that occurred in Massachusetts at Camp Greylock for Boys in the 1970s. It is further undisputed that, during the relevant period, plaintiff A.A. was a New Jersey resident. "When a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation[s] periods of both New York and the jurisdiction where the cause of action accrued" (*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999]; *see S. H.*, 205 AD3d at 190). In tort cases, the Court of Appeals has held that "a cause of action accrues at the time and in the place of the injury" (*Global Fin. Corp.*, 93 NY2d at 529). Thus, for A.A.'s claims to survive, they must be timely under both CPLR 214-g and the applicable Massachusetts statute of limitations. Inasmuch as the relevant Massachusetts statute of limitations requires tort actions to be commenced within three years after accrual (*see* Mass Gen Laws Ann ch 260, § 2A), A.A.'s first and second causes of action against Greylock are time-barred and the court properly granted the Greylock defendants' motion to that extent.

It is further undisputed that Shapiro and plaintiff David Sweet were New York residents when the first and second causes of action accrued. Pursuant to the "resident exception" of the borrowing statute (*Tanges v Heidelberg N. Am.*, 93 NY2d 48, 53 [1999]), a claim that accrues in favor of a New York resident will be governed by the New York statute of limitations regardless of where the claim accrued (*see* CPLR 202; *see also Antone v Gen. Motors Corp., Buick Motor Div.*, 64 NY2d 20, 26 [1984]). We therefore agree with Shapiro and Sweet that the CVA revival statute applies and that the court erred in granting the Greylock defendants' motion insofar as it sought summary judgment dismissing the first and second causes of action of Shapiro and Sweet against Greylock (*see generally* CPLR 202, 214-g), and we modify the order accordingly.

Finally, we agree with the court's determination that Greylock failed to establish a lack of successor liability for the alleged torts of Camp Greylock for Boys, and it is not entitled to summary judgment dismissing the first and second causes of action of Shapiro and Sweet against it on those grounds (*see generally Schumacher v*

Richards Shear Co., 59 NY2d 239, 244-245 [1983]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

311
CA 21-01337
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND BANNISTER, JJ.

SCOTT THOMAS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NORTH COUNTRY FAMILY HEALTH CENTER, INC.
AND NORTH COUNTRY CHILDREN'S CLINIC,
DEFENDANTS-RESPONDENTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (ANTHONY R. MARTOCCIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered August 31, 2021. The order, among other things, granted defendants' cross motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the cross motion in part and reinstating the Labor Law § 240 (1) claim and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when he fell from an A-frame ladder, which tipped over while he was carrying an approximately 90-pound piece of sheetrock that he was attempting to hand to a coworker who was operating a scissor lift. Plaintiff appeals from an order that denied his motion for partial summary judgment on his Labor Law § 240 (1) claim and granted defendants' cross motion seeking summary judgment dismissing the complaint.

We reject plaintiff's contention that Supreme Court erred in denying his motion. Plaintiff failed to meet his initial burden on the motion inasmuch as his own submissions in support thereof raise triable issues of material fact whether plaintiff's conduct was the sole proximate cause of the accident due to his failure "to use available, safe and appropriate equipment"—i.e., the scissor lift—at the time of the accident (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015] [internal quotation marks omitted]; *see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Specifically, plaintiff submitted, inter alia, his deposition testimony wherein he

acknowledged both that the scissor lift that was present on site was the proper means of lifting the sheetrock and that using a ladder to perform that task was unsafe (*see Ward v Corning Painted Post Area Sch. Dist.*, 192 AD3d 1563, 1564 [4th Dept 2021]; *Banks v LPCiminelli, Inc.*, 125 AD3d 1334, 1334-1335 [4th Dept 2015]). Additionally, plaintiff's submissions raise a question of fact whether plaintiff "chose for no good reason" to use the ladder instead of the scissor lift (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *cf. Schutt v Bookhagen*, 186 AD3d 1027, 1028 [4th Dept 2020], *appeal dismissed* 36 NY3d 939 [2020]; *see generally Robinson*, 6 NY3d at 555). Inasmuch as plaintiff did not satisfy his initial burden on the motion, we need not consider the sufficiency of defendants' submissions in opposition thereto (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016]).

Nonetheless, we have considered defendants' submissions with respect to plaintiff's contentions that the court erred in granting the cross motion with respect to the Labor Law §§ 240 (1) and 241 (6) claims. With respect to the Labor Law § 240 (1) claim, we conclude that defendants did not meet their initial burden of establishing as a matter of law that plaintiff was the sole proximate cause of the accident (*see Fazekas*, 132 AD3d at 1404). In particular, deposition testimony submitted by defendants established that the coworker, who was operating and standing in the scissor lift at the time of the accident, denied plaintiff's request for access to the device by refusing to reposition it to allow plaintiff to safely lift the sheetrock into place. We note that "[i]t is well established that there may be more than one proximate cause of an injury" (*Doctor v Juliana*, 277 AD2d 1013, 1014 [4th Dept 2000]), and that "[q]uestions concerning . . . proximate cause are generally questions for the jury" (*Paul v Cooper*, 45 AD3d 1485, 1487 [4th Dept 2007] [internal quotation marks omitted]; *see Stern v Easter*, 92 AD3d 1250, 1252 [4th Dept 2012], *lv denied* 19 NY3d 815 [2012]; *see generally Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 1391-1392 [4th Dept 2014]).

Our dissenting colleague argues that the court properly concluded that, as a matter of law, plaintiff was the sole proximate cause of the accident because he chose to use the ladder instead of the scissor lift. The court's conclusion was based on plaintiff's deposition testimony admitting that use of the scissor lift was *the* proper and expected way to perform the task of lifting the sheetrock. We disagree with the dissent's conclusion. Although plaintiff testified that the scissor lift was the proper device to use for his work, that statement alone does not, under the unique circumstances of this case, establish that plaintiff knew that the scissor lift was "available" and "chose for no good reason" not to use it (*Cahill*, 4 NY3d at 40). Further, "[w]here causation is disputed, summary judgment is not appropriate unless only one conclusion may be drawn from the established facts" (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 44 [2003] [internal quotation marks omitted]) and, here, in light of the coworker's alleged conduct, the evidence is not conclusive about whether plaintiff chose to use the ladder over an "available" scissor

lift for “no good reason.”

As noted above, there are factual questions whether plaintiff’s decision not to use the scissor lift was the result of the intransigence of the coworker operating the scissor lift at the time of the accident, who refused plaintiff’s request to reposition that device to allow for the proper installation of the sheetrock. To the extent that the coworker’s conduct—i.e., failing to reposition the scissor lift despite plaintiff’s request—was a proximate cause of the accident, it would be conceptually impossible for plaintiff’s own failure to use the scissor lift to be the *sole* proximate cause thereof (*see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Fazekas*, 132 AD3d at 1402). In other words, when plaintiff’s conduct is viewed along with the coworker’s conduct, it cannot be said as a matter of law that plaintiff was the sole proximate cause of the accident.

In light of the foregoing, plaintiff’s reliance on case law holding that a worker is not the sole proximate cause of an accident where the worker acts at the direction or insistence of someone with supervisory authority over the worker is wholly immaterial to our resolution of this case, and we do not address it any further. The pertinent issue is not whether the coworker directed plaintiff to use the unsafe ladder, but rather whether the conduct of the coworker—who alone controlled the scissor lift—in refusing to reposition that safety device was a proximate cause of the accident. The questions of fact on that issue preclude a determination as a matter of law that plaintiff’s decision to use the ladder was the sole proximate cause of the accident.

The logical result of the dissent’s conclusion that “plaintiff cannot, as a matter of law, evade an adverse finding of sole proximate cause on summary judgment by attributing his conduct to the coworker,” at least under the circumstances presented here, would be the effective resurrection of the long-discarded fellow worker rule (*cf. Butler v Townsend*, 126 NY 105, 111 [1891]; *see generally Blake*, 1 NY3d at 285-286; *Buckley v City of New York*, 56 NY2d 300, 304-305 [1982]), and is therefore contrary to the purpose of Labor Law § 240 (1), which “fix[es] ultimate responsibility for safety practices . . . where such responsibility actually belongs, on the owner and general contractor” (*Haimes v New York Tel. Co.*, 46 NY2d 132, 136 [1978] [internal quotation marks omitted]; *see Martin v Niagara Falls Bridge Commn.*, 162 AD3d 1604, 1605 [4th Dept 2018]). Burdening plaintiff with the consequences of the coworker’s conduct for the purpose of determining that plaintiff is, as a matter of law, the sole proximate cause of the accident is contrary to the statute’s purpose. Further, the dissent suggests that plaintiff, rather than using the ladder to lift the sheetrock, should have more vigorously protested the coworker’s refusal to reposition the scissor lift or alerted his supervisor to the situation. We note, however, that plaintiff was under no “obligation to affirmatively request an adequate safety device” (*McEachern v Extell Dev. Co.*, 199 AD3d 464, 465 [1st Dept 2021]; *see Greene v Raynors Lane Prop. LLC*, 194 AD3d 520, 522 [1st Dept 2021]).

Consequently, we conclude that defendants failed to eliminate all issues of fact with respect to the Labor Law § 240 (1) claim, and thus the court erred in granting the cross motion with respect to that claim. We therefore modify the order accordingly.

Finally, we reject plaintiff's contention that the court erred in granting the cross motion with respect to the Labor Law § 241 (6) claim insofar as that claim was based upon violations of 12 NYCRR 23-1.21 (b) (4) (ii) and (e) (3). Pursuant to 12 NYCRR 23-1.21 (b) (4) (ii), "[s]lippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings" and, pursuant to 12 NYCRR 23-1.21 (e) (3), "[s]tanding stepladders shall be used only on firm, level footings." Defendants satisfied their initial burden by submitting evidence establishing that neither provision is applicable to the facts of this case. Although those provisions are sufficiently specific to support a Labor Law § 241 (6) claim (*see Losurdo v Skyline Assoc., L.P.*, 24 AD3d 1235, 1237 [4th Dept 2005]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [2d Dept 1997]; *see generally Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504 [1993]), the deposition testimony relied on by defendants established that neither provision is applicable to this case because the accident did not occur due to the ladder's placement on an uneven or slippery surface (*see Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 594 [1st Dept 2014]; *cf. Tuzzolino v Consolidated Edison Co. of N.Y.*, 160 AD3d 568, 569 [1st Dept 2018]). We further conclude that plaintiff did not raise a triable issue of material fact in opposition with respect to the applicability of either provision to the facts of this case (*see generally Zuckerman*, 49 NY2d at 562).

All concur except PERADOTTO, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent because, in my view, the majority strains Labor Law § 240 (1) beyond what the legislature intended to accomplish and improperly penalizes owners and contractors for complying with the law.

Plaintiff and his fellow laborer, who were coworkers employed by the same contractor, had been working as a team throughout the day on a building owned and operated by defendants using the appropriate method for hanging heavy sheetrock at a height, with plaintiff standing on the ground and cutting pieces of sheetrock while the coworker used a provided scissor lift to raise the cut sheetrock from ground level and then access the elevated portions of a 20-foot wall where he would fasten the sheetrock in place. In the afternoon, however, the coworker asked, for the sake of convenience, that plaintiff climb a ladder and hand him a piece of sheetrock. Plaintiff, knowing that the method proposed by the coworker was inappropriate, nonetheless acquiesced to the request and attempted to carry a heavy piece of sheetrock up an A-frame ladder with one hand, at which point the ladder tipped over and plaintiff was injured in the resulting fall.

Plaintiff commenced this action asserting, inter alia, a claim for violation of Labor Law § 240 (1). Supreme Court denied plaintiff's motion for partial summary judgment on his Labor Law

§ 240 (1) claim and granted defendants' cross motion for summary judgment dismissing the complaint after determining, in relevant part, that defendants established as a matter of law that plaintiff was the sole proximate cause of the accident and plaintiff failed to raise a triable issue of fact. Unlike the majority, I would affirm the order in its entirety.

"Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute" (*Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013]). "The statute is . . . designed to minimize injuries to [workers] by placing ultimate responsibility for safety practices on owners and contractors, rather than on the workers, who as a practical matter lack the means of protecting themselves from accidents" (*Martinez v City of New York*, 93 NY2d 322, 325 [1999]; *see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985]). Stated differently, the legislature intended "to force owners and contractors to provide a safe workplace, under pain of damages" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]). Thus, the statute " 'undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed' " (*id.* at 292, quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

At the same time, however, "the language of Labor Law § 240 (1) 'must not be strained' to accomplish what the Legislature did not intend" (*id.*, quoting *Martinez*, 93 NY2d at 326). Therefore, the statute imposes absolute liability upon owners and contractors only for a "breach of the statutory duty that proximately causes a plaintiff's injury" (*Panek v County of Albany*, 99 NY2d 452, 457 [2003]; *see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015], *rearg denied* 25 NY3d 1211 [2015]; *Blake*, 1 NY3d at 287). Consequently, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *see Barreto*, 25 NY3d at 433; *Blake*, 1 NY3d at 290).

It is thus well established that "[l]iability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of [the] injury" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Stated in enumerated fashion, "[a] defendant has no liability under Labor Law § 240 (1) when plaintiffs: (1) 'had adequate safety devices available,' (2) 'knew both that' the safety devices 'were available and that [they were] expected to use them,' (3) 'chose for no good reason not to do so,' and (4) would not have been injured had they 'not made that choice' " (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020], quoting *Cahill*, 4 NY3d at 40; *see Gallagher*, 14 NY3d at 88).

Here, as the court properly determined, defendants met their initial burden by establishing as a matter of law that plaintiff's conduct was the sole proximate cause of the accident, and plaintiff failed to raise a triable issue of fact. The deposition testimony of plaintiff, upon which defendants relied in support of their cross motion, established that the provided scissor lift was the appropriate safety device for performing the task of carrying the heavy sheetrock pieces to the elevated position for fastening and, indeed, that is precisely how plaintiff and the coworker had been installing the sheetrock all morning. According to plaintiff, having one person at ground level cutting the sheetrock with another person lowering the scissor lift to that level, having the sheetrock placed on the machine's bracket arms, and then raising the sheetrock to the elevated position before placing it against the wall for fastening was *the* proper way to install such sheetrock. Over the course of his long career in construction, plaintiff had followed that proper method "a thousand times." Plaintiff was also emphatic during his deposition that carrying a heavy piece of sheetrock up a ladder to hand that material to a person in an elevated scissor lift was an *inappropriate* method for performing the task.

Although they had performed the task in the proper manner all morning, the coworker asked plaintiff at one point in the afternoon to climb the ladder and hand him a piece of sheetrock for convenience so that the coworker did not have to maneuver the scissor lift from its location in a corner, a process that would have taken about four minutes. Plaintiff suggested that the coworker reposition and lower the scissor lift to follow the proper method but, after the coworker responded that using a ladder would be faster, plaintiff acquiesced to the request and, despite knowing that the method proposed by the coworker was inappropriate, attempted to carry an approximately 90-pound piece of sheetrock up the ladder with one hand, at which point the ladder tipped over and plaintiff was injured in the resulting fall. The evidence submitted by defendants therefore established as a matter of law that an adequate safety device in the form of a scissor lift was on the work site, that plaintiff knew through his training, prior practice, and common sense not to carry the sheetrock by hand up the ladder and that he was instead expected to use the provided scissor lift, and that plaintiff would not have been injured if he had chosen to use the adequate safety device rather than the inappropriate method (*see generally Biaca-Neto*, 34 NY3d at 1167-1168; *Ward v Corning Painted Post Area Sch. Dist.*, 192 AD3d 1563, 1564 [4th Dept 2021]).

The question thus becomes whether the coworker's request and ostensible insistence on using the ladder to avoid having to reposition the scissor lift may appropriately be considered as raising a triable question of fact on the issues of whether the scissor lift was readily available and whether plaintiff chose for no good reason not to use that safety device. Initially on that question, I agree with the majority that plaintiff's reliance on case law standing for the proposition that a worker is not the sole proximate cause of an accident where the worker performs a task in a particular manner at the insistence or direction of his or her *foreperson* or *supervisor* is

misplaced (*cf. DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 46-47 [1st Dept 2014]). That proposition is justified on the basis that, "[w]hen faced with an employer's instruction [or the demand of a person with supervisory authority] to use an inadequate device, many workers would be understandably reticent to object for fear of jeopardizing their employment and their livelihoods" (*id.* at 47; *see e.g. Finocchi v Live Nation Inc.*, 204 AD3d 1432, 1434 [4th Dept 2022]; *Gutierrez v 451 Lexington Realty LLC*, 156 AD3d 418, 419 [1st Dept 2017]; *Gove v Pavarini McGovern, LLC*, 110 AD3d 601, 602-603 [1st Dept 2013]).

But, as the majority notes and the court correctly recognized, that principle does not apply here because the coworker was not a supervisor and had no supervisory authority. Plaintiff specifically testified that the coworker was not a supervisor and was, instead, a fellow laborer. Both plaintiff and the coworker testified that their supervisor, who was on-site during the job, was another person employed by the contractor. Plaintiff received his instruction and direction for his work from the supervisor. To the extent that plaintiff attempted to raise a triable issue of fact as to the coworker's supervisory authority through submission of papers in opposition to the cross motion asserting that "[s]upervision ha[d] not been established" and that the coworker "was a senior employee," the record is clear that plaintiff "merely raised [a] feigned issue[] of fact designed to avoid the consequences of [his] earlier deposition" (*Mitthauer v T. Moriarty & Son, Inc.*, 69 AD3d 588, 589 [2d Dept 2010]).

Contrary to the majority's conclusion, however, plaintiff cannot, as a matter of law, evade an adverse finding of sole proximate cause on summary judgment by attributing his conduct to the coworker. Plaintiff's testimony unambiguously established that he knew that he was expected to use the provided scissor lift and that using a ladder to manually lift a heavy piece of sheetrock was an inappropriate method and would not be acceptable (*cf. Biaca-Neto*, 34 NY3d at 1167-1168). Given that using the provided scissor lift was the proper method for performing the task and plaintiff and the coworker had been appropriately following that method as a team throughout the day, plaintiff's " 'normal and logical response' " to the nonsupervisory request should have been to ask again and wait for the coworker to reposition and lower the scissor lift rather than to merely accede and join in the use of a known unsafe method for the sake of expediency (*Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]; *see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554-555 [2006]). While the majority is correct that a worker has no obligation to affirmatively request an adequate safety device *where none has been provided* by the owner or contractor (*see McEachern v Extell Dev. Co.*, 199 AD3d 464, 465 [1st Dept 2021]; *Greene v Raynors Lane Prop. LLC*, 194 AD3d 520, 522 [1st Dept 2021]), the majority errs in suggesting that plaintiff had no obligation to wait until the coworker would free up the provided scissor lift for their continued collective use or to perhaps even speak with his supervisor about the situation instead of immediately opting to engage in an unacceptable method of work ostensibly to save time (*cf. Robinson*, 6 NY3d at 554-555; *Montgomery*, 4 NY3d at 806). Plaintiff's own negligent actions—choosing to perform

the task by manually lifting the sheetrock on a ladder in a manner that he knew was inappropriate to accomplish the work, instead of using the provided scissor lift—"were, as a matter of law, the sole proximate cause of his injuries" (*Robinson*, 6 NY3d at 555; *see Montgomery*, 4 NY3d at 806).

The majority alleges, with much qualification, that the position taken by this dissent may result in the "effective" resurrection of the fellow servant rule. The majority is mistaken. As the foregoing discussion makes clear, I am not adopting the position that defendants may "escape liability by blaming [plaintiff's] coworker[]" (*Blake*, 1 NY3d at 285); rather, defendants are not liable under Labor Law § 240 (1) because "there is no evidence of violation and the proof reveals that . . . *plaintiff's own negligence* was the sole proximate cause of the accident" (*id.* at 290 [emphasis added]). Plaintiff was not injured by the coworker; he was injured as a result of his decision to carry a heavy piece of sheetrock up an A-frame ladder with one hand—a method he knew was unsafe and inappropriate—without waiting for the coworker to free up the provided scissor lift for use in the proper manner or speaking with the supervisor (*see Robinson*, 6 NY3d at 554-555). The majority's reference to the coworker's conduct as a proximate cause of the accident is thus incorrect not only on the facts but also on the law inasmuch as the majority's sole proximate cause analysis improperly substitutes the supposed negligence of the nonparty coworker for a statutory violation by defendants (*cf. Blake*, 1 NY3d at 290).

Ultimately, "[t]he point of Labor Law § 240 (1) is to compel contractors and owners to comply with the law, not to penalize them when they have done so" (*id.* at 286). Unfortunately, the latter is precisely what the majority's decision does and will allow. For the reasons set forth above, I cannot join in that endeavor.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

335
CA 21-00764
PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

KEY EQUITY OF NEW YORK, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AHMED AZZAM, AS TRUSTEE OF THE AZZAM FAMILY
REVOCABLE TRUST, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MICHAEL J. KAWA, SYRACUSE, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered October 23, 2020. The order, insofar as appealed from, denied plaintiff's cross motion for summary judgment.

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

Memorandum: In October 2012, plaintiff entered into a lease agreement with nonparty Marwan Azzam for certain real property. The lease agreement included an option to purchase the property and provided, inter alia, that plaintiff could exercise the option within a certain time period by delivering written notice, using the methods set forth in the lease agreement, of its intention to do so. In November 2012, plaintiff executed an assignment agreement, which assigned "all of its right, title and interest in and to the [l]ease" to nonparty Key Convenient Mart, Inc. (Key Convenient), but which also included a clause specifically excluding the option to purchase. Marwan Azzam died in March 2016, and the ownership of the property was subsequently transferred by the executor of his estate, i.e., his wife, nonparty Noha Azzam, to defendant, Ahmed Azzam, as trustee of the Azzam Family Revocable Trust.

Plaintiff commenced the instant action alleging that, in May 2016, it duly and timely exercised its option to purchase the property by written notice to Noha Azzam, and seeking specific performance of the purchase option. After answering, but prior to the completion of discovery, defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for summary judgment on the complaint. In appeal No. 1, plaintiff appeals from that part of an

order that denied the cross motion. In appeal No. 2, plaintiff appeals from an order that denied its motion seeking leave to reargue and renew the cross motion.

Initially, we conclude that appeal No. 2 must be dismissed because, although plaintiff denominated its motion as one for leave to reargue and renew, the motion was actually one for leave to reargue only (*see MidFirst Bank v Storto*, 121 AD3d 1575, 1575 [4th Dept 2014]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 983 [4th Dept 1990]), and it is well settled that no appeal lies from an order denying such a motion (*see Matter of Kleinbach v Cullerton*, 151 AD3d 1686, 1687 [4th Dept 2017]; *Britt v Buffalo Mun. Hous. Auth.*, 115 AD3d 1252, 1252 [4th Dept 2014]).

With respect to appeal No. 1, we agree with plaintiff that Supreme Court erred insofar as it denied the cross motion on the ground that defendant should be afforded the opportunity for further discovery concerning whether plaintiff complied with the lease agreement's written notice requirement when it sought to exercise the purchase option. In support of its cross motion, plaintiff submitted the lease agreement, which provided that written notices may be delivered by, inter alia, "deposit[ ] in the United States Mail, Certified Mail, postage prepaid, return receipt requested." Plaintiff also submitted an affidavit from its president, who averred that he exercised the purchase option by mailing written notice to Noha Azzam by "certified mail, return receipt requested." Plaintiff further submitted a copy of the written notice and a copy of the certified mail receipt bearing Noha Azzam's signature. In light of those submissions, we conclude that plaintiff established that it complied with the lease's written notice requirement when seeking to exercise the option to purchase, and the burden then shifted to defendant to raise an issue of fact with respect to that issue (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In opposition, defendant failed to meet that burden. Defendant submitted the affidavit of Noha Azzam, who denied that she received plaintiff's notice in the mail. The mere denial of the receipt of the notice, however, was insufficient to overcome the presumption of delivery (*see Engel v Lichterman*, 62 NY2d 943, 944-945 [1984]; *Dunlop v Saint Leo the Great R.C. Church*, 109 AD3d 1120, 1121 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013]). We further conclude that "defendant did not make the required showing that further discovery may raise a triable issue of fact" on that issue (*LMK Psychological Servs., P.C. v Liberty Mut. Ins. Co.*, 30 AD3d 727, 729 [3d Dept 2006] [internal quotation marks omitted]; *see Smith v Sfeir*, 207 AD2d 1010, 1010 [4th Dept 1994]), inasmuch as mere speculation that Noha Azzam's signature on the certified mail receipt was not authentic is insufficient to raise a triable issue of fact (*see generally Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2003]).

Nonetheless, we conclude that plaintiff's cross motion was properly denied because plaintiff's own submissions on the cross motion raise triable issues of fact whether plaintiff assigned the

purchase option to Key Convenient pursuant to the assignment agreement. It is well settled that an option contained in a lease that entitles the lessee to purchase the leased premises is a covenant running with the land (*see Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 [2001]; *Gilbert v Van Kleeck*, 284 App Div 611, 617 [3d Dept 1954], *appeal dismissed* 308 NY 882 [1955]). "In the absence of an express intent to the contrary in the lease, the option to purchase passes to the assignee upon assignment of the lease, and the assignee may enforce the option in the same manner and to the same extent as the original lessee" (*Antler v Jamaica 163 Location Corp.*, 241 AD2d 437, 438 [2d Dept 1997]). In support of the cross motion, plaintiff submitted the assignment agreement, which contains conflicting provisions whether the option to purchase was made part of the assignment and, therefore, triable issues of fact exist that warranted the court's denial of plaintiff's cross motion (*see generally Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923 [4th Dept 1994]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

336
CA 21-00760
PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

KEY EQUITY OF NEW YORK, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AHMED AZZAM, AS TRUSTEE OF THE AZZAM FAMILY
REVOCABLE TRUST, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

MICHAEL J. KAWA, SYRACUSE, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 2, 2021. The order, among other things, denied plaintiff's motion seeking leave to reargue and renew its cross motion for summary judgment.

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

Same memorandum as in *Key Equity of New York, Inc. v Azzam* ([appeal No. 1] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

337
CA 21-01338
PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

OF DOE 44, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIK P.R., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BONARIGO & MCCUTCHEON, BATAVIA (KRISTIE L. DEFREZE OF COUNSEL), FOR DEFENDANT-APPELLANT.

O'BRIEN & FORD, P.C., BUFFALO (CHRISTOPHER J. O'BRIEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 28, 2021. The order granted plaintiff's motion for partial summary judgment on liability.

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

Memorandum: Plaintiffs commenced these actions under the Child Victims Act (*see* CPLR 214-g) seeking damages as a result of defendant's alleged sexual abuse of them from "2003 to February 2006." Plaintiffs thereafter moved for partial summary judgment on liability, contending that our determination in a prior Family Court Act article 10 proceeding (*Matter of Breanna R.*, 61 AD3d 1338, 1339 [4th Dept 2009]) collaterally estopped defendant "from now attempting to dispute the sexual abuse of [each] [p]laintiff." Supreme Court granted the motions, thereby awarding judgment to plaintiffs even though they have never testified under oath regarding their allegations against defendant. We agree with defendant in both appeals that the court erred in granting the motions.

"Collateral estoppel prevents a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . whether or not the . . . causes of action are the same . . . The doctrine applies only where the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the party who is being estopped had a full and fair opportunity to litigate the issue in the earlier action" (*Simmons v Trans Express Inc.*, 37 NY3d 107, 112 [2021] [internal quotation marks and emphasis omitted]).

Here, although the burden of proof for both the Family Court proceeding and these personal injury actions is the same, i.e., preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Crystal S. [Patrick P.]*, 193 AD3d 1353, 1354 [4th Dept 2021]; *Matter of M.C. v State of New York*, 74 Misc 3d 682, 692 n 7 [Ct Cl 2022]; *Doe v MacFarland*, 66 Misc 3d 604, 622 [Sup Ct, Rockland County 2019]), hearsay evidence that was admissible in the underlying Family Court proceeding would not be admissible in the instant personal injury actions (*see* § 1046 [a] [vi]; *see generally Johnson v Lutz*, 253 NY 124, 128 [1930]). Inasmuch as our determination in the prior Family Court proceeding was based largely on hearsay evidence that would not be admissible in these civil actions, we agree with defendant that he should not be collaterally estopped from defending these actions and that the court erred in granting plaintiffs' motions for partial summary judgment on liability. We therefore reverse the order in each appeal.

All concur except BANNISTER, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent because, in my view, this Court's prior determination in the Family Court Act article 10 proceeding in question (*Matter of Breanna R.*, 61 AD3d 1338, 1340 [4th Dept 2009]) should be given collateral estoppel effect in these actions brought under the Child Victims Act (*see* CPLR 214-g). As the majority recognizes, the collateral estoppel doctrine gives conclusive effect to prior determinations when certain conditions are met. As relevant here, there must be "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001]). The burden rests upon the proponent of collateral estoppel to demonstrate the identicality of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (*see Matter of Dunn*, 24 NY3d 699, 704 [2015]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 501 [1984]).

Here, there is no dispute that the parties are the same in both the prior Family Court proceeding and the instant actions and that the central issue in the prior proceeding and these actions is identical, i.e., whether defendant sexually abused plaintiffs. Thus, the question in both appeals then becomes whether defendant met his burden of establishing that he did not have a full and fair opportunity to litigate the issue of his alleged abuse in the Family Court proceeding.

A determination whether the first action or proceeding genuinely provided a full and fair opportunity to litigate requires consideration of "the realities of the [prior] litigation, including the context and other circumstances which . . . may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him" (*People v Plevy*, 52 NY2d 58, 65 [1980] [internal quotation marks omitted]). Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation,

the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law, and the foreseeability of future litigation (*see Gilberg v Barbieri*, 53 NY2d 285, 292 [1981]; *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 72 [1969]).

Here, the majority recognizes that the burden of proof was the same in the Family Court proceeding and the instant actions. Additionally, it does not appear to be disputed that defendant had an incentive to fully litigate the Family Court proceeding. Indeed, an adverse determination in that proceeding could have, among other things, constituted a basis to terminate his parental rights in a subsequent proceeding. Contrary to the majority's view, in my view, the differences in the form of the proceeding and these actions were not significant. The fact-finding hearing held in the Family Court proceeding involved testimony from a child protective services (CPS) caseworker, a licensed clinical social worker, and an expert clinical psychologist, all of whom were subject to cross-examination by defendant. While the majority takes issue with the fact that the testimony of those witnesses involved in some way the hearsay statements of plaintiffs regarding the sexual abuse, those hearsay statements were required to be reliably corroborated, and the record as a whole needed to support a finding of abuse in the Family Court proceeding (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987], *rearg denied* 71 NY2d 890 [1988]). Furthermore, other evidence besides the hearsay statements was provided at the fact-finding hearing, including the testimony from the CPS caseworker about her own investigation and her finding of credible evidence to support the report of sexual abuse, which included evidence that plaintiffs, who were children at the time of the hearing, possessed age-inappropriate knowledge of sexual conduct.

Finally, I note that it is well settled that determinations rendered by quasi-judicial administrative agencies will qualify for collateral estoppel effect (*see Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013]; *Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]), so long as the requirements of the doctrine are satisfied. Indeed, determinations of the Workers' Compensation Board are within the scope of the doctrine (*see Szymkowiak v New York Power Auth.*, 203 AD3d 1618, 1620-1621 [4th Dept 2022]) and, as with a Family Court Act article 10 proceeding, hearsay evidence is permissible in a workers' compensation hearing so long as it is corroborated or found to be otherwise sufficiently reliable (*see Matter of Pugliese v Remington Arms*, 293 AD2d 897, 897-898 [3d Dept 2002]). I see no reason why we should not apply the doctrine to Family Court proceedings.

Thus, in my view, defendant failed to meet his burden in each action of establishing that he did not have a full and fair opportunity to defend the allegations of sexual abuse in the prior Family Court proceeding. I would therefore affirm Supreme Court's orders in both appeals granting plaintiffs' motions for partial summary judgment on liability inasmuch as defendant is barred by the doctrine of collateral estoppel from disputing his sexual abuse of

plaintiffs.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

342
CA 21-01339
PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

OF DOE 45, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIK P.R., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BONARIGO & MCCUTCHEON, BATAVIA (KRISTIE L. DEFREZE OF COUNSEL), FOR DEFENDANT-APPELLANT.

O'BRIEN & FORD, P.C., BUFFALO (CHRISTOPHER J. O'BRIEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 28, 2021. The order granted plaintiff's motion for partial summary judgment on liability.

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

Same memorandum as in *OF Doe 44 v Erik P.R.* ([appeal No. 1] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

All concur except BANNISTER, J., who dissents and votes to affirm in the same memorandum as in *OF Doe 44 v Erik P.R.* ([appeal No. 1] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022 Ann Dillon Flynn
Clerk of the Court

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

376
CAF 20-01662
PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF DANIELLE E.P.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER N., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

TRICIA DORN, SYRACUSE, D.J. & J.A. CIRANDO, PLLC (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT.

LISA H. BLITMAN, SYRACUSE, FOR PETITIONER-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered May 28, 2020 in a proceeding pursuant to Family Court Act article 5. The order adjudicated respondent to be the father of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 5, respondent-petitioner (respondent) appeals in appeal No. 1 from an order that, following a hearing, adjudicated him to be the father of a child born in September 2016. In appeal No. 2, respondent appeals from a subsequent order that denied his motion to vacate the prior order under CPLR 5015 (a) on grounds of fraud and newly discovered evidence. We now affirm in both appeals.

Initially, we note that the order in appeal No. 2 is not appealable as of right because a Family Court order denying a motion to vacate a prior order that disposed of a proceeding is not an "order of disposition" within the meaning of Family Court Act § 1112 (a) (*Matter of Cote*, 127 AD2d 1011, 1011 [4th Dept 1987] [internal quotation marks omitted]). Nevertheless, we deem the notice of appeal in appeal No. 2 to be an application for leave to appeal and, in the exercise of our discretion, we grant leave to appeal (*see* § 1112 [a]; *see generally Matter of Steeno v Szydlowski*, 181 AD3d 1224, 1225 [4th Dept 2020]).

Respondent and petitioner-respondent (petitioner) had sexual relations in September 2015 and January 2016. At the time that

petitioner gave birth to the subject child, she was in a relationship with another man who is identified as the child's father on the birth certificate and who signed an acknowledgment of paternity. Shortly after the child was born, petitioner's relationship with that man ended. Petitioner then informed respondent that he might be the child's father and filed a paternity petition against him. Based on the acknowledgment of paternity, Family Court dismissed the petition. After the acknowledgment of paternity was vacated, petitioner commenced this proceeding.

At the outset of the proceeding, the Support Magistrate ordered genetic marker testing, which established that respondent is the child's biological father. The Support Magistrate thereafter transferred the matter to Family Court for a hearing on respondent's defense of equitable estoppel. Following the hearing, the court adjudicated respondent to be the child's father.

Respondent contends in appeal No. 1 that reversal is required because the Support Magistrate erred in ordering him to submit to genetic marker testing before the issue of equitable estoppel was resolved. We reject that contention. It is well settled that "the doctrine of equitable estoppel may be used by a purported biological father to prevent a child's mother from asserting biological paternity—when the mother has acquiesced in the development of a close relationship between the child and another father figure, and it would be detrimental to the child's interests to disrupt that relationship" (*Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 6 [2010]). As respondent points out, no genetic marker or DNA marker tests shall be ordered in a paternity proceeding "upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman" (Family Ct Act § 532 [a]; *see also* § 418 [a]). Thus, the court "should consider paternity by estoppel before it decides whether to test for biological paternity" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 330 [2006]; *see Matter of Jennifer L. v Gerald S.*, 145 AD3d 1581, 1582 [4th Dept 2016], *lv dismissed* 29 NY3d 942 [2017]).

Nevertheless, the fact that testing has already been conducted when a court holds a hearing on equitable estoppel does not mandate reversal of a subsequent order determining paternity (*see Shondel J.*, 7 NY3d at 330; *Jennifer L.*, 145 AD3d at 1583). We note that respondent had a full and fair opportunity to litigate his equitable defense, which the court rejected following the hearing, and that respondent does not challenge the court's determination that he failed to establish that equitable estoppel applies. Moreover, the court made clear that, notwithstanding the results of the genetic marker test, the paternity petition would have been denied had respondent met his burden of proof on equitable estoppel (*cf. Jennifer L.*, 145 AD3d at 1583).

We reject respondent's further contention in appeal No. 1 that the Support Magistrate erred in ordering genetic testing before respondent was represented by counsel. Although a "respondent in any

proceeding under [Family Court Act article 5] in relation to the establishment of paternity” has a right to the assistance of counsel (Family Ct Act § 262 [a] [viii]), respondent cites no authority for the proposition that a Support Magistrate cannot lawfully order a party to submit to genetic testing before the party is represented by counsel. To the contrary, paternity proceedings have, in fact, been adjourned to provide the parties with the opportunity to obtain counsel and complete genetic testing (*see Matter of Marianne R. v Richard C.*, 150 AD2d 378, 379 [2d Dept 1989]; *cf. Matter of Ingravera v Goss*, 13 AD3d 627, 628 [2d Dept 2004]).

In appeal No. 2, respondent contends that the court erred in denying his motion to vacate the order that adjudicated him to be the child’s father. We disagree. In support of his motion, respondent submitted evidence that petitioner and a man who was her boyfriend at the time of the hearing became joint owners of a home approximately six months after the hearing ended and that they were married later that year. As the court determined, this was not newly discovered evidence within the meaning of CPLR 5015 (a) (2) inasmuch as it was not evidence that “was in existence but undiscoverable with due diligence at the time of the original order or judgment” (*Wall St. Mtge. Bankers, Ltd. v Rodgers*, 148 AD3d 1088, 1089 [2d Dept 2017]; *see Matter of Commercial Structures v City of Syracuse*, 97 AD2d 965, 966 [4th Dept 1983]). Even assuming, arguendo, that it did constitute newly discovered evidence, we conclude that it would not “probably have produced a different result” if it had been introduced at the hearing (CPLR 5015 [a] [2]; *see Wall St. Mtge. Bankers, Ltd.*, 148 AD3d at 1089; *Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1459 [4th Dept 2015], *lv dismissed* 26 NY3d 995 [2015]).

“Whether estoppel should be applied depends entirely on the best interests of the child and not the equities between the adults” (*Jennifer L.*, 145 AD3d at 1582; *see Shondel J.*, 7 NY3d at 330). Thus, even if petitioner had admitted at the hearing that she and the boyfriend discussed marriage or had a more committed relationship than appeared from their testimony, that evidence would not establish a basis for applying the doctrine of equitable estoppel. Respondent’s claim of estoppel was not based on the nature and extent of the relationship between petitioner and her boyfriend; rather, it was based on the nature and extent of the relationship between the boyfriend and the child, and there was insufficient evidence that the boyfriend ever held himself out as the child’s father.

Finally, the court also properly rejected respondent’s claim that the paternity order was obtained as a result of “fraud, misrepresentation, or other misconduct of an adverse party” (CPLR 5015 [a] [3]; *see Arkadian S.*, 130 AD3d at 1459; *Matter of Shere L. v Odell H.*, 303 AD2d 1023, 1023 [4th Dept 2003]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

377
CAF 21-00832
PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CHRISTOPHER N.,
PETITIONER-APPELLANT,

V   MEMORANDUM AND ORDER

DANIELLE P., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

TRICIA DORN, SYRACUSE, D.J. & J.A. CIRANDO, PLLC (REBECCA L. KONST OF COUNSEL), FOR PETITIONER-APPELLANT.

LISA H. BLITMAN, SYRACUSE, FOR RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered May 26, 2021 in a proceeding pursuant to Family Court Act article 5. The order denied petitioner’s motion to vacate a prior order.

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

Same memorandum as in *Matter of Danielle E.P.* ([appeal No. 1] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022   Ann Dillon Flynn
                                                               Clerk of the Court

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

391

KA 09-00381

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ORLANDO GONZALEZ, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered January 16, 2009. The judgment convicted defendant upon a jury verdict of murder in the second degree and attempted murder in the second 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 directing that the sentences shall run concurrently with one another, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), defendant contends that the verdict is against the weight of the evidence because the jury gave undue weight to eyewitness identifications, which are "highly error prone" (*see generally People v Boone*, 30 NY3d 521, 527 [2017]). We reject that contention. Although "[m]istaken eyewitness identifications are 'the single greatest cause of wrongful convictions in this country,' . . . 'responsible for more . . . wrongful convictions than all other causes combined' " (*id.*), the issues of identification and credibility at issue herein " 'were properly considered by the jury and there is no basis for disturbing its determinations' " (*People v Kelley*, 46 AD3d 1329, 1330 [4th Dept 2007], *lv denied* 10 NY3d 813 [2008]; *see People v Jones*, 193 AD3d 1410, 1411 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]). This is not a case involving "an uncorroborated eyewitness identification of dubious reliability" (*People v Miller*, 191 AD3d 111, 116 [4th Dept 2020]). Rather, three of the four witnesses who identified defendant as the shooter were familiar with him from the neighborhood. One of them, the surviving victim, frequented the same multifamily building where defendant's father once lived and in front of which the shooting occurred. As a result, the surviving victim

frequently saw defendant at the building. Moreover, that surviving victim recognized defendant from an altercation with defendant and others that occurred a few weeks before the shooting.

To the extent that defendant contends that an instruction on cross-racial identification was warranted (*see Boone*, 30 NY3d at 525-526), he failed to request such an instruction and, as a result, that contention is not preserved for our review (*see People v Dingle*, 147 AD3d 1080, 1080-1081 [2d Dept 2017], *lv denied* 29 NY3d 1078 [2017], 31 NY3d 1146 [2018]; *see also People v Williams*, 172 AD3d 586, 587 [1st Dept 2019], *lv denied* 34 NY3d 940 [2019]).

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 thus conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that the verdict was tainted by a coercive deadlock charge. Inasmuch as defendant failed to raise any objection to the charge, his contention is not preserved for our review (*see People v Al-Kanani*, 33 NY2d 260, 265 [1973], *cert denied* 417 US 916 [1974]; *People v Rumph*, 93 AD3d 1346, 1348 [4th Dept 2012], *lv denied* 19 NY3d 967 [2012]; *People v Roman*, 85 AD3d 1630, 1631 [4th Dept 2011], *lv denied* 17 NY3d 821 [2011]). In any event, the contention lacks merit. The fact that County Court discussed the potential of another jury selection and a retrial "in the event the jury could not reach a verdict did not render the *Allen* charge coercive. Those concepts appear at least twice in the standard deadlock charge in the Criminal Jury Instructions" (*People v Colon*, 173 AD3d 1704, 1706 [4th Dept 2019], *lv denied* 34 NY3d 929 [2019], citing CJI2d[NY] Deadlock Charge; *see People v Ford*, 78 NY2d 878, 880 [1991]; *People v Cowen*, 249 AD2d 560, 560 [2d Dept 1998], *lv denied* 92 NY2d 895 [1998]; *cf. People v Aponte*, 2 NY3d 304, 306-308 [2004]; *People v Nunez*, 256 AD2d 192, 193 [1st Dept 1998], *lv denied* 93 NY2d 975 [1999]).

We agree with defendant, however, that the aggregate sentence of 45 years to life is unduly harsh and severe. Under the circumstances of this case, including the fact that defendant was 19 years old at the time of the incident and had only a few convictions for minor drug possession offenses on his record, we modify the judgment as a matter of discretion in the interest of justice by directing that the sentences imposed on both counts run concurrently (*see People v Brewer*, 196 AD3d 1172, 1175 [4th Dept 2021], *lv denied* 35 NY3d 1095 [2021], *cert denied* — US —, 142 S Ct 1684 [2022]; *see generally* CPL 470.15 [6] [b]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

427
CA 21-00879
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, NEMOYER, AND BANNISTER, JJ.

TODD SALANSKY, INDIVIDUALLY AND DERIVATIVELY
ON BEHALF OF BUFFALO FERMENTATION INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY EMPRIC, HEATHER LUCAS AND BUFFALO
FERMENTATION INC., DEFENDANTS-RESPONDENTS.

STAN COHEN, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered December 21, 2020. The order, among other things, granted defendants' motion insofar as it sought partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendants' motion seeking summary judgment dismissing the first cause of action insofar as it alleges breach of the shareholder agreement as asserted by plaintiff, individually, and the third cause of action insofar as it was asserted by plaintiff, individually, reinstating those causes of action to that extent, and granting plaintiff partial summary judgment on the issue of liability on the first cause of action insofar as it alleges breach of the shareholder agreement and on the third cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action individually and derivatively on behalf of Buffalo Fermentation Inc. (BFI), seeking damages for, inter alia, breach of a shareholder agreement. At the time of BFI's incorporation in early 2017, 100 shares of stock were issued, and plaintiff owned 45% while defendants Jeffrey Empric and Heather Lucas owned the remaining 55%. The certificate of incorporation (CI) stated that the total number and value of shares of common stock that BFI shall have the authority to issue is 200 shares with no par value. Plaintiff, Empric, and Lucas also entered into a shareholder agreement in September 2017. In 2019, Empric and Lucas voted to make a capital contribution to BFI in exchange for additional shares of stock and voted to have an accounting firm value the business to determine how many additional shares Empric and Lucas

would receive from their respective capital contributions. As a result of those actions, plaintiff's ownership in BFI decreased from 45% to less than 3%. Plaintiff then commenced this action seeking monetary damages and rescission of the allegedly wrongfully issued shares of stock. Plaintiff's first and third causes of action, brought both individually and derivatively, were for breach of fiduciary duty and breach of the shareholder agreement, respectively, and the second cause of action, brought derivatively only, was for unjust enrichment.

Defendants moved for partial summary judgment seeking, as relevant here, dismissal of the derivative claims, dismissal of the third cause of action, and dismissal of the first cause of action insofar as it is based on the breach of the shareholder agreement. Plaintiff opposed the motion and requested partial summary judgment pursuant to CPLR 3212 (b). Supreme Court granted defendants' motion to the extent described above and denied plaintiff's request for partial summary judgment. We now modify.

Initially, we conclude that plaintiff has abandoned any contention with respect to the propriety of the dismissal of the derivative claims by failing to raise the issue in his brief on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). In any event, plaintiff alleges harm to him personally, not the corporation, and thus the court properly granted defendants' motion insofar as it sought summary judgment dismissing the second cause of action and so much of the first and third causes of action that were brought on a derivative basis (*see Matter of Lazar v Robinson Knife Mfg. Co.*, 262 AD2d 968, 969-970 [4th Dept 1999]; *cf. Davis v Magavern*, 237 AD2d 902, 902 [4th Dept 1997]; *see generally Accredited Aides Plus, Inc. v Program Risk Mgt., Inc.*, 147 AD3d 122, 132 [3d Dept 2017]).

We agree with plaintiff that the court erred in granting those parts of defendants' motion seeking summary judgment dismissing the first cause of action insofar as it alleges breach of the shareholder agreement as asserted by plaintiff, individually, and the third cause of action insofar as it was asserted by plaintiff, individually, and that plaintiff is entitled to partial summary judgment on those causes of action, and we therefore modify the order accordingly. It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Section four of the shareholder agreement provided that the CI "will not be amended or repealed except by written Agreement of all of the Shareholders." In opposition to the motion, plaintiff submitted an amendment to the CI made in September 2020 to increase the number of shares that BFI was authorized to issue from 200 shares to 2,000. The amendment to the CI stated that the amendment was authorized by a vote of a majority of all outstanding shares entitled to vote thereon. Thus, plaintiff established that defendants violated the shareholder agreement by amending the CI without his written approval.

Contrary to defendants' assertion, we conclude that section four of the shareholder agreement does not conflict with Business Corporation Law § 803 (a). That statute provides, inter alia, that a certificate of incorporation may be amended by a simple majority vote of the shares present at a meeting of the shareholders (*see id.*). If the certificate of incorporation itself requires a greater number than a majority vote for an amendment, then that provision cannot be changed except by such greater vote (*see id.*). There was no provision in the CI here that required a vote of all the shareholders in order to amend the CI, and thus it could be amended by a simple majority vote of the shareholders. However, plaintiff alleged that defendants violated the *shareholder agreement* by amending the CI without his approval. Business Corporation Law § 803 (a) does not prohibit parties from entering into a separate agreement that requires unanimity among the shareholders to amend a certificate of incorporation. Inasmuch as there is no conflict between the Business Corporation Law and the shareholder agreement, section 41 of the shareholder agreement, which provides that when there is such a conflict the Business Corporation Law will prevail, is not applicable to the issue.

We have examined plaintiff's remaining contentions and conclude that they do not require further modification or reversal of the order.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

429
OP 22-00326
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JON GRIFFIN, ESQ., ON BEHALF OF LEROY
REYNOLDS, ET AL., PETITIONER,

V MEMORANDUM AND ORDER

TODD BAXTER, MONROE COUNTY SHERIFF, AND
ANTHONY ANNUCCI, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION, RESPONDENTS.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ROCHESTER (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION.

Proceeding pursuant to CPLR article 70 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 7002 [b][2]) seeking a writ of habeas corpus on behalf of 23 individuals.

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

Memorandum: Petitioner commenced this original proceeding pursuant to CPLR 7002 (b) (2) seeking a writ of habeas corpus on behalf of 23 individuals (relators) who were detained before March 1, 2022, due to alleged violations of their release to parole, postrelease supervision, or conditional release. Petitioner contends that the relators are entitled to recognizance hearings, as set forth in the recently amended Executive Law § 259-i (3) (iv), and that no such hearings were held with respect to their detention; therefore, petitioner seeks an order directing respondents to hold such hearings or to release the relators from custody. Assuming, arguendo, that the exception to the mootness doctrine applies to the extent that this proceeding has been rendered moot with respect to certain relators (*see generally People ex rel. McManus v Horn*, 18 NY3d 660, 663-664 [2012]; *People ex rel. Bradley v Baxter*, 203 AD3d 1576, 1576 [4th Dept 2022]; *People ex rel. Doyle v Fischer*, 159 AD2d 208, 208 [1st Dept 1990]), and that the relief sought by petitioner on behalf of each relator is available in this proceeding (*cf. Bradley*, 203 AD3d at

1576; *People ex rel. Gonzalez v Wayne County Sheriff*, 96 AD3d 1698, 1699 [4th Dept 2012], *lv denied* 21 NY3d 852 [2013]; *see generally State of N.Y. ex rel. Harkavy v Consilvio*, 8 NY3d 645, 650-652 [2007]), we conclude that petitioner's contentions lack merit. Consequently, we dismiss the petition.

"In our tripartite form of government, the legislature determines the public policy of this State, recalibrating rights and changing course when it deems such alteration appropriate as it grapples with enduring problems and rises to meet new challenges facing our communities. It is the distinct role of the courts to interpret the laws to give effect to legislative intent while safeguarding the constitutional rights of impacted individuals" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 348 [2020], *rearg denied* 35 NY3d 1079, 1081 [2020]). In interpreting the law, one of the issues confronting the courts has been whether a new or revised statute should be applied retroactively. "A statute has retroactive effect if 'it would impair rights a party possessed when [that party] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,' thus impacting 'substantive' rights" (*id.* at 365). Here, petitioner contends that the recent changes to Executive Law § 259-i (3) (iv) should apply to the relators. The parties correctly agree that those changes took effect on March 1, 2022 (*see* L 2021, ch 427, § 10), that the relators were all taken into custody prior to that date, and that the changes impose new duties upon respondents with respect to hearings; thus, the statute will apply to them only if the statutory changes are applied retroactively.

It is well settled that, although "procedural changes are, in the absence of words of exclusion, deemed applicable to '*subsequent* proceedings in pending actions' . . . , it takes 'a clear expression of the legislative purpose to justify' a retrospective application of even a procedural statute so as to affect proceedings *previously taken* in such actions" (*Simonson v International Bank*, 14 NY2d 281, 289 [1964]; *see Gleason v Gleason*, 26 NY2d 28, 36 [1970]; *People v McFadden*, 189 AD3d 2086, 2087 [4th Dept 2020], *lv denied* 36 NY3d 1099 [2021]). That "assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits" (*Landgraf v USI Film Prods.*, 511 US 244, 272-273 [1994]). Furthermore, an amendment to a statute will generally not be applied retroactively where, as here, it "affects the rights of the parties and 'bestows a new right' " (*People v George*, 199 AD3d 831, 832 [2d Dept 2021], *lv denied* 38 NY3d 927 [2022]), inasmuch as "[e]ven remedial statutes are applied prospectively where they establish new rights" (*State of New York v Daicel Chem. Indus., Ltd.*, 42 AD3d 301, 302 [1st Dept 2007]; *see Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 424 [1st Dept 2010]).

Here, we conclude that there is no clear expression of a legislative intent that the amendments are to be applied retroactively. The amendments unquestionably grant a new right, i.e.,

a releasee who allegedly violates a condition of his or her release is entitled to a recognizance hearing upon being taken into custody. Petitioner does not contend that the procedures taken by respondents did not comport with the then-existing law, and petitioner seeks to undo the actions taken pursuant to those procedures and apply the amendments. In addition, we note that the amendments were part of a law that was enacted in 2021 and signed by the Governor on September 17, 2021 (L 2021, ch 427), but was to take effect on March 1, 2022 (L 2021, ch 427, § 10). "If the amendments were to have retroactive effect, there would have been no need for any postponement" of the effective date of the amendments (*People v Utsey*, 7 NY3d 398, 403-404 [2006]).

Finally, it is well settled that, when interpreting a statute, "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91 [2001]; *see People v Kisina*, 14 NY3d 153, 158 [2010]). Here, the statutory section mandating that the amendments at issue take effect on March 1, 2022, i.e., section 10 of chapter 427 of the laws of 2021, further states that, "within six months of such effective date, the department of corrections and community supervision in consultation with the board of parole shall calculate and award all earned time credits pursuant to subdivision 4 of section 70.40 of the penal law as added by section two of this act to all persons serving a sentence subject to community supervision at the time this legislation becomes law retroactive to the initial date such person began his or her earliest period of community supervision prior to any revocation of community supervision." Thus, where the "[l]egislature intended to [make the amendments retroactive], it unequivocally did so, leading inexorably to the conclusion that it did not intend that" the remaining parts of the same statutory section be applied retroactively (*People v Hill*, 82 AD3d 77, 80 [4th Dept 2011]). We therefore conclude that petitioner's " 'suggested interpretation is wholly at odds with the wording of the statute and would require us to rewrite the statute. This we cannot do' " (*id.*, quoting *People v Smith*, 63 NY2d 41, 79 [1984], *cert denied* 469 US 1227 [1985], *reh denied* 471 US 1049 [1985]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

435

KA 19-01122

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES L. LEWIS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered May 9, 2019. 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 affirmed.

Memorandum: Defendant, a transgender female, appeals from a judgment convicting her upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant contends, and the dissent agrees, that the conviction is not supported by legally sufficient evidence because a rational jury could not have found from the trial evidence that defendant acted as an accomplice by intentionally aiding her friend in possessing cocaine with the intent to sell it. We reject that contention.

"A verdict is legally sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]; *see People v Kancharla*, 23 NY3d 294, 302 [2014]). "A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained [their] burden of proof" (*Danielson*, 9 NY3d at 349; *see Kancharla*, 23 NY3d at 302). In conducting a sufficiency inquiry, "[w]e must assume that the jury credited the People's witnesses and gave the prosecution's evidence the full weight it might reasonably be accorded" (*People v Hampton*, 21 NY3d 277, 288 [2013]; *see People v Gordon*, 23 NY3d 643, 649 [2014]). Moreover, we must "tak[e] into account all of the evidence the jury

considered in reaching [its] verdict, including proof adduced by the defense" (*People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *see People v Santi*, 3 NY3d 234, 247 [2004]; *People v Bridges*, 294 AD2d 913, 914 [4th Dept 2002]).

As relevant to this case, "[a] person is guilty of criminal possession of a controlled substance in the third degree when [she] knowingly and unlawfully possesses . . . a narcotic drug with intent to sell it" (Penal Law § 220.16 [1]). Moreover, "Penal Law § 20.00 provides that when a principal commits a crime, the principal's accomplice may be held liable where the accomplice 'acting with the mental culpability required for the commission [of the crime] . . . solicits, requests, commands, importunes, or intentionally aids [the principal] to engage in [the commission of the crime]' " (*People v Scott*, 25 NY3d 1107, 1109-1110 [2015]). It is thus well established that, "[e]ven though a defendant may not have physical possession of the drugs, evidence that [she] was an accomplice to a coperpetrator who did have possession of the drugs is legally sufficient to uphold a conviction of criminal possession of a controlled substance" (*People v Dean*, 200 AD2d 582, 582-583 [2d Dept 1994], *lv denied* 83 NY2d 871 [1994]; *see People v Moreno*, 58 AD3d 516, 517 [1st Dept 2009], *lv denied* 12 NY3d 819 [2009]; *People v Cortes*, 112 AD2d 946, 946-947 [2d Dept 1985]). In this case, "[t]o establish defendant's guilt as an accessory, the People were required to prove that defendant had a shared intent, or community of purpose with the principal [actor]" (*People v Nelson*, 178 AD3d 1395, 1396 [4th Dept 2019], *lv denied* 35 NY3d 972 [2020] [internal quotation marks omitted]; *see People v Cabey*, 85 NY2d 417, 421 [1995]; *People v Carpenter*, 138 AD3d 1130, 1131 [2d Dept 2016], *lv denied* 28 NY3d 928 [2016]), and that she "intentionally aided the principal in bringing forth [the] result" (*People v Kaplan*, 76 NY2d 140, 146 [1990] [emphasis omitted]; *see Nelson*, 178 AD3d at 1396; *see generally People v Bello*, 92 NY2d 523, 526 [1998]).

Here, the evidence and the reasonable inferences drawn therefrom establish that, two days before her arrest, defendant agreed that, in exchange for compensation, she would either drive or otherwise accompany the friend to complete a sale of cocaine. According to defendant's testimony, the friend indicated that she wanted defendant to accompany her because they were friends and she did not want to be alone with the two people involved in the proposed drug transaction, i.e., the drug dealer and the ostensible buyer. In order for the friend to carry out the proposed drug transaction with the requested assistance of defendant, the friend first needed to possess the cocaine, and defendant began taking overt action to uphold her commitment by traveling with the friend to a different city and staying in a hotel where, on the day after the first night of their stay, the drug dealer arrived and provided the friend with the cocaine that was to be sold to the ostensible buyer. The next day, defendant, still acting pursuant to her commitment with the expectation of receiving payment for her service, accompanied the friend—who defendant knew possessed the cocaine—to a fast food restaurant for the ultimate purpose of completing the sale. The ostensible buyer had, however, acted as an informant by reporting to the police that

defendant and the friend were in possession of cocaine at the fast food restaurant. The police responded to the scene, the friend turned over her purse in which the cocaine was located, and the police seized the cocaine and took the friend and defendant into custody. Given the abovementioned evidence, we conclude that "the jury rationally could have concluded both that defendant had acted with the mental state necessary for the crime of criminal possession of a controlled substance in the [third] degree and that defendant 'intentionally aid[ed] [the friend] to engage in . . . conduct' . . . constituting that offense" (*Moreno*, 58 AD3d at 517; *see Cortes*, 112 AD2d at 946-947; *see also Dean*, 200 AD2d at 582-583).

We also reject defendant's contention that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *see generally People v Stumbo*, 155 AD3d 1604, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]).

Defendant's further contention that the reason that the prosecutor gave for striking a prospective juror in response to her *Batson* challenge was pretextual is not preserved for our review inasmuch as defendant " 'failed to articulate . . . any reason why [she] believed that the prosecutor's explanation[] w[as] pretextual' " (*People v Massey*, 173 AD3d 1801, 1802 [4th Dept 2019]; *see People v Smocum*, 99 NY2d 418, 423-424 [2003]). 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]).

We reject defendant's contention that County Court, in determining the sentence to be imposed, penalized her for asserting her right to a trial. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that [the] defendant was punished for asserting his [or her] right to trial" (*People v Tetro*, 181 AD3d 1286, 1290 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020] [internal quotation marks omitted]) and, here, "there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*id.* [internal quotation marks omitted]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. Finally, inasmuch as the sentencing proceeding and the sentence reflect defendant's status as a second felony drug offender (Penal Law § 70.70 [1] [b]), and the record thus confirms that the court merely misstated during sentencing that defendant was a second felony offender rather than a second felony drug offender, we note that the amended certificate of conviction and uniform sentence and commitment form must be corrected to reflect that defendant was sentenced as a second felony drug offender (*see People v Bradley*, 196 AD3d 1168, 1170-1171 [4th Dept 2021]).

All concur except WHALEN, P.J., and BANNISTER, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. We conclude that the evidence is legally insufficient to support a finding that defendant, based on accessorial liability, was guilty of the crime of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). To establish accessorial liability, the People were required to prove beyond a reasonable doubt that defendant acted with the mental culpability necessary to commit the crime charged and that, in furtherance thereof, she "solicited, requested, commanded, importuned or intentionally aided [her friend] in the commission of the crime" (*People v Maldonado*, 189 AD3d 2083, 2084 [4th Dept 2020], *lv denied* 36 NY3d 1098 [2021]; *see* § 20.00). Notably, a defendant's "mere presence at the scene of a crime, even with knowledge that the crime is taking place, or mere association with a perpetrator of a crime, is not enough for accessorial liability" (*People v Lopez*, 137 AD3d 1166, 1167 [2d Dept 2016] [internal quotation marks omitted]; *see People v McDonald*, 172 AD3d 1900, 1902 [4th Dept 2019]).

Here, the People's theory at trial was that defendant intentionally aided her friend's possession of drugs by agreeing to drive her friend to another city where the friend would engage in the sale of such drugs, and that defendant would return by bus. However, the evidence in this case, when considered in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), established that defendant merely accompanied her friend. The majority relies on evidence presented by the People consisting of a brief statement that defendant made to the police in which defendant said that she was "supposed" to drive her friend in exchange for money, and brief jail calls in which defendant made similar remarks. While that evidence tends to establish that defendant had the necessary mental culpability, "the statute includes an actus reus component as well: the accomplice must have intentionally aided the principal in bringing forth a result" (*People v Carpenter*, 138 AD3d 1130, 1131 [2d Dept 2016], *lv denied* 28 NY3d 928 [2016] [internal quotation marks omitted]; *see People v Kaplan*, 76 NY2d 140, 146 [1990]). Here, there was no evidence presented at trial, circumstantial or otherwise, that defendant actually drove her friend to any location. We reject the conclusion of the majority that defendant's purported provision of, in essence, moral support to her friend constitutes an overt action by which she intentionally aided her friend (*see Kaplan*, 76 NY2d at 146). Furthermore, contrary to the People's assertion, there was no evidence establishing that defendant acted as a bodyguard (*cf. People v Cortes*, 112 AD2d 946, 946-947 [2d Dept 1985]). Therefore, inasmuch as there is legally insufficient evidence to establish the possession element of the crime as charged, we would reverse the judgment and dismiss the indictment (*see generally People v Williams*, 162 AD3d 1544, 1545 [4th Dept 2018]). In light of our determination, it is not necessary to address defendant's

remaining contentions.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

444

CA 21-00983

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

ELEANOR STANLEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MICHAEL STANLEY, DECEASED, CHLOE STANLEY, BY AND THROUGH HER PARENT AND NATURAL GUARDIAN, ELEANOR STANELY, AND AMANDA STANLEY, PLAINTIFFS-APPELLANTS,

V   MEMORANDUM AND ORDER

THOMAS KELLY, JILLIAN KELLY, DEFENDANTS-RESPONDENTS, AND BOONVILLE HOTEL, INC., DEFENDANT-RESPONDENT-APPELLANT.

LAW OFFICE OF ROBERT F. DANZI, JERICHO (CHRISTINE COSCIA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DETRAGLIA LAW OFFICE, UTICA (MICHELE E. DETRAGLIA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

BURKE, SCOLAMIERO & HURD, LLP, ALBANY (STEVEN V. DEBRACCIO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered July 7, 2021. The order granted the motions of defendants for summary judgment and dismissed plaintiffs' complaint and the cross claim of defendant Boonville Hotel, Inc.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order is affirmed without costs.

Memorandum: Decedent died after he drove a snowmobile—lent to him by defendant Thomas Kelly (Kelly)—into the side of an overpass located adjacent to a trail on which he and his companions had been traveling. Shortly before the accident, decedent and his companions, including Kelly, spent several hours at defendant Boonville Hotel, Inc. (Hotel), where they purchased food and drinks. Decedent's autopsy revealed that his blood alcohol content (BAC) was .16%, and it was subsequently determined that his intoxication was a cause of the accident. Plaintiffs—decedent's wife and daughters—commenced this action asserting a cause of action for negligent entrustment against Kelly and his wife, defendant Jillian Kelly (collectively, Kelly defendants), alleging that they knew or should have known about

decedent's intoxication, which rendered him unfit to properly operate the snowmobile that Kelly lent him. Plaintiffs also asserted a cause of action against the Hotel for violation of the Dram Shop Act, alleging that the Hotel had sold alcoholic beverages to decedent despite his visible intoxication. In its verified answer, the Hotel asserted, inter alia, a cross claim against the Kelly defendants for indemnification and contribution. Plaintiffs appeal from that part of an order that granted defendants' respective motions for summary judgment dismissing the complaint, and the Hotel cross-appeals from that part of the order that dismissed its cross claim for indemnification and contribution.

With respect to plaintiffs' appeal, we note, initially, that plaintiffs have abandoned their claims against Kelly's wife, inasmuch as they do not challenge on appeal Supreme Court's dismissal of the negligent entrustment cause of action with respect to her (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We also note that because "an intoxicated person should not generally be permitted to benefit from his or her own intoxication" (*Shultes v Carr*, 127 AD2d 916, 917 [3d Dept 1987]; *see also Parslow v Leake*, 117 AD3d 55, 66 [4th Dept 2014]; *Dodge v Victory Mkts.*, 199 AD2d 917, 919 [3d Dept 1993]), courts have held that the intoxicated driver of a car, or one suing on his or her behalf, may not recover on a theory of negligent entrustment (*see Shultes*, 127 AD2d at 917; *see also Luczak v Town of Colonie*, 233 AD2d 691, 692 [3d Dept 1996]; 1A NY PJI3d 2:28 at 351 [2022]). Here, there is no dispute that decedent was intoxicated at the time of the accident and, therefore, we conclude that plaintiffs are precluded from asserting a negligent entrustment cause of action against Kelly for lending the snowmobile to the intoxicated decedent (*see Shultes*, 127 AD2d at 917).

Even assuming, arguendo, that decedent's voluntary intoxication does not preclude plaintiffs from asserting a negligent entrustment cause of action against Kelly, we conclude that the court properly dismissed that cause of action against him on the merits. On a negligent entrustment cause of action, " '[t]he owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others' " (*Graham v Jones*, 147 AD3d 1369, 1371 [4th Dept 2017], quoting *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 236 [2001]). To that end, " '[t]he tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion' " (*Graham*, 147 AD3d at 1371, quoting *Hamilton*, 96 NY2d at 237; *see Monette v Trummer*, 105 AD3d 1328, 1330 [4th Dept 2013], *affd* 22 NY3d 944 [2013]; *Splawnik v Di Caprio*, 146 AD2d 333, 335 [3d Dept 1989]).

We conclude that the Kelly defendants met their initial burden on the motion with respect to Kelly by establishing that he lacked any "special knowledge" of decedent's intoxication—i.e., the purported "condition peculiar to [decedent] that render[ed] [his] use of [the snowmobile] unreasonably dangerous" (*Monette*, 105 AD3d at 1330).

Regardless of whether decedent was too intoxicated to operate the snowmobile safely, the Kelly defendants submitted in support of their motion deposition testimony from eyewitnesses—decedent's companions and members of the Hotel's staff—who saw decedent at the Hotel before the fatal accident, and who all consistently testified that decedent did not appear to be visibly intoxicated, impaired or otherwise incompetent to operate the snowmobile (*cf. generally Calagiovanni v Carello*, 177 AD3d 1286, 1286-1287 [4th Dept 2019]). Further, the Kelly defendants submitted deposition testimony from a police officer who responded to the accident, who corroborated the accounts of the other witnesses by testifying that none of decedent's companions appeared to be intoxicated after the accident.

With respect to plaintiffs' opposition to the Kelly defendants' motion, even fully crediting the conclusion in the report from plaintiffs' expert toxicologist and the autopsy report that decedent's BAC was .16%, we note that "[p]roof of a high [BAC] alone . . . generally does not establish" that a person actually appeared visibly intoxicated and, therefore, "a high [BAC] in the person served may not provide a sound basis for drawing inferences about the individual's appearance or demeanor" (*Romano v Stanley*, 90 NY2d 444, 450-451 [1997]; *see McGilveary v Baron*, 4 AD3d 844, 845 [4th Dept 2004]). Consequently, in light of the unanimous deposition testimony reflecting that no one observed that decedent was visibly intoxicated at the Hotel before the accident, we conclude that plaintiffs' submissions in opposition did not raise a triable issue of material fact with respect to whether Kelly knew or should have known about decedent's intoxication before he allowed him to use the snowmobile (*cf. Calagiovanni*, 177 AD3d at 1286-1287).

Plaintiffs also contend that the court erred in granting the Hotel's motion for summary judgment. The Hotel satisfied its initial burden on its motion by submitting deposition testimony from the same witnesses relied on by the Kelly defendants in support of their motion, all of whom testified that they did not observe decedent and the members of his group to be visibly intoxicated while at the Hotel shortly before the accident (*cf. id.*). We note that the record is insufficient to determine whether plaintiffs raised an issue of fact in opposition to the Hotel's motion inasmuch as plaintiffs failed to include their opposition papers to that motion in the record (*see* CPLR 5526; *Matter of Hoge [Select Fabricators, Inc.]*, 96 AD3d 1398, 1399 [4th Dept 2012]; *Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). Plaintiffs, "as the appellant[s], . . . must suffer the consequences of submitting an incomplete record" (*Mohamed v Abuhamra*, — AD3d —, —, 2022 NY Slip Op 04448, *2 [4th Dept 2022] [internal quotation marks omitted]; *see Cherry v Cherry*, 34 AD3d 1186, 1186 [4th Dept 2006]). In any event, even assuming, arguendo, that the expert affidavit submitted by plaintiffs in opposition to *the Kelly defendants'* motion constitutes a sufficient record upon which we may review plaintiffs' opposition to *the Hotel's* motion (*see generally DiMarco v Bombard*, 66 AD3d 1344, 1344 [4th Dept 2009], *amended on rearg* 67 AD3d 1459 [4th Dept 2009]), we reject plaintiffs' contention that the expert affidavit raised a triable issue of fact with respect thereto.

The affidavit from plaintiffs' expert about the level of decedent's intoxication is insufficient to raise a question of fact in opposition to the Hotel's motion because, as discussed above with respect to the negligent entrustment cause of action, "[p]roof of a high [BAC] alone . . . generally does not establish" that a person actually appeared intoxicated (*Romano*, 90 NY2d at 450). Plaintiffs' expert opined merely that decedent's BAC was .16% and that he was in the "excitement" stage of alcohol influence. Even if plaintiffs' expert had opined that decedent, based on his BAC, would have shown signs of visible intoxication at the Hotel, that would still be insufficient to raise a triable issue of fact in light of the otherwise consistent eyewitness testimony establishing that decedent did not appear to be visibly intoxicated at the Hotel (*see id.* at 451-452; *Kelly v Fleet Bank*, 271 AD2d 654, 655 [2d Dept 2000], *lv denied* 96 NY2d 702 [2001]; *Sorenson v Denny Nash, Inc.*, 249 AD2d 745, 747-748 [3d Dept 1998]).

In light of our determination, we dismiss the Hotel's cross appeal as moot.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

447

CA 21-00896

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

ANTOINETTE N. CARLSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CAROL L. MANNING, AND DOUGLAS M. NICHOLS,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF JOHN WALLACE, ROCHESTER (JORDYN MARIE PHILLIPS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO LAW LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered May 28, 2021. The order denied the motion of defendants for summary judgment and granted in part the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that plaintiff sustained a serious injury to her cervical spine under the significant limitation of use and permanent consequential limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d), and that plaintiff sustained a serious injury to her left shoulder, and dismissing the claim for economic loss in excess of basic economic loss, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when her vehicle was struck, while making a left turn at an intersection, by a vehicle driven by defendant Douglas M. Nichols and owned by Nichols's mother, defendant Carol L. Manning. Insofar as relevant here, plaintiff alleged that, as a result of the motor vehicle accident, she sustained serious injuries within the meaning of Insurance Law § 5102 (d) under the significant disfigurement, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories based on injuries to her right foot, cervical spine, lumbar spine, and left shoulder. Defendants moved for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury to her cervical spine as contemplated by section 5102 (d), and that any injuries to her left shoulder, right foot, and lumbar spine were related to preexisting conditions. Plaintiff cross-moved for

summary judgment on the issue of, inter alia, negligence. Defendants now appeal from an order that, among other things, denied their motion and granted that part of plaintiff's cross motion seeking summary judgment on the issue of negligence.

We conclude at the outset that, contrary to defendants' contention, Supreme Court did not abuse its discretion in allowing plaintiff to make her cross motion after expiration of both the 120-day period after the filing of the note of issue and a subsequent deadline allegedly imposed by the court (*see* CPLR 3212 [a]). There is no order in the record demonstrating that the subsequent deadline was imposed, defendants established no prejudice from the delay (*see Chambers v City of New York*, 147 AD3d 471, 472 [1st Dept 2017]), the cross motion was timely within the meaning of CPLR 2215, and the record supports the court's conclusion that plaintiff's delay was attributable to the parties' good faith participation in settlement negotiations (*see generally Brill v City of New York*, 2 NY3d 648, 652 [2004]; *Cibener v City of New York*, 268 AD2d 334, 334 [1st Dept 2000]). Furthermore, even assuming, arguendo, that the cross motion was untimely, it is well settled that "[a]n untimely . . . cross motion for summary judgment may be considered by the court where[, as here,] a timely motion was made on nearly identical grounds" (*Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]; *see Brill & Meisel v Brown*, 113 AD3d 435, 435 [1st Dept 2014]).

Defendants initially contend that the court erred in refusing to consider the affirmations of two medical experts submitted in support of the motion, in which the experts relied upon, inter alia, unsworn medical reports. We agree with defendants insofar as their contention concerns the affirmation of the expert who made the first evaluation (first expert), and insofar as it concerns the initial affirmation of the expert who made the second evaluation (second expert). The reports relied upon in those affirmations were attached to defendants' moving papers and, "[a]lthough '[those] reports were unsworn, the . . . medical opinion[s] relying on those . . . reports [are] sworn and thus competent evidence' " (*Harris v Carella*, 42 AD3d 915, 916 [4th Dept 2007], quoting *Brown v Dunlap*, 4 NY3d 566, 577 n 5 [2005]). Furthermore, the court erred to the extent that it rejected the affirmation of the first expert on the ground that a CT scan upon which that expert relied was not attached. It is well settled that the opinion of a medical expert is admissible insofar as it is supported by facts in the record or the expert's personal knowledge (*see generally Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984]; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959], *rearg denied* 6 NY2d 882 [1959]; *Sample v Yokel*, 94 AD3d 1413, 1414 [4th Dept 2012]). Here, the affirmation from the first expert established that, in addition to his review of the CT scan, he relied upon medical records that were attached and upon his interpretation of other radiological studies (*see e.g. Arias v Janelle Car Serv. Corp.*, 72 AD3d 848, 849 [2d Dept 2010]; *Cariddi v Hassan*, 45 AD3d 516, 517 [2d Dept 2007]).

Nevertheless, the court properly concluded that the addendum affirmation of defendants' second expert should not be considered. In that addendum, the second expert opined that, because the CT scan

reviewed by the first expert established that plaintiff had a preexisting herniated disc at L4-L5, she did not sustain an injury to her lumbar spine as a result of the subject accident. However, that opinion was based only on the first expert's opinion and on a radiologist's report that defendants did not attach to their motion papers. Thus, that opinion was properly rejected by the court because it was "not based on facts personally known to the [second] expert[]" (*Ritts v Gowanda Rehabilitation & Nursing Ctr.*, 201 AD3d 1341, 1342 [4th Dept 2022]).

Based on our review of the experts' admissible affirmations, we conclude that the court properly denied the motion insofar as it sought summary judgment with respect to the alleged injuries to plaintiff's lumbar spine and foot under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. The second expert opined in his initial affirmation that, as a result of the accident, plaintiff sustained a serious injury to her lumbar spine within the meaning of those categories, and thus defendants "failed to establish, prima facie, that . . . plaintiff's alleged [lumbar spine injury] was unrelated to the subject accident" (*Cariddi*, 45 AD3d at 517). In addition, neither of defendants' experts opined that plaintiff did not sustain a foot injury as the result of this accident. Because defendants failed to meet their initial burden on those parts of the motion, the burden never shifted to plaintiff, and denial of the motion in those respects "was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

We reach a different result with respect to the claims of serious injury to plaintiff's left shoulder. In support of the part of their motion seeking summary judgment dismissing those claims, defendants submitted the admissible opinions of both experts that plaintiff had sustained prior left shoulder injuries that caused the symptoms at issue, and we conclude that those opinions constituted " 'persuasive evidence that plaintiff's alleged pain and injur[y was] related to a preexisting condition' " (*Kwitek v Seier*, 105 AD3d 1419, 1420 [4th Dept 2013], quoting *Carrasco v Mendez*, 4 NY3d 566, 580 [2005]). In opposition to the motion, plaintiff submitted an affirmation from a physician who performed an independent medical examination of her for no-fault insurance purposes, and an affidavit from her treating physician. Those documents did not address the opinion that the shoulder injury was a preexisting condition, however, and thus they did not adequately address how plaintiff's alleged injuries, "in light of [plaintiff's] past medical history, are causally related to the subject accident" (*D'Angelo v Litterer*, 87 AD3d 1357, 1358 [4th Dept 2013] [internal quotation marks omitted]). Those opinions were therefore insufficient to raise a triable issue of fact, and thus we modify the order accordingly (*see Edwards v Devine*, 111 AD3d 1370, 1371-1372 [4th Dept 2013]).

Furthermore, "by submitting evidence that plaintiff sustained only a temporary cervical strain, rather than any significant injury

to [her cervical] nervous system or spine, as a result of the accident" (*Williams v Jones*, 139 AD3d 1346, 1347 [4th Dept 2016]), defendants met their initial burden on the motion with respect to the claims of serious injury under the permanent consequential limitation of use and significant limitation of use categories insofar as those claims were based on that alleged injury (*see Paternosh v Wood*, 151 AD3d 1733, 1734 [4th Dept 2017]; *Bleier v Mulvey*, 126 AD3d 1323, 1324 [4th Dept 2015]). Plaintiff failed to raise a triable issue of fact in opposition in that respect, and therefore we further modify the order accordingly.

Contrary to defendants' additional contention, however, the court properly denied the motion with respect to the claim of a serious injury under the 90/180-day category insofar as it is based on that alleged cervical injury. Defendants conceded that plaintiff sustained a cervical strain as the result of the accident and, in support of their motion, they "failed to establish as a matter of law that plaintiff was not curtailed from performing [her] usual activities to a great extent rather than some slight curtailment during the time period at issue" (*Williams*, 139 AD3d at 1347-1348 [internal quotation marks omitted]; *see Cook v Peterson*, 137 AD3d 1594, 1598-1599 [4th Dept 2016]). Thus, defendants failed to meet their initial burden on that part of the motion.

We agree with defendants, however, that the court erred in denying their motion insofar as it sought summary judgment dismissing the claim for economic loss in excess of basic economic loss. Plaintiff's admission in her bill of particulars that her economic loss did not exceed that threshold is sufficient to meet defendants' burden on the motion (*see e.g. McKnight v LaValle*, 147 AD2d 902, 903 [4th Dept 1989], *lv denied* 74 NY2d 605 [1989]; *see also Fernandez v Hernandez*, 151 AD3d 581, 582 [1st Dept 2017]), and plaintiff failed to raise a triable issue of fact. Therefore, we further modify the order accordingly.

We reject defendants' further contention that the court erred in granting the part of plaintiff's cross motion seeking summary judgment on the issue of negligence. Plaintiff established as a matter of law that Nichols violated Vehicle and Traffic Law § 1110 (a) by inexcusably disobeying a traffic-control device and driving directly into plaintiff's vehicle (*see Peterson v Ward*, 156 AD3d 1438, 1439 [4th Dept 2017]; *Amerman v Reeves*, 148 AD3d 1632, 1633 [4th Dept 2017]; *Redd v Juarbe*, 124 AD3d 1274, 1275 [4th Dept 2015]), and defendants failed to raise a triable issue of fact in opposition. Defendants' reliance upon deposition testimony from Manning about a hearsay statement that Nichols allegedly made to her, which directly contradicted Nichols's deposition testimony, " 'clearly constituted an attempt to avoid the consequences of [his] prior deposition testimony by raising feigned issues of fact, and was [thus] insufficient to avoid summary judgment' " (*Martin v Savage*, 299 AD2d 903, 904 [4th Dept 2002]; *see Chrisman v Syracuse Soma Project, LLC*, 192 AD3d 1594, 1596 [4th Dept 2021]; *Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1579 [4th Dept 2016]).

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

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

448
CA 21-00496
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

LORI J. OLIVIERI, PLAINTIFF,

V MEMORANDUM AND ORDER

BARNES & NOBLE, INC., ET AL., DEFENDANTS.

BARNES & NOBLE, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

NATIONAL JANITORIAL SOLUTIONS INCORPORATED,
THIRD-PARTY DEFENDANT-APPELLANT,
ET AL., THIRD-PARTY DEFENDANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

GOLDBERG SEGALLA, LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 11, 2021. The order granted in part the motion of defendant-third-party plaintiff for partial summary judgment in the third-party action and denied the cross motion of third-party defendant National Janitorial Solutions Incorporated for summary judgment dismissing the third-party complaint and all cross claims against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the cross motion seeking summary judgment dismissing the first cause of action, the third cause of action insofar as it is based on the alleged failure to procure insurance, the fifth cause of action, and all cross claims against third-party defendant National Janitorial Solutions Incorporated, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced the underlying negligence action against defendant-third-party plaintiff, Barnes & Noble, Inc. (BN), seeking to recover damages for injuries she allegedly sustained as a result of a slip and fall at one of BN’s stores. BN subsequently commenced this third-party action against, among others, third-party defendant National Janitorial Solutions Incorporated (NJS), alleging that NJS had agreed to provide janitorial services at the subject

store, that the agreement between BN and NJS contained an indemnification provision, and that NJS had subcontracted with others who had performed janitorial services on the premises where plaintiff allegedly fell on the date of the accident. BN asserted causes of action for common-law and contractual indemnification against NJS and third-party defendant subcontractors and for breach of contract against NJS. NJS now appeals from an order that, in effect, granted in part BN's motion for summary judgment on its cause of action seeking contractual indemnification from NJS, subject to an inquest on damages, and denied NJS's cross motion for summary judgment dismissing the third-party complaint and all cross claims against it.

In a prior order in the underlying action, Supreme Court determined that plaintiff could not establish that the floor in BN's store was negligently maintained, which order was later affirmed by this Court (*Olivieri v Barnes & Noble, Inc.*, 203 AD3d 1589, 1589-1590 [4th Dept 2022], *affg* — Misc 3d —, 2020 NY Slip Op 34752[U] [Sup Ct, Erie County 2021]). On that basis, NJS contends that the court should have denied BN's motion for summary judgment on its cause of action for contractual indemnification from NJS and granted NJS's cross motion for summary judgment dismissing that cause of action because, contrary to BN's assertion and the court's determination, the contractual indemnification provision of the agreement is not triggered by the mere assertion of a claim but, instead, requires a finding of an actual breach of the agreement by NJS. In NJS's view, because no breach of the agreement can be found, the indemnification provision can never be triggered in this case, and BN's contractual indemnification cause of action against NJS should be dismissed on that basis. We reject NJS's contention. Instead, we conclude that BN established its entitlement to summary judgment on its cause of action for contractual indemnification from NJS insofar as it is based on plaintiff's claim or action, that NJS failed to raise a triable issue of fact in opposition thereto, and that NJS failed to meet its burden on its cross motion insofar as it sought summary judgment dismissing the contractual indemnification cause of action against NJS to that extent (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"[I]t is elementary that the right to contractual indemnification depends upon the specific language of the contract" (*Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939 [4th Dept 1995]; *see Miller v Rerob, LLC*, 197 AD3d 979, 981 [4th Dept 2021]). "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances' " (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). Consequently, "[a] contract that provides for indemnification will be enforced as long as the intent to assume such a role is 'sufficiently clear and unambiguous' " (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007]).

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading

into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). Thus, "[t]he language of an indemnity provision should be construed so as to encompass only that loss and damage which reasonably appear to have been within the intent of the parties" (*Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.*, 107 AD2d 450, 453 [4th Dept 1985], *affd for reasons stated* 65 NY2d 1038 [1985]). At the same time, however, "[a] court must also be careful not to interpret a contracted indemnification provision in a manner that would render it meaningless" (*Bradley*, 8 NY3d at 274). In accordance with that principle, "[e]ffect and meaning must be given to every term of the contract . . . , and reasonable effort must be made to harmonize all of its terms" (*Corter-Longwell v Juliano*, 200 AD3d 1578, 1583 [4th Dept 2021] [internal quotation marks omitted]). Critical to the issue on appeal, when all the terms of a contractual indemnification provision are given effect and meaning, the language may establish that indemnification is required even in the absence of a finding of negligence or fault on the part of the indemnitor (*see e.g. Bradley*, 8 NY3d at 275; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *see generally Margolin*, 32 NY2d at 153).

Here, in pertinent part, the indemnification provision provided that NJS would "indemnify and hold harmless" BN "against any and all claims, actions, demands, liabilities, losses, damages, judgments, settlements, costs and expenses (including reasonable attorneys' fees and expenses) brought about by any person" insofar as such aforementioned items "arise out of or are based on," inter alia, NJS's "breach of th[e] [a]greement" or of any of the warranties NJS made therein. Construing the language in the appropriate manner, we conclude that "[t]he agreement does not condition the indemnification of [BN] upon a finding that [NJS] was negligent or at fault" (*Tanksley v LCO Bldg. LLC*, 196 AD3d 1037, 1038 [4th Dept 2021]; *see Bradley*, 8 NY3d at 275). Instead, "[t]his is a clear and unambiguous indemnity provision that does not, despite [NJS's] argument to the contrary, require a finding of 'active negligence' or fault on the part of [NJS]" (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 88 [1st Dept 2018]).

More particularly, we agree with BN that NJS's obligation to indemnify BN against all "claims" and "actions" that "arise out of" NJS's breach of the agreement or of the warranties therein does not require a finding of an actual breach. As a general matter, the phrase "arising out of" has been interpreted by the Court of Appeals to mean "originating from, incident to, or having connection with" (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008] [internal quotation marks omitted]). Here, plaintiff's action has a connection with the agreement and the claimed breach thereof by NJS inasmuch as NJS represented and warranted in the agreement, among other things, that "all services w[ould] be performed in a competent and professional manner." Plaintiff alleged in her action that the floor—which was ultimately NJS's responsibility under the agreement—was not kept in a reasonably safe condition and, in fact, was in a defective, waxy, and slippery state. Thus, plaintiff's

action originates from, is incident to, or has connection with a claimed breach of NJS's obligations under the agreement. Inasmuch as NJS—using "broad and all-inclusive language" (*Margolin*, 32 NY2d at 154)—agreed to indemnify BN against all *claims* or *actions* arising out of such a breach, we conclude that "the unambiguous intent of the clause was . . . to provide for indemnification even though [NJS] was not negligent" (*ZRAJ Olean, LLC v Erie Ins. Co. of N.Y.*, 134 AD3d 1557, 1560 [4th Dept 2015], *lv denied* 29 NY3d 915 [2017]).

Similarly, NJS's obligation to indemnify BN against any "claims" insofar as such a claim is "based on" NJS's breach of the agreement or the warranties therein likewise does not require a finding of fault (*see Bradley*, 8 NY3d at 275). Pursuant to that language, there is no requirement in the indemnification provision that the claim successfully establish an actual breach, i.e., failure of NJS to maintain the floor competently and professionally, and, therefore, NJS's obligation is triggered regardless of whether fault can actually be established in the underlying action (*see id.*).

The indemnification provisions in the cases relied upon by NJS contain different language, and we conclude that those cases are distinguishable or otherwise inapposite (*cf. JPMorgan Chase Bank, N.A. v Luxor Capital, LLC*, 101 AD3d 575, 575-576 [1st Dept 2012]; *DiStefano v Kmart Corp. Intl.*, 89 AD3d 459, 459 [1st Dept 2011], *lv denied* 19 NY3d 802 [2012]; *Steuhl v Home Therapy Equip., Inc.*, 51 AD3d 1101, 1105 [3d Dept 2008]; *Newman v Town of York*, 140 AD2d 936, 937 [4th Dept 1988], *lv dismissed* 72 NY2d 952 [1988]). In sum, the indemnification provision here "expresse[s] an unmistakable intent that [NJS] indemnify [BN], regardless of whether either party is at fault or is found liable" (*Gregware v City of New York*, 132 AD3d 51, 64 [1st Dept 2015]; *see e.g. Bradley*, 8 NY3d at 274-275; *Brown*, 76 NY2d at 178; *Tanksley*, 196 AD3d at 1038; *ZRAJ Olean, LLC*, 134 AD3d at 1560).

NJS nonetheless contends that, even if BN is correct that a mere claim triggers the indemnification provision, plaintiff's "bare bones" allegations in this case were insufficient to trigger NJS's indemnity obligations. We reject that contention as well.

Plaintiff's complaint alleged that she was on the premises of the subject store when she fell and sustained personal injuries, and that such injuries were caused by the negligence of, among others, BN and its agents, in failing to maintain the premises in a reasonably safe condition and in creating a hazardous condition. To the extent that those allegations alone may not be sufficient to trigger NJS's indemnity obligation, notwithstanding that it was responsible for the maintenance of much of the store premises, we note that NJS's exclusive focus on those allegations is misplaced because, beyond a complaint, "a bill of particulars amplifies a pleading by setting forth in greater detail the nature of the allegations and what the party making them intends to prove" (*Northway Eng'g v Felix Indus.*, 77 NY2d 332, 336 [1991]). Here, plaintiff's allegations, as amplified by her bills of particulars, clearly brought the claim within the indemnification provision inasmuch as plaintiff alleged that her

injuries arose from the creation of a defective, waxy, and slippery condition on the floor—which NJS knew it was responsible for maintaining pursuant to the agreement—that was allowed to remain for an unreasonable length of time.

Next, with respect to BN's theory that it is entitled to contractual indemnification on the separate ground that NJS breached an obligation under the agreement to procure, or have its subcontractors procure, general liability insurance naming BN as an additional insured, NJS contends that the court should have granted its cross motion insofar as it sought summary judgment dismissing that claim as well as the cause of action for breach of contract against NJS. We agree with NJS, and we therefore modify the order accordingly.

Preliminarily, we note that the court "did not address that part of the motion for summary judgment" on the contractual indemnification cause of action insofar as it is based on NJS's alleged failure to procure, or have its subcontractors procure, proper insurance, and "the failure to rule on that part of the motion is deemed a denial thereof" (*Utility Servs. Contr., Inc. v Monroe County Water Auth.*, 90 AD3d 1661, 1662 [4th Dept 2011], *lv denied* 19 NY3d 803 [2012]; *see Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864 [4th Dept 1993]).

With regard to the merits, "[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Corter-Longwell*, 200 AD3d at 1580 [internal quotation marks omitted]). Moreover, " '[a] provision in a . . . contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a . . . party be named as an additional insured' " (*id.* at 1581).

Here, with respect to NJS's alleged breach of its direct obligation to procure insurance naming BN as an additional insured, BN failed to meet its burden on its motion and, instead, NJS met its burden on its cross motion of establishing entitlement to summary judgment as a matter of law. Notably, BN does not contend otherwise on appeal. The insurance provision of the agreement provided that "[NJS] agrees to obtain and maintain at all times while this [a]greement remains in effect . . . General Liability Insurance with minimum limits of $5,000,000, on an occurrence form basis" which "shall protect [NJS] and [BN] and each subsidiary or affiliate of [BN] from claims for personal injury (including bodily injury and death), intellectual property and other property damage." NJS also agreed to furnish certificates of insurance, which would include BN as an additional insured. The record establishes that NJS complied with that obligation inasmuch as BN's own submissions contain NJS's insurance policy, which included a blanket additional insured endorsement covering parties that NJS had contractually agreed to name as additional insureds (*see Payne v NSH Community Servs., Inc.*, 203

AD3d 546, 548 [1st Dept 2022]; *Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004]).

With respect to BN’s assertion that NJS was required by the agreement to ensure that its subcontractors procure insurance naming BN as an additional insured, we conclude that BN’s assertion lacks merit because there is no provision in the agreement “expressly and specifically” requiring that NJS’s subcontractors obtain insurance naming BN as an additional insured (*Corter-Longwell*, 200 AD3d at 1581). The insurance provision quoted above requires *NJS* to procure insurance naming BN as an additional insured, but it does not state, as other contracts do, that NJS *and its subcontractors* shall maintain insurance in favor of BN (*cf. e.g. id.*). In support of its assertion, BN falls back on an entirely different provision of the agreement governing subcontracting, which provides in relevant part that “[NJS] shall be responsible for all its obligations and responsibilities hereunder, and [NJS] shall be responsible for all acts or omissions of its subcontractors.” Contrary to BN’s assertion, the provision that NJS is responsible for “all acts or omissions of its subcontractors,” without more, does not constitute language “ ‘expressly and specifically’ ” stating a requirement that NJS’s subcontractors procure insurance naming BN as an additional insured (*id.*). “Absent any express and specific language requiring that [BN] be named as an additional insured” on the subcontractor’s policies, the agreement does not require that NJS ensure that its subcontractors procure additional insured coverage in favor of BN (*Clavin v CAP Equip. Leasing Corp.*, 156 AD3d 404, 405 [1st Dept 2017]).

In addition, as NJS contends and BN effectively concedes, NJS is entitled to summary judgment dismissing BN’s cause of action for common-law indemnification from NJS. We therefore further modify the order accordingly. “ ‘The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party’ ” (*Genesee/Wyoming YMCA v Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242, 1244 [4th Dept 2012]). Here, BN has not been, and will not be, compelled to pay for the wrong of another inasmuch as plaintiff’s complaint was dismissed on summary judgment and we have affirmed that order (*see Olivieri*, 203 AD3d at 1589-1590). In addition, entitlement to common-law indemnification requires that the proposed indemnitor be guilty of some negligence that contributed to the causation of the accident and, here, the affirmed order dismissing plaintiff’s complaint forecloses any finding that NJS’s negligence contributed to the accident (*see Grove v Cornell Univ.*, 151 AD3d 1813, 1816-1817 [4th Dept 2017]).

Finally, we agree with NJS that it is entitled to summary judgment dismissing all cross claims against it, and we therefore further modify the order accordingly.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

450

CA 21-00277

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

NOAH J. GIUSIANA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT AND
JANE AND/OR JOHN DOE #1-6,
DEFENDANTS-APPELLANTS.

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT AND
JANE AND/OR JOHN DOE #1-6, THIRD-PARTY
PLAINTIFFS-APPELLANTS,

V

JONAH GIUSIANA, THIRD-PARTY DEFENDANT,
AND AMERICAN MEDICAL RESPONSE, INC., THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.
(ACTION NO. 2.)

NOAH J. GIUSIANA, PLAINTIFF-RESPONDENT,

V

AMERICAN MEDICAL RESPONSE, INC., AMERICAN
MEDICAL RESPONSE OF NEW YORK, LLC, HALEY I.
HERTZOG AND JOSHUA A. KRIEGER,
DEFENDANTS-APPELLANTS.
(ACTION NO. 3.)

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (WILLIAM P. MATHEWSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS IN ACTION NO. 2.

PHELAN, PHELAN & DANEK, LLP, ALBANY (TIMOTHY S. BRENNAN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT IN ACTION NO. 2 AND DEFENDANTS-APPELLANTS IN ACTION NO. 3.

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

Appeals from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 16, 2021. The order, inter alia, denied in part the motion for summary judgment of defendants-third-party plaintiffs in action No. 2 and denied the motion for

summary judgment of defendants in action No. 3.

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

Memorandum: Plaintiff commenced these related actions seeking damages for injuries arising from an incident that took place outside of a cinema in the City of Buffalo (City), which is a defendant and third-party plaintiff in action No. 2. Plaintiff and his brother, Jonah Giusiana, who is a third-party defendant in action No. 2, both of whom had been drinking on the evening in question, got into a physical altercation after leaving the cinema. At some point during the altercation, an off-duty police officer with the Buffalo Police Department (BPD), which is a defendant and third-party plaintiff in action No. 2, intervened and took plaintiff down to the ground. Shortly thereafter, additional BPD officers, as well as emergency medical technicians Haley I. Hertzog and Joshua A. Krieger, who are defendants in action No. 3, responded to the scene. Plaintiff was cleared by Hertzog for transport by the BPD to the City's central booking facility. While in a holding cell, plaintiff suffered a seizure. It was later revealed that plaintiff had sustained an acute subdural hematoma, and he thereafter underwent an emergency craniotomy. As relevant to these appeals, plaintiff commenced action No. 2 against the City, the BPD, and various "Jane and/or John Doe" defendants allegedly employed as police officers (collectively, City defendants), and asserted against them causes of action for, inter alia, negligence, negligent hiring, and violations of 42 USC § 1983. The City defendants thereafter commenced a third-party action against Jonah Giusiana and American Medical Response, Inc. (AMR). Subsequently, plaintiff commenced action No. 3 against AMR, American Medical Response of New York, LLC, Hertzog, and Krieger (collectively, AMR defendants), and asserted against them causes of action sounding in negligence and medical malpractice. The City defendants moved, inter alia, to dismiss the complaint in action No. 2 pursuant to CPLR 3211 (a) (7) and sought summary judgment dismissing the complaint in that action and on their third-party cause of action for contractual indemnification against AMR, and the AMR defendants moved, inter alia, for summary judgment dismissing the complaint in action No. 3. The City defendants and the AMR defendants now separately appeal from an order that, inter alia, granted the City defendants' motion insofar as it sought summary judgment dismissing the complaint in action No. 2 against the BPD and dismissing the remaining negligent hiring allegations in that action, denied the remainder of the City defendants' motion, and denied the AMR defendants' motion. We affirm.

With respect to the AMR defendants' motion, we reject the AMR defendants' contention that they are entitled to summary judgment dismissing the complaint in action No. 3. Plaintiff's causes of action in action No. 3 are premised on allegations that the AMR defendants failed to provide plaintiff with timely medical treatment and transport to the hospital, and that they failed to correctly assess, diagnose and evaluate plaintiff. The AMR defendants contend that they cannot be held liable as a matter of law because they established that plaintiff refused their medical treatment at the

scene. It is well settled that a competent adult has the right to determine the course of his or her own medical treatment, including declining treatment (*see Matter of Fosmire v Nicoleau*, 75 NY2d 218, 226 [1990]). Here, however, the evidence submitted in support of the AMR defendants' motion itself raises questions of fact whether plaintiff refused medical treatment and whether an examination was appropriately performed by Hertzog and Krieger such that plaintiff could competently refuse medical treatment (*cf. Fornabaio v Beacon Broadway Co., LLC*, 188 AD3d 565, 566 [1st Dept 2020]). In particular, the AMR defendants submitted the deposition testimony of Hertzog, in which she testified that plaintiff's refusal of treatment would have been included on the report she prepared at the scene, but that there was no such notification in the documentation. Additionally, Hertzog testified that she did not recall conducting certain necessary assessments of plaintiff, including taking his vital signs or performing a Glasgow Coma Scale test, and she further testified that it was her decision alone to clear plaintiff to be transported to central booking. The AMR defendants also submitted the deposition testimony of other witnesses that were outside the cinema, who testified that plaintiff appeared "dazed" and "confused," and that he appeared to have sustained a concussion. Because the AMR defendants' submissions themselves raise triable issues of fact, we need not consider plaintiff's opposition papers (*see Zalewski v East Rochester Bd. of Educ.*, 193 AD3d 1426, 1427 [4th Dept 2021]).

With respect to the City defendants' motion, the City defendants contend that they are entitled to dismissal of the remaining negligence claims in action No. 2 pursuant to CPLR 3211 (a) (7) because plaintiff did not allege in his complaint that the City defendants owed him a special duty. We reject that contention. Plaintiff's negligence cause of action in action No. 2 is based upon the City defendants' alleged failure to provide him with reasonable and adequate medical care while in the holding cell. It is well settled that "inmate[s], who must rely on prison authorities to treat [the inmates'] medical needs . . . , [have] a fundamental right to reasonable . . . and adequate . . . medical care" (*Kagan v State of New York*, 221 AD2d 7, 11 [2d Dept 1996] [internal quotation marks omitted]; *see Powlowski v Wullich*, 102 AD2d 575, 587 [4th Dept 1984]). Here, although plaintiff was not an inmate, the City defendants had assumed custody over him, and plaintiff was thus unable to obtain medical treatment on his own (*see generally Sanchez v State of New York*, 99 NY2d 247, 252-253 [2002]). Therefore, contrary to the City defendants' contention, plaintiff was not required to plead and prove that the City defendants owed him a special duty.

Contrary to the City defendants' further contention, we conclude that Supreme Court properly denied their motion insofar as it sought summary judgment on their third-party cause of action for contractual indemnification against AMR. In support of their motion, the City defendants submitted the City's "Request for Proposals for Emergency Medical Services" (EMS RFP), which contains an indemnification clause providing that any entity contracting with the City is required to "indemnify and save harmless the City of Buffalo and all its . . .

agents and employees from any and all suits or action at law or in equity . . . for, or on account of, all matters arising out of, or related to said contractor's services." In addition, the City defendants submitted an "Emergency Ambulance Services Agreement" (EAS Agreement) entered into by the City and a nonparty ambulance service provider (nonparty provider), whereby the nonparty provider agreed to provide onsite and en route medical assistance and emergency transport. We conclude that the City defendants' submissions themselves raise triable issues of fact whether AMR assumed the obligations of the nonparty provider under the EAS Agreement and whether that agreement included the indemnification provision found in the EMS RFP (*see generally Sarmiento v Klar Realty Corp.*, 35 AD3d 834, 836 [2d Dept 2006]). Moreover, even assuming, arguendo, that the indemnification provision applies to AMR, we conclude that the City defendants' submissions themselves raise triable issues of fact whether plaintiff's causes of action against the City defendants in action No. 2 were premised on "matters arising out of, or related to [AMR's] services" (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188 [4th Dept 2008]).

Finally, we conclude that the City defendants' remaining contentions are unpreserved for our review (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

453
CA 21-00684
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND WINSLOW, JJ.

MICHAEL D'AMBROSIO, CLAIMANT-RESPONDENT,

V ORDER

ROSWELL PARK CANCER INSTITUTE CORPORATION,
DEFENDANT-APPELLANT.
(CLAIM NO. 135157.)

CONNORS LLP, BUFFALO (MICHAEL J. ROACH OF COUNSEL), FOR
DEFENDANT-APPELLANT.

FARACI LANGE, LLP, BUFFALO (JENNIFER L. FAY OF COUNSEL), FOR
CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered January 8, 2021. The order granted the motion of claimant to have his notice of claim deemed timely served nunc pro tunc.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 10 and 11, 2022,

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

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

454
CA 21-01696

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

ANDREW G. VANDEE, JERRY PHALEN, JAMES LYNCH, ROGER SLATER, RICHARD THOMAS, ELIJAH CLOSSON, WILLIAM PRINDLE AND SHAWN KIRK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SUIT-KOTE CORPORATION, DEFENDANT-RESPONDENT.

FINN LAW OFFICES, ALBANY (RYAN M. FINN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered June 29, 2021. The order granted the motion of defendant for leave to reargue and, upon reargument, granted the motion of defendant for summary judgment insofar as it sought dismissal of the breach of contract cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion for summary judgment insofar as it sought to dismiss the first cause of action and reinstating that cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs are members of a class of employees who allege that defendant failed to pay them prevailing supplemental (or fringe) benefits for work they performed on various public works contracts. In a prior appeal, we concluded, inter alia, that Supreme Court properly denied defendant's cross motion for summary judgment dismissing the amended complaint "inasmuch as triable issues of fact exist with respect to whether defendant's payroll practices complied with Labor Law § 220 (3) and the corresponding regulations" (*Vandee v Suit-Kote Corp.*, 162 AD3d 1620, 1621 [4th Dept 2018]). After that appeal, defendant moved for summary judgment dismissing plaintiffs' "putative class action claims." The court denied the motion with respect to the first cause of action, for breach of contract, which cause of action is based on plaintiffs' status as third-party beneficiaries of the public works contracts entered into by defendant (*see Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 601 [2008]). Thereafter, defendant sought leave to reargue its motion with respect

to the breach of contract cause of action. Plaintiffs now appeal from an order that granted leave to reargue and, upon reargument, granted summary judgment with respect to the breach of contract cause of action.

Pursuant to Labor Law § 220 (3) (b), contractors undertaking a public works project must provide their employees with supplemental benefits "in accordance with prevailing practices for private sector work in the same locality" (*Matter of Chesterfield Assoc. v New York State Dept. of Labor*, 4 NY3d 597, 600 [2005]). Supplemental benefits are defined as "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay[,] life insurance and apprenticeship training" (§ 220 [5] [b]).

A contractor's obligations under the statute "will be fulfilled when employees are supplied with the cash equivalent of the cost of obtaining the prevailing benefits or by providing an equivalent benefits plan, or by a combination of benefits and cash equal to the cost of the prevailing benefits" (*Matter of Action Elec. Contrs. Co. v Goldin*, 64 NY2d 213, 218 [1984]). "In short, a contractor may provide supplemental benefits in any form or combination so long as the sum total is not less than the prevailing rate" (*Chesterfield Assoc.*, 4 NY3d at 600).

Here, the parties agree that defendant failed to pay plaintiffs prevailing supplemental benefits for their work on the projects in question. The parties also agree that defendant properly calculated the amount of the shortfall in benefits by using the Department of Labor's "annualization regulation" set forth in 12 NYCRR 220.2 (d), and then made an irrevocable contribution in that amount to the Government Contractor's Benefit Trust (Trust), a pooled ERISA plan that defendant uses to provide benefits to all of its employees, including those who did not work on the public works contracts in question. The parties disagree, however, as to whether defendant's payment of the shortfall into the Trust satisfied its obligations under Labor Law § 220 (3) to pay prevailing supplemental benefits to its employees who worked on public works projects.

According to plaintiffs, defendant did not comply with the statute because defendant's payment of funds into the pooled Trust diluted the amount of money that was owed to plaintiffs as prevailing wage workers. The dilution occurred because funds from the Trust went to pay benefits for nonprevailing wage workers as well. Although plaintiffs concede that defendant was not required to pay them directly in cash for the shortage in supplemental benefits, they contend that they are legally entitled to receive from the Trust an amount of supplemental benefits that makes them whole for defendant's acknowledged failure to provide them with prevailing benefits. To achieve that result, plaintiffs assert, defendant must conduct additional annualization calculations, with corresponding contributions to the Trust, until plaintiffs are made whole for the

entire shortfall in supplemental benefits.

Defendant asserts that it complied with Labor Law § 220 (3) (b) because it made up for the shortfall in benefits by paying into the Trust an amount of money equal to the shortfall, and that it is irrelevant whether that amount was received by or credited to plaintiffs because the purpose of the prevailing wage law is to equalize the labor costs for contractors who bid on public works projects, not to increase the pay or benefits of prevailing wage workers. Defendant further contends that there is no authority for plaintiffs' so-called "re-annualization" theory.

We agree with plaintiffs that defendant's payment of the shortage of supplemental benefits into the pooled Trust, as determined by the annualization regulation, does not satisfy its obligation to provide prevailing supplemental benefits to plaintiffs for their work on public works projects. Prior to 1956, Labor Law § 220 required only the payment of prevailing wages to employees who work on public works contracts (*see Action Elec. Contrs. Co.*, 64 NY2d at 221-222). The statute carried out the constitutional mandate set forth in Article I, § 17 of the New York State Constitution, which requires the payment of prevailing wages on public works contracts (*see Chesterfield Assocs.*, 4 NY3d at 599). In 1956, the legislature amended the statute to require the payment of prevailing supplemental benefits, not just wages to the covered workers (*see Action Elec. Contrs. Co.*, 64 NY2d at 221). As defendant contends, the purpose of the amendment was to eliminate the unfair advantage in bidding on public works contracts that accrued to non-union contractors who did not provide employees with the same level of benefits afforded by union contractors, i.e., prevailing supplemental benefits (*see id.* at 222).

Nevertheless, the overall purpose of the prevailing wage statute, which was amended to cover supplemental benefits as well, is to hold the territorial subdivisions of the state "*to a standard of social justice* in their dealings with laborers, workmen, and mechanics" (*Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney*, 89 NY2d 395, 402 [1996], *rearg denied* 89 NY2d 1031 [1997] [internal quotation marks omitted]; *see Chesterfield Assoc.*, 4 NY3d at 601). That purpose is not served unless prevailing wage workers are fully compensated, in cash or otherwise, for any shortage in the payment to them of supplemental benefits.

Consider, for example, a hypothetical contractor that fails to pay prevailing wages (as opposed to benefits) to its employees on a public works project, and then pays the shortfall in wages into a common fund out of which all of its employees are compensated, including those who are not prevailing wage workers. Due to the dilution of funds resulting from those funds also being paid to the nonprevailing wage workers, the employees who worked on the public works contracts would not receive the full wages they would be entitled to for their work on the public works project. Under that scenario, the contractor would clearly have failed to comply with Labor Law § 220 (3) (a), notwithstanding that the contractor paid the same amount in wages to a fund as it would have paid if the prevailing

wage workers had been paid directly according to scale. We do not perceive any justification in law or logic for treating supplemental benefits differently from wages. In other words, regardless of whether the employer pays the prevailing wage workers directly in cash for any shortage in supplemental benefits or indirectly through an ERISA-approved plan, each individual prevailing wage worker must ultimately receive supplemental benefits equal to the value of prevailing supplemental benefits as determined by the Department of Labor.

Inasmuch as defendant failed to meet its initial burden of establishing as a matter of law that its method of paying the acknowledged shortfall of supplemental benefits into the pooled Trust resulted in plaintiffs each receiving full prevailing supplemental benefits, we conclude that the court erred in, upon reargument, granting defendant’s motion for summary judgment insofar as it sought dismissal of the breach of contract cause of action. The failure of defendant to meet its initial burden requires denial of the motion to that extent regardless of the sufficiency of plaintiffs’ opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We therefore modify the order accordingly.

To the extent that plaintiffs on appeal request judgment on their breach of contract cause of action, that request is not properly before us on their appeal from the court’s order granting defendant leave to reargue and, upon reargument, granting summary judgment dismissing that cause of action.

Entered: August 4, 2022 Ann Dillon Flynn
Clerk of the Court

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

460
CA 21-01205
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND WINSLOW, JJ.

RAG HERKIMER, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HERKIMER COUNTY, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

THE WEST FIRM, PLLC, ALBANY (CHRISTOPHER W. RUST OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a decision of the Supreme Court, Herkimer County (Charles C. Merrell, J.), entered July 28, 2021 in a proceeding pursuant to Eminent Domain Procedure Law. The decision, among other things, determined the fair market value of certain real property.

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

Same memorandum as in *RAG Herkimer, LLC v Herkimer County* ([appeal No. 2] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

461
CA 21-01611
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND WINSLOW, JJ.

RAG HERKIMER, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HERKIMER COUNTY, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

THE WEST FIRM, PLLC, ALBANY (CHRISTOPHER W. RUST OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Herkimer County (Charles C. Merrell, J.), entered October 21, 2021 in a proceeding pursuant to Eminent Domain Procedure Law. The judgment, among other things, awarded defendant costs and disbursements.

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

Memorandum: In appeal No. 1, plaintiff appeals from a decision, entered after a bench trial on the issue of just compensation, determining that the fair market value of certain real property that had been acquired by defendant through eminent domain was $575,600. In appeal No. 2, plaintiff appeals from a judgment that, inter alia, restated the value of the property and awarded defendant costs and disbursements.

Inasmuch as no appeal lies from a mere decision, the appeal from the decision in appeal No. 1 must be dismissed (*see Moyer v Moyer*, 198 AD3d 1384, 1384 [4th Dept 2021]; *Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]). We affirm the judgment in appeal No. 2.

"Both the State and Federal Constitutions require that owners receive just compensation when private property is taken for public use" (*520 E. 81st St. Assoc. v State of New York*, 99 NY2d 43, 47 [2002]). Just compensation for a taking must be "determined according to the fair market value of the property in its highest and best use" (*Matter of City of New York [Rudnick]*, 25 NY2d 146, 148 [1969]). Here, contrary to plaintiff's assertion, we conclude that "the evidence supports [Supreme Court's] finding that the highest and best use of the property is [low-intensity] commercial, [and] that finding should not be disturbed" (*Matter of City of Syracuse Indus. Dev.*

Agency [Alterm, Inc.], 20 AD3d 168, 171 [4th Dept 2005]; *see Matter of Rochester Urban Renewal Agency v Lee*, 83 AD2d 770, 770 [4th Dept 1981]; *see generally Matter of FFT Senior Communities, Inc. v Town of Canandaigua*, 96 AD3d 1396, 1396 [4th Dept 2012], *lv denied* 20 NY3d 856 [2013]).

We also reject plaintiff's contention that the court erred in accepting comparable sales of defendant's expert rather than its expert's comparable sales. Whether to accept evidence of remote sales, such as those relied upon by plaintiff's expert, is a matter committed to the court's discretion and depends "on the nature and character of the property involved" (*Matter of Great Atl. & Pac. Tea Co. v Kiernan*, 42 NY2d 236, 242 [1977]; *see also Matter of General Elec. Co. v Town of Salina*, 69 NY2d 730, 731 [1986]; *Welch Foods v Town of Westfield*, 222 AD2d 1053, 1054 [4th Dept 1995]; *see generally Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356 [1992], *rearg denied* 81 NY2d 784 [1993]). Here, the court did not abuse its discretion in rejecting the remote comparable sales of plaintiff's expert, which it concluded were derived from "strikingly different" markets. Further, although the comparable sales of defendant's expert "may leave much to be desired, the trial court could accept [them] as the best basis for evaluating the property and[,] with a proper adjustment for [their] differences from the instant property, utilize [them]" (*Niagara Falls Urban Renewal Agency v 123 Falls Realty*, 66 AD2d 1009, 1010 [4th Dept 1978], *appeal dismissed* 46 NY2d 997 [1979], *lv denied* 47 NY2d 711 [1979] [internal quotation marks omitted]).

We have considered plaintiff's remaining contentions and conclude that they lack merit.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

477
CA 21-00912
PRESENT: SMITH, J.P., CENTRA, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF AN APPLICATION FOR A RECOMMITMENT ORDER PURSUANT TO CRIMINAL PROCEDURE LAW SECTION 330.20 (14) IN RELATION TO JOHN P., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF MENTAL HEALTH, PETITIONER-RESPONDENT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (TRACIE M. HIATT OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), entered December 28, 2020. The order, among other things, directed that respondent be retained in a secure facility operated by petitioner.

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

Memorandum: In this recommitment proceeding pursuant to CPL 330.20 (14), respondent appeals from an order issued after a hearing in which Supreme Court concluded, inter alia, that respondent suffers from a dangerous mental disorder requiring that he be confined in a secure facility operated by petitioner for a period of four months (*see* CPL 330.20 [1] [c]). Initially, we note that although "an insanity acquittee dissatisfied with a commitment, recommitment or retention determination [may pursue] a permissive appeal under CPL 330.20 (21)" (*Matter of Jamie R. v Consilvio*, 6 NY3d 138, 148 [2006]), no appeal as of right lies from such an order, and respondent has not been granted leave to appeal. Although the issue is not raised by either party, we nevertheless treat the notice of appeal as an application for leave to appeal pursuant to CPL 330.20 (21) (a) (ii), and, in the exercise of our discretion, we grant the application (*see generally People v Richardson*, 129 AD3d 1629, 1629 [4th Dept 2015], *lv denied* 26 NY3d 971 [2015]; *Aloi v Ellis*, 96 AD3d 1564, 1565 [4th Dept 2012]).

As a further initial matter, as respondent contends and petitioner correctly concedes, although the order appealed from has expired, this appeal is not moot (*see Matter of George L.*, 85 NY2d 295, 302 n 2 [1995]; *People v Juan R.*, 180 AD3d 935, 936 [2d Dept

2020]; *Matter of Barber v Rochester Psychiatric Ctr.*, 250 AD2d 87, 89 [4th Dept 1998]).

With respect to the merits, we reject respondent's contention that the order is not supported by the requisite preponderance of the evidence, and therefore we affirm. The law is well settled. " 'Dangerous mental disorder' means: (i) that a defendant currently suffers from a 'mental illness' as that term is defined in [Mental Hygiene Law § 1.03 (20)], and (ii) that because of such condition he [or she] currently constitutes a physical danger to himself [or herself] or others" (CPL 330.20 [1] [c]). The word "currently," as used in the definition of dangerous mental disorder, "does not constrain a court to determining dangerousness as of the moment in time that a defendant is before it after a verdict or plea of not responsible by reason of mental disease or defect" (*George L.*, 85 NY2d at 305). "The prosecution may meet its burden of proving that a defendant poses a current threat to himself [or herself] or others warranting confinement in a secure environment, for example, by presenting proof of a history of prior relapses into violent behavior, substance abuse or dangerous activities upon release or termination of psychiatric treatment, or upon evidence establishing that continued medication is necessary to control defendant's violent tendencies and that defendant is likely not to comply with prescribed medication because of a prior history of such noncompliance or because of threats of future noncompliance . . . Dependence upon factors such as these—clearly evidencing a defendant's threat to himself [or herself] or society—is warranted to justify the significant limitations on an insanity acquitee's liberty interest which accompany secure confinement" (*id.* at 308; *cf. Matter of Eric F.*, 152 AD3d 586, 588-589 [2d Dept 2017]). Furthermore, when reviewing a determination made after a hearing, "this Court's authority is as broad as that of . . . Supreme Court . . . Our factual review power permits us to render the determination warranted by the facts, making our own findings of fact when necessary, while bearing in mind that in a close case, . . . Supreme Court had the advantage of seeing and hearing the witnesses" (*Matter of Marvin P.*, 120 AD3d 160, 169-170 [2d Dept 2014], *lv dismissed* 36 NY3d 1074 [2021]; *see generally George L.*, 85 NY2d at 305; *Matter of Barry V.*, 46 AD3d 1392, 1393 [4th Dept 2007]).

Applying that well-settled law, we conclude that petitioner met its burden of establishing by a preponderance of the evidence that respondent suffered from a dangerous mental disorder within the meaning of CPL 330.20 (1) (c) (*see People v Escobar*, 61 NY2d 431, 439-440 [1984]). Contrary to respondent's contention, his temporary "compliance or lack of dangerousness in a facility does not necessarily mean that [he] does not suffer from a dangerous mental disorder" (*Matter of Francis S.*, 206 AD2d 4, 13 [1st Dept 1994], *affd* 87 NY2d 554 [1995]; *see George L.*, 85 NY2d at 305). To the contrary, respondent displayed a years-long pattern of complying with his mandated medication regime while confined to a mental institution, but then ceasing to comply upon his release into the community. After release, respondent repeatedly resumed substance abuse, made threats, and engaged in self-harm and other dangerous behavior, and thus we conclude that petitioner met its burden (*see George L.*, 85 NY2d at

308; *cf. Eric F.*, 152 AD3d at 588-589).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

481
CA 21-00072
PRESENT: SMITH, J.P., CENTRA, NEMOYER, AND BANNISTER, JJ.

JOSEPH MARINO, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MANNING SQUIRES HENNIG CO., INC.,
DEFENDANT-APPELLANT.

MANNING SQUIRES HENNIG CO., INC.,
THIRD-PARTY PLAINTIFF,

V

HIGHLAND MASONRY AND RESTORATION, INC.,
THIRD-PARTY DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SAMANTHA V. CATONE OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF.

HURWITZ & FINE, P.C., BUFFALO (MARC A. SCHULZ OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (EDWARD L. SMITH, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 23, 2020. The order, among other things, granted in part plaintiff's motion seeking, inter alia, partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion seeking determinations that 12 NYCRR 23-1.7 (d), 23-1.7 (e), and 23-9.2 (a) are applicable to the facts of this case and were violated and that those violations constituted a failure to use reasonable care and seeking a determination that 12 NYCRR 23-9.8 (c) was violated and that the violation constituted a failure to use reasonable care, and as modified the order is affirmed without costs.

Memorandum: Plaintiff was injured when the forklift that he had been operating on a construction project began to roll backwards toward a nearby street. According to plaintiff, he had placed the forklift in neutral, put on the parking brake, and exited the vehicle to retrieve some materials. When plaintiff observed the forklift

rolling backwards, he ran after it. Once he reached the forklift, plaintiff planted his foot on the ground and in his effort to enter the vehicle, his knee "popped." Plaintiff commenced this action for damages against defendant-third-party plaintiff, Manning Squires Hennig Co., Inc. (Manning), the general contractor of the construction project, asserting causes of action for, inter alia, violations of Labor Law § 241 (6). With respect to that cause of action, plaintiff alleges that Manning violated various Industrial Code provisions, including 12 NYCRR 23-1.7 (d), 23-1.7 (e), 23-9.2 (a), and 23-9.8 (c). Manning commenced a third-party action against plaintiff's employer—third-party defendant, Highland Masonry and Restoration, Inc. (Highland). Plaintiff moved for, inter alia, summary judgment on liability on the Labor Law § 241 (6) cause of action, seeking various determinations with respect thereto. In appeal No. 1, Manning and Highland appeal from an order that, inter alia, granted those parts of plaintiff's motion seeking determinations that the cited regulations were applicable to the case and had been violated as a matter of law and that the violations constituted a failure to use reasonable care. In appeal No. 2, Manning and Highland appeal from an order denying their motions seeking leave to renew their opposition to plaintiff's motion.

In appeal No. 1, we agree with Manning and Highland that Supreme Court erred in granting in its entirety that part of plaintiff's motion seeking determinations that the regulations were applicable to the case and had been violated as a matter of law and that the violations constituted a failure to use reasonable care. With respect to the alleged violation of 12 NYCRR 23-9.2 (a), that provision provides, in relevant part, that "[u]pon discovery, any structural defect or unsafe condition in [power-operated] equipment shall be corrected by necessary repairs or replacement." Recovery under Labor Law § 241 (6) for a violation of 12 NYCRR 23-9.2 (a) requires an "employer[]" to have "actual notice of the structural defect or unsafe condition" (*Misicki v Caradonna*, 12 NY3d 511, 521 [2009]; *see Shaw v Scepter, Inc.*, 187 AD3d 1662, 1665 [4th Dept 2020]; *Salerno v Diocese of Buffalo, N.Y.*, 161 AD3d 1522, 1523-1524 [4th Dept 2018]). Here, in support of his motion, plaintiff submitted conflicting deposition testimony, including his own testimony, on the issue whether a malfunction of the forklift's parking brake had occurred on a date prior to plaintiff's accident or whether the date of the accident was the first time any party was aware of the alleged faulty brake. Thus, plaintiff's own submissions raised a triable issue of fact whether 12 NYCRR 23-9.2 (a) applied to the facts of this case.

Additionally, we conclude that plaintiff failed to meet his burden of establishing that 12 NYCRR 23-1.7 (d) and (e) were applicable to the facts of this case. Those provisions apply to various designated work areas (*see St. John v Westwood-Squibb Pharms., Inc.*, 138 AD3d 1501, 1502-1503 [4th Dept 2016]; *see generally Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250-1251 [4th Dept 2013]; *Bannister v LPCiminelli, Inc.*, 93 AD3d 1294, 1295-1296 [4th Dept 2012]). Here, in support of his motion, plaintiff submitted inconsistent deposition testimony on the specific location where he

was injured and, thus, questions of fact exist whether plaintiff's injury occurred inside the construction area and, if so, whether it occurred on a surface contemplated by the relevant provisions (*see generally St. John*, 138 AD3d at 1502-1503; *Ghany v BC Tile Contrs., Inc.*, 95 AD3d 768, 769 [1st Dept 2012]).

Inasmuch as plaintiff's submissions raised questions of fact on the alleged application of 12 NYCRR 23-9.2 (a), 23-1.7 (d), and 23-1.7 (e), the court should have denied plaintiff's motion insofar as it sought determinations that the cited regulations are applicable to the facts of this case and were violated and that the violations constituted a failure to use reasonable care, regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We therefore modify the order accordingly.

We further conclude that issues of fact exist as to the alleged violation of 12 NYCRR 23-9.8 (c). Initially, plaintiff met his burden of establishing that 12 NYCRR 23-9.8 (c), which provides in relevant part that "[e]very power-operated fork and lift truck shall be provided with a lockable brake," applied to this case and was violated (*see generally Sharrow v Dick Corp.*, 233 AD2d 858, 860 [4th Dept 1996], *lv denied* 89 NY2d 810 [1997], *rearg denied* 89 NY2d 1087 [1997]). Plaintiff testified at his deposition that the forklift was equipped with a light that, when illuminated, indicated that the parking brake was engaged. He also testified that the parking brake light was on when he caught up to the runaway forklift, indicating that the brake had been engaged. In opposition, Manning and Highland failed to raise any issue of fact as to the applicability of 12 NYCRR 23-9.8 (c). However, Manning and Highland raised an issue of fact whether that regulation was violated. Manning and Highland submitted plaintiff's General Municipal Law § 50-h testimony, which conflicted with his deposition testimony on the issue whether the brake indicator light was activated during the incident and, thus, raised an issue of fact whether the parking brake was defective at the time of the incident. We therefore further modify the order by denying that part of the motion seeking a determination that 12 NYCRR 23-9.8 (c) was violated and that the violation constituted a failure to use reasonable care.

In light of our determination, we need not reach the remaining contention raised by Highland in appeal No. 1, and we dismiss appeal No. 2 as moot (*see Kelsey v Hourigan*, 175 AD3d 918, 919-920 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

482
CA 21-01531
PRESENT: SMITH, J.P., CENTRA, NEMOYER, AND BANNISTER, JJ.

JOSEPH MARINO, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MANNING SQUIRES HENNIG CO., INC.,
DEFENDANT-APPELLANT.

MANNING SQUIRES HENNIG CO., INC.,
THIRD-PARTY PLAINTIFF,

V

HIGHLAND MASONRY AND RESTORATION, INC.,
THIRD-PARTY DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SAMANTHA V. CATONE OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF.

HURWITZ & FINE, P.C., BUFFALO (MARC A. SCHULZ OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (EDWARD L. SMITH, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered October 21, 2021. The order denied the motions of defendant-third-party plaintiff and third-party defendant for leave to renew their opposition to that part of plaintiff’s prior motion seeking partial summary judgment.

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

Same memorandum as in *Marino v Manning Squires Hennig Co., Inc.* ([appeal No. 1] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

493
CAF 21-00093
PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF BRADY J.S.,
PETITIONER-RESPONDENT,

V   MEMORANDUM AND ORDER

DARLA A.B., TIMOTHY B., RESPONDENTS,
AND JEANETTE W.B., RESPONDENT-APPELLANT.

IN THE MATTER OF DARLA A.B. AND
TIMOTHY B., PETITIONERS-RESPONDENTS,

V

BRADY J.S., RESPONDENT-RESPONDENT,
AND JEANETTE W.B., RESPONDENT-APPELLANT.

PAUL B. WATKINS, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR RESPONDENT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT BRADY J.S.

Appeals from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered December 14, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted joint legal custody of the subject child to Darla A.B., Timothy B., Jeanette W.B. and Brady J.S.

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-respondent mother and the Attorney for the Child (AFC) appeal from an order that, among other things, determined that petitioner-respondent father established a change in circumstances and granted the mother, respondents-petitioners maternal grandparents (grandparents), and the father joint legal custody of the subject child, assigned the grandparents and the father various “zones of influence,” and awarded the grandparents and the father shared

physical residence, with the child splitting her time equally between the two residences.

It is undisputed that the father, at the age of 20, began a sexual relationship with the mother when she was only 15 and that the child was born when the mother was 17. At the time of the child's birth, the father was in jail on a petit larceny conviction. The father was released shortly after the child was born and was thereafter convicted upon a plea of guilty of rape in the third degree for having sexual intercourse with the mother before she turned 17 (Penal Law § 130.25 [2]). Although the father was originally sentenced to 10 years of probation, he was resentenced to two years in prison after he violated the terms of his probation in an incident involving the mother. During his incarceration, the father entered into a consent order (2009 order) awarding the mother custody of the child.

Following his release from prison, the father filed a petition seeking modification of the 2009 order, and the grandparents thereafter filed a custody petition. Ultimately, the father, the mother, and the grandparents agreed that the mother and the grandparents would have joint custody of the child, with the grandparents having primary physical residence. A consent order to that effect was entered in 2013 (2013 order) pursuant to which the father's visitation was to "increase in time and frequency" and to transition to unsupervised visitation over the course of the calendar year.

In 2015, after the father secured gainful employment, purchased a home, and began to maintain a sober lifestyle, he petitioned for custody of the child, noting that the grandparents had not abided by the provisions of the 2013 order concerning increased, unsupervised visitation. He later amended the petition to seek the alternative relief of increased visitation with the child. Relying on the father's past conviction regarding the statutory rape of their daughter, the grandparents refused to provide any increase in visitation to the father, whom they referred to as "a convicted rapist and a level one pedophile sex offender." Nevertheless, the AFC at the time stated that the child "was very happy and comfortable and safe with her father"; she "love[d]" her father; and, although the father never said anything negative about the grandparents, she did hear her grandparents say "negative things about her dad." The AFC added that the child wanted to spend more time, including overnights, with her father but she knew that, if she asked her grandparents, "the answer will just absolutely be no."

After noting that the father's actions were well in the past, the AFC concluded that "[t]here comes a time six years later that we all have to take personal responsibility for our own actions and our past actions. And this little child wants to love everybody. And I don't think she is being unreasonable wanting to love everybody."

Ultimately, the matter proceeded to trial on the father's amended petition. As a preliminary matter, we reject the position taken by

the father that neither the mother nor the AFC has standing to appeal. The mother is aggrieved by the order on appeal inasmuch as she had joint custody of the child with the grandparents and, through counsel, she opposed the father's amended petition, which was granted, in part, by the order on appeal (*see* CPLR 5511; *Matter of Johnson v Johnson*, 192 AD3d 1670, 1672 [4th Dept 2021], *lv denied* 37 NY3d 905 [2021]; *cf. Matter of Chase v Chase*, 181 AD3d 1323, 1324 [4th Dept 2020], *lv dismissed in part and denied in part* 35 NY3d 996 [2020]). A person is aggrieved within the meaning of CPLR 5511 " 'when he or she asks for relief but that relief is denied in whole or in part,' or, when someone 'asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part' " (*Matter of Michael O.F. [Fausat O.]*, 101 AD3d 1121, 1122 [2d Dept 2012]; *see Matter of Valenson v Kenyon*, 80 AD3d 799, 799 [3d Dept 2011]). Here, the mother, as a joint custodian of the child, had "a direct interest in the matter at issue that [was] affected by the result, and the adjudication [had] binding force against [her] rights, person or property" (*Valenson*, 80 AD3d at 799; *see Johnson*, 192 AD3d at 1672). Based on our determination regarding the mother's standing, we conclude that the AFC also had standing to appeal the order (*see Matter of Newton v McFarlane*, 174 AD3d 67, 71-74 [2d Dept 2019]; *cf. Matter of Lawrence v Lawrence*, 151 AD3d 1879, 1879 [4th Dept 2017]).

The mother and the AFC contend that remittal is required because Family Court failed to conduct a scheduled *Lincoln* hearing. We reject that contention. It is undisputed that the hearing did not occur as a result of a snowstorm and, shortly thereafter, a global pandemic. Assuming, arguendo, that the contentions of the mother and the AFC are not waived and are preserved for our review (*see generally Matter of Pfalzer v Pfalzer*, 150 AD3d 1705, 1706 [4th Dept 2017], *lv denied* 29 NY3d 918 [2017]), we conclude that the failure to conduct a *Lincoln* hearing does not require remittal under the circumstances of this case.

A *Lincoln* hearing, "though often preferable, is not mandatory, and the determination is addressed to [the court's] discretion" (*Matter of Jessica B. v Robert B.*, 104 AD3d 1077, 1078 [3d Dept 2013]). "In determining whether such a hearing is warranted, the court must determine whether the in camera testimony of the child 'will on the whole benefit the child by obtaining for the Judge significant pieces of information he [or she] needs to make the soundest possible decision' " (*Matter of Walters v Francisco*, 63 AD3d 1610, 1611 [4th Dept 2009], quoting *Matter of Lincoln v Lincoln*, 24 NY2d 270, 272 [1969]; *see Bielli v Bielli*, 60 AD3d 1487, 1487 [4th Dept 2009], *lv dismissed* 12 NY3d 896 [2009]).

Here, the court was able to discern the child's wishes as a result of the position expressed by the AFC (*see Matter of Muriel v Muriel*, 179 AD3d 1529, 1530-1531 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]; *cf. Matter of Yeager v Yeager*, 110 AD3d 1207, 1209-1210 [3d Dept 2013]). Moreover, there are indications in the record that information provided by the child might have been tainted by the obvious disdain the grandparents regularly expressed regarding the

father (*see Muriel*, 179 AD3d at 1530; *see generally Matter of Krier v Krier*, 178 AD3d 1372, 1373 [4th Dept 2019]).

Finally, we conclude, contrary to the mother's and the AFC's contentions, that there is a sound and substantial basis for the court's determination to award the father joint custody with the mother and grandparents and shared physical residence with the grandparents, with zones of influence for the father and grandparents (*see generally Graves v Huff* [appeal No. 2], 169 AD3d 1476, 1476 [4th Dept 2019]). Although the father has a troubled past and his relationship with the mother began under illegal circumstances, he and the mother have had a long-standing, on-and-off romantic relationship that has spanned over a decade and continued well into the mother's adulthood. The father admitted his prior mistakes without excuses or hesitancy, and he testified that he was trying, to the best of his ability, to make amends for the "ramifications [of] a decision [that] he made as a young man," which were far greater than he could have ever expected. The father has paid for his crimes and turned his life around, obtaining gainful employment and purchasing his own home. He has demonstrated a consistent desire to parent his child, who has never been harmed in his presence and desires to spend time with him.

The evidence at the hearing established that, as the father became more successful in life and more desirous of a relationship with his child, the grandparents became more restrictive and more hostile to the idea of *any* relationship between the father and the child. The grandparents testified that they saw no distinction between forcible rape and statutory rape, even when the parties continued the relationship for more than a decade. According to the grandmother, "[r]ape is rape." Moreover, without citing evidence to support their fear, the grandparents opined that the father was victimizing and grooming the child for future sexual actions with the father. Based on their steadfast (and unreasonable) belief that there should be no contact between the father and the child, the grandparents, in violation of a court order, denied the father visitation with the child for several months. Visitation resumed only after the father obtained an additional court order.

Considering the factors relevant to a determination of a child's best interests (*see Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]), as well as the " 'concerted effort by [the grandparents] to interfere with the [father's] contact with the child' " (*Matter of Cramer v Cramer*, 143 AD3d 1264, 1264 [4th Dept 2016], *lv denied* 28 NY3d 913 [2017]), we conclude that there is a sound and substantial basis for the determination that an award of joint custody to the mother, the father, and the grandparents, with shared physical residence between the father and the grandparents and zones of interest for the father and the grandparents, is in the child's best interests, and we therefore decline to disturb that determination (*see Krier*, 178 AD3d at 1373-1374; *Matter of Thayer v Ennis*, 292 AD2d 824, 825 [4th Dept 2002]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

499

CA 21-00548

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

JAMES BAKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TRENISA GILL, JOSEPH MILLER,
ALLISON L. YUNA AND CHRISTIAN LYNCH,
DEFENDANTS-RESPONDENTS.

HOGAN WILLIG PLLC, AMHERST (RYAN C. JOHNSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (NICHOLE M. AUSTIN OF COUNSEL), FOR DEFENDANT-RESPONDENT TRENISA GILL.

CARMAN, CALLAHAN & INGHAM, LLP, FARMINGDALE (TRACY S. REIFER OF COUNSEL), FOR DEFENDANT-RESPONDENT JOSEPH MILLER.

CHELUS HERDZIK SPEYER & MONTE, P.C., BUFFALO (NICHOLAS M. HRICZKO OF COUNSEL), FOR DEFENDANT-RESPONDENT ALLISON L. YUNA.

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL C. PRETSCH OF COUNSEL), FOR DEFENDANT-RESPONDENT CHRISTIAN LYNCH.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered March 26, 2021. The order denied the motion of defendant Trenisa Gill for summary judgment and granted the motion of defendant Joseph Miller and the motions and cross motions of Allison L. Yuna and Christian Lynch for summary judgment and dismissed the complaint and all cross claims against said defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motions and cross motions of defendant Allison L. Yuna and defendant Christian Lynch and reinstating the complaint and cross claims against those defendants, and as modified the order is affirmed without costs.

Memorandum: In this action to recover damages for injuries sustained in a motor vehicle accident involving five vehicles, plaintiff appeals from an order that, among other things, granted the motion of defendant Joseph Miller, the motion and cross motion of defendant Allison L. Yuna, and the motion and cross motion of defendant Christian Lynch, all seeking summary judgment dismissing the complaint and cross claims against them.

Contrary to plaintiff's contention, Miller met his initial burden on his motion, and plaintiff failed to raise a triable issue of fact in opposition (*see Paterson v Sikorski*, 118 AD3d 1330, 1331 [4th Dept 2014]). Supreme Court therefore properly granted Miller's motion. We agree with plaintiff, however, that Lynch and Yuna failed to meet their initial burdens on their respective motions and cross motions (*see Craig v Haynos*, 57 AD3d 1503, 1503 [4th Dept 2008]; *Owsian v Cobo*, 45 AD3d 1368, 1369 [4th Dept 2007]; *see also McMorrow v Trimper*, 149 AD2d 971, 972-973 [4th Dept 1989], *affd for the reasons stated* 74 NY2d 830 [1989]; *Burg v Mosey*, 126 AD3d 1522, 1523 [4th Dept 2015]). The court thus erred in granting the motions and cross motions of Lynch and Yuna, and we modify the order accordingly.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

500
CA 21-00889
PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

COUNSEL FINANCIAL HOLDINGS LLC,
PLAINTIFF-RESPONDENT,

V — ORDER

SULLIVAN LAW, L.L.C., ROBERT C. SULLIVAN,
BIANCA T. SULLIVAN, JOHN R. BONDON, PARROT
PROPERTIES, INC., ROBBA PROPERTIES, L.L.C.,
AND SOUTH SIDE INVESTMENT COMPANY,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (SEAN C. MCPHEE OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, BUFFALO (JOHN C. NUTTER OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 19, 2021. The order granted the motion of plaintiff for summary judgment in lieu of complaint.

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: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

501

CA 21-00891

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

COUNSEL FINANCIAL HOLDINGS LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SULLIVAN LAW, L.L.C., ROBERT C. SULLIVAN,
BIANCA T. SULLIVAN, JOHN R. BONDON, PARROT
PROPERTIES, INC., ROBBA PROPERTIES, L.L.C.,
AND SOUTH SIDE INVESTMENT COMPANY,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (SEAN C. MCPHEE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, BUFFALO (JOHN C. NUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 26, 2021. The judgment awarded money damages to plaintiff.

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

Memorandum: Defendants appeal from a judgment awarding plaintiff damages in the amount of $6,865,243.34. By motion for summary judgment in lieu of complaint (*see* CPLR 3213), plaintiff sought to recover on a revolving promissory note (note) executed by defendant Sullivan Law, L.L.C. (Sullivan Law) and a guaranty for payment and performance (guaranty) for the note executed by defendants Robert C. Sullivan, Bianca T. Sullivan, John R. Bondon, Parrot Properties, Inc., Robba Properties, L.L.C., and South Side Investment Company (collectively, guarantors). Monies advanced under the line of credit evidenced by the note were for the purpose of funding Sullivan Law's operating expenses or interest payments due under the note. Supreme Court granted plaintiff's motion, and we affirm.

We reject defendants' contention that the note and guaranty are not instruments for the payment of money only within the ambit of CPLR 3213. The note contains an unambiguous promise to pay as and when required, as well as provisions governing default and acceleration of the debt upon default. The guaranty obligates the guarantors to "irrevocably, absolutely and unconditionally" guarantee to plaintiff

"the punctual payment and performance" of the debt owed by Sullivan Law and to waive all defenses thereto. Thus, the instruments may be read "in the first instance" as instruments for the payment of money only (*Weissman v Sinorm Deli*, 88 NY2d 437, 445 [1996] [internal quotation marks omitted]).

Defendants further contend that the note is not an instrument within the scope of CPLR 3213 because it is neither a negotiable instrument nor a commercial paper. CPLR 3213, however, does not *require* that an instrument either be negotiable or qualify as commercial paper. CPLR 3213 has been applied even though an instrument was "technically not commercial paper," and "the statute is not limited to negotiable and non-negotiable paper within the terms of Article 3 of the Uniform Commercial Code" inasmuch as "CPLR 3213 contains no such restriction nor does the policy underlying this procedure" (*Maglich v Saxe, Bacon & Bolan*, 97 AD2d 19, 21-22 [1st Dept 1983], *appeal withdrawn* 61 NY2d 906 [1984]; *see Logan v Williamson & Co.*, 64 AD2d 466, 468-469 [4th Dept 1978], *appeal dismissed* 46 NY2d 996 [1979]). We likewise reject defendants' contention that a line of credit may not be the subject of a motion for summary judgment in lieu of complaint pursuant to CPLR 3213 (*see Stache Invs. Corp. v Ciolek*, 174 AD3d 1393, 1393 [4th Dept 2019]; *see generally Counsel Fin. Servs., LLC v David McQuade Leibowitz, P.C.*, 67 AD3d 1483, 1484 [4th Dept 2009]).

Defendants also contend that the guaranty is not an instrument for the payment of money only because, in addition to guaranteeing Sullivan Law's obligation to make payment under the note, it contains language obligating the guarantors to guarantee performance under the note. We decline to follow the First Department precedent advanced by defendants (*see e.g. PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 495-496 [1st Dept 2017]), and we conclude that the guaranty's references to ensuring the performance of the note's obligations do not negate its status as an instrument for the payment of money only (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 488, 492 [2015]; *see generally Northwoods, L.L.C. v Hale*, 201 AD3d 1357, 1357-1358 [4th Dept 2022]; *Midtown Mkt. Mo. City, Tx. LLC v Tavakoli*, 192 AD3d 1646, 1647-1648 [4th Dept 2021]). In any event, the guaranty "required no additional performance by plaintiff[ ] as a *condition precedent* to payment [nor] otherwise made [the guarantors'] promise to pay something other than unconditional" (*iPayment, Inc. v Silverman*, 192 AD3d 586, 587 [1st Dept 2021], *lv dismissed* 37 NY3d 1020 [2021] [emphasis added and internal quotation marks omitted]).

We have considered defendants' remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

503
CA 21-00942
PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

ANN SYRETT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES SYRETT, DEFENDANT-APPELLANT.

VANLOON LAW, LLC, ROCHESTER (NATHAN A. VANLOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

OSBORN REED & BURKE, LLP, ROCHESTER (VINCENT M. FERRERO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John M. Owens, A.J.), entered December 21, 2020 in a divorce action. The judgment, among other things, distributed the parties' marital assets, ordered that defendant pay child support and maintenance, and directed defendant to maintain a life insurance policy to secure his child support and maintenance obligations.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the amount of life insurance defendant is required to obtain to secure his child support and maintenance obligations from $500,000 to $300,000 and by providing that defendant may obtain a declining term life insurance policy, and as modified the judgment is affirmed without costs in accordance with the following memorandum: Defendant appeals from a judgment of divorce that, inter alia, ordered equal distribution of certain bank and brokerage accounts, directed defendant to maintain a life insurance policy with plaintiff as the sole beneficiary until his child support and maintenance obligations are satisfied and awarded $30,000 in counsel fees to plaintiff. We reject defendant's contention that Supreme Court abused its discretion in equally dividing the bank and brokerage accounts as of the date of the commencement of this action and in declining to award defendant credit for post-commencement payments (*see generally Altomer v Altomer*, 300 AD2d 927, 928 [3d Dept 2002]).

We further reject defendant's contention that the court abused its discretion in awarding counsel fees to plaintiff. "An award of an attorney's fee pursuant to Domestic Relations Law § 237 (a) is a matter within the sound discretion of the trial court, and the issue is controlled by the equities and circumstances of each particular case" (*Grant v Grant*, 71 AD3d 634, 634-635 [2d Dept 2010] [internal quotation marks omitted]; *see Dechow v Dechow*, 161 AD3d 1584, 1585

[4th Dept 2018]). Here, the court properly considered the circumstances of this case, including the parties' relative financial circumstances and the merits of their positions during trial, and we conclude that the award is reasonable.

We agree with defendant, however, that the amount of life insurance that the court required defendant to maintain to secure his child support and maintenance obligations is excessive, and we therefore modify the judgment by reducing that amount from $500,000 to $300,000 (*see Marfone v Marfone*, 118 AD3d 1488, 1489 [4th Dept 2014]; *see also Siskind v Siskind*, 89 AD3d 832, 834 [2d Dept 2011]). In light of the fact that defendant's continuing child support obligation will decline as each of the children of the marriage either becomes emancipated or reaches the age of 21 (*see* Domestic Relations Law § 240 [1-b] [b] [2]; *Marfone*, 118 AD3d at 1489) and the fact that defendant's maintenance obligation will be satisfied in 2027 (*see Florio v Florio*, 25 AD3d 947, 951 [3d Dept 2006]), we further modify the judgment by providing that the amount of life insurance defendant is required to obtain to secure his child support and maintenance obligations may have a declining term that would permit defendant to reduce the amount of life insurance by the amount of child support and maintenance actually paid, provided that at all times the amount of life insurance is not less than the amount of child support and maintenance remaining unpaid (*see Marfone*, 118 AD3d at 1489; *Florio*, 25 AD3d at 951).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

539
CA 21-00455
PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, CURRAN, AND WINSLOW, JJ.

MARK MOLL AND CARMELA MOLL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WILLIAM F. GRIFFITH, II, ALSO KNOWN AS
W F GRIFFITH, II, CITY OF JAMESTOWN AND
JAMESTOWN DEPARTMENT OF PUBLIC WORKS,
DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM LLP, BUFFALO (MARINA A. MURRAY OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

LEWIS & LEWIS, P.C., BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered March 12, 2021. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as it alleges claims of negligent hiring, training, and supervision and negligent entrustment, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Mark Moll when the pickup truck that he was driving was struck by a snowplow owned by defendant City of Jamestown (City) and operated by defendant William F. Griffith, II, also known as W F Griffith, II, an employee of defendant Jamestown Department of Public Works (DPW). Defendants appeal from an order that, inter alia, denied their motion for summary judgment dismissing the complaint.

We agree with defendants that Supreme Court erred in denying that part of their motion seeking summary judgment dismissing plaintiffs' negligent hiring, training, and supervision claim, and we therefore modify the order accordingly. "Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision, or training" (*Decker v State of New York*, 164

AD3d 650, 653 [2d Dept 2018] [internal quotation marks omitted]; *see Brown v First Student, Inc.*, 167 AD3d 1455, 1456 [4th Dept 2018]; *Watson v Strack*, 5 AD3d 1067, 1068 [4th Dept 2004]). "While an exception exists to this general principle where the injured plaintiff is seeking punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee" (*Watson*, 5 AD3d at 1068 [internal quotation marks omitted]), "that exception is inapplicable [where the plaintiffs] did not seek punitive damages based upon an allegation that the defendant was grossly negligent in the hiring of its employees" (*Decker*, 164 AD3d at 654; *see Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation*, 147 AD3d 739, 741-742 [2d Dept 2017]). Here, plaintiffs do not seek punitive damages and failed to allege that defendants acted with gross negligence (*see Decker*, 164 AD3d at 654).

We also agree with defendants that the court erred in denying their motion with respect to plaintiffs' negligent entrustment claim, and we therefore further modify the order accordingly. "To establish a cause of action under a theory of negligent entrustment, the defendant must . . . have some *special knowledge concerning a characteristic or condition peculiar to the [person to whom a particular chattel is given]* which renders [that person's] use of the chattel unreasonably dangerous" (*Monette v Trummer*, 105 AD3d 1328, 1330 [4th Dept 2013], *affd* 22 NY3d 944 [2013] [internal quotation marks omitted]; *see Cook v Schapiro*, 58 AD3d 664, 666 [2d Dept 2009], *lv denied* 12 NY3d 710 [2009]). Here, defendants' submissions established that Griffith had prior experience driving a snowplow and, for a few weeks after Griffith was hired by DPW, he was trained by an experienced snowplow driver through a training program provided by the City, during which Griffith observed and emulated the experienced driver's practices. Further, Griffith did not have a poor driving record, he had a commercial driver's license, and he previously was employed by the State of New York as a snowplow driver. We therefore conclude that defendants met their prima facie burden for summary judgment with respect to the negligent entrustment claim (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to defendants' contention, however, they failed to establish as a matter of law that Griffith did not operate the snowplow with reckless disregard for the safety of others, and we therefore conclude that the court properly denied the motion with respect to that issue (*see Haist v Town of Newstead*, 27 AD3d 1133, 1134 [4th Dept 2006]; *see generally* Vehicle and Traffic Law § 1103 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Ruiz v Cope*, 119 AD3d 1333, 1334 [4th Dept 2014]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

543

CA 21-01668

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

MCLEAREN SQUARE SHOPPING CENTER HERNDON, VA.
LIMITED PARTNERSHIP, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BADANARA, LLC, HAE-CHAN PARK AND KYUNGHWA PARK,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

YOON LLP, NEW YORK CITY (CHARLES M. YOON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (KYLE D. GOOCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered April 27, 2021. The order, inter alia, awarded plaintiff a default judgment against defendant BadaNara, LLC and granted those parts of plaintiff’s motion seeking summary judgment against defendants Hae-Chan Park and Kyunghwa Park.

It is hereby ORDERED that said appeal insofar as taken by defendant BadaNara, LLC is unanimously dismissed and the order is modified on the law by vacating that part of the fourth ordering paragraph awarding interest of nine percent from April 1, 2020, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff, a commercial landlord, commenced this action against defendant BadaNara, LLC (BadaNara), which operated a restaurant on premises that it rented from plaintiff pursuant to a lease, and defendants Hae-Chan Park and Kyunghwa Park (guarantor defendants), who are members of BadaNara and who executed a guaranty of performance of BadaNara’s obligations pursuant to the lease. Plaintiff asserted a cause of action against BadaNara for breach of contract for failure to pay rent, a cause of action against the guarantor defendants seeking to recover on the guaranty based on BadaNara’s breach of the lease, and a cause of action against all defendants seeking attorneys’ fees and expenses. Plaintiff moved for, inter alia, summary judgment on the complaint and an order striking BadaNara’s answer for failure to properly appear by attorney as required by CPLR 321 (a) and, in appeal No. 1, defendants appeal from an order that, inter alia, struck BadaNara’s answer and entered a default judgment against it, granted those parts of plaintiff’s motion seeking summary judgment on the causes of action

against the guarantor defendants, awarded plaintiff $380,949.90 in damages with statutory interest of nine percent from April 1, 2020, and ordered that plaintiff could submit an application for the recovery of attorneys' fees. In appeal No. 2, defendants appeal from an order granting plaintiff's application for attorneys' fees.

With respect to both appeals, we note at the outset that BadaNara appeared pro se in its answer, which Supreme Court properly determined rendered BadaNara's appearance a nullity because a limited liability company, such as BadaNara, "shall appear by attorney" (CPLR 321 [a]; *see Hamilton Livery Leasing, LLC v State of New York*, 151 AD3d 1358, 1360 [3d Dept 2017]; *Boente v Peter C. Kurth Off. of Architecture & Planning, P.C.*, 113 AD3d 803, 804 [2d Dept 2014]). Consequently, the court properly entered the orders in appeal Nos. 1 and 2 with respect to BadaNara on its default based on its failure to appear (*see Mail Boxes Etc. USA v Higgins*, 281 AD2d 176, 176 [1st Dept 2001], *appeal dismissed* 96 NY2d 895 [2001], *reconsideration dismissed* 98 NY2d 725 [2002], *reconsideration dismissed* 99 NY2d 649 [2003]), and we therefore conclude that appeal Nos. 1 and 2 must be dismissed insofar as taken by BadaNara inasmuch as no appeal lies from orders entered on default (*see* CPLR 5511; *Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]; *cf. Matter of Hopkins v Gelia*, 56 AD3d 1286, 1286 [4th Dept 2008]).

In appeal No. 1, we reject the guarantor defendants' contention that the court erred in granting that part of plaintiff's motion for summary judgment on the cause of action to recover on the guaranty. Plaintiff met its initial burden by submitting the guaranty executed by the guarantor defendants, the underlying lease, and evidence of BadaNara's and the guarantor defendants' nonpayment of rent (*see Northwoods, L.L.C. v Hale*, 201 AD3d 1357, 1357-1358 [4th Dept 2022]; *see generally Medlock Crossing Shopping Ctr. Duluth, GA. LP v Kitchen & Bath Studio, Inc.*, 126 AD3d 1463, 1464 [4th Dept 2015]). In opposition, the guarantor defendants failed " 'to establish, by admissible evidence, the existence of a triable issue [of fact] with respect to a bona fide defense' " (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]). Even assuming, arguendo, that the unconditional and absolute guaranty signed by the guarantor defendants does not "contain language obligating the guarantor to payment without recourse to any defenses or counterclaims" (*id.* at 493), thereby permitting them to assert defenses that could be raised by BadaNara, we conclude that the defenses asserted by the guarantor defendants—i.e., frustration of purpose and impossibility of performance—are inapplicable here.

With respect to the defense of frustration of purpose, we conclude that the guarantor defendants failed to raise any issues of fact regarding its applicability. " 'In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense' " (*Warner v Kaplan*, 71 AD3d 1, 6 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010];

see Shmaltz Brewing Co., LLC v Dog Cart Mgt. LLC, 202 AD3d 1349, 1352 [3d Dept 2022]; *Arons v Charpentier*, 36 AD3d 636, 637 [2d Dept 2007]; *see generally 407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 282 [1968]). Contrary to the contention of the guarantor defendants, the temporary pandemic-related governmental restrictions imposed on BadaNara's business operations did not implicate that defense because "[t]he doctrine of frustration of purpose does not apply as a matter of law where, as here, the tenant was not *completely deprived* of the benefit of its bargain" (*Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577 [1st Dept 2021] [emphasis added and internal quotation marks omitted]; *see Arista Dev. LLC v Clearmind Holdings, LLC*, — AD3d —, —, 2022 NY Slip Op 04451, *3 [4th Dept 2022]; *see generally Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34, 43 [1st Dept 2020]). Specifically, although the governmental restriction at issue here precluded BadaNara from offering in-person dining services, it expressly permitted restaurants such as BadaNara to offer take-out or delivery services and "frustration of purpose is not implicated by temporary governmental restrictions on in-person operations, as the parties' respective duties were to pay rent in exchange for occupying the leased premises" (*Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480, 480 [1st Dept 2022]).

The guarantor defendants also failed to raise a question of fact with respect to the defense of impossibility of performance. The doctrine of impossibility of performance "excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible" (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]; *see generally Thompson v McQueeney*, 56 AD3d 1254, 1257 [4th Dept 2008]). Here, for essentially the same reasons that we conclude that the frustration of purpose defense does not apply, we conclude that the temporary restrictions on in-person dining did not render BadaNara's performance under the lease objectively impossible. "[T]he pandemic, while continuing to be 'disruptive for many businesses,' did not render [BadaNara's] performance impossible, even if its ability to provide a [dining] experience was rendered more difficult, because the leased premises were not destroyed" (*Valentino U.S.A., Inc.*, 203 AD3d at 480; *see Gap, Inc.*, 195 AD3d at 577).

The guarantor defendants' contention that the court erred in awarding plaintiff damages for the costs associated with cleaning and restoring the premises to a leasable condition is unpreserved for our review because they did not raise that argument in opposition to the original motion, and improperly raised it for the first time in their motion for leave to reargue (*see Matter of Gaspard v American Tr. Ins. Co.*, 157 AD2d 543, 544 [1st Dept 1990]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

We agree, however, with the guarantor defendants that the court erred to the extent that it directed that statutory interest on the entire damages award run from the date of April 1, 2020, i.e., the earliest date that the lease was breached. CPLR 5001 (b) provides

that "[w]here[, as here,] such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date" (*see CAS Mktg. & Licensing Co. v Jay Franco & Sons, Inc.*, 188 AD3d 522, 523 [1st Dept 2020]). Thus, we conclude that "the court incorrectly calculated the amount of prejudgment interest . . . based on the entire principal balance measured from [the earliest date of breach], rather than upon the accumulating balance as remaining [rent payments and other payments] became due" (*State Farm Fire & Cas. Co. v Browne*, 43 AD3d 1149, 1150 [2d Dept 2007]). Consequently, we modify the order in appeal No. 1 by vacating that part of the fourth ordering paragraph awarding interest of nine percent from April 1, 2020, and we remit the matter to Supreme Court to calculate the interest in accordance with CPLR 5001 (b).

With respect to appeal No. 2, we reject the guarantor defendants' contention that the court abused its discretion in granting plaintiff's application for attorneys' fees (*see A&M Global Mgt. Corp. v Northtown Urology Assoc. P.C.*, 115 AD3d 1283, 1290 [4th Dept 2014]; *Pelc v Berg*, 68 AD3d 1672, 1673 [4th Dept 2009]). "In evaluating what constitutes . . . reasonable attorney[s'] fee[s], factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount [of money] involved, the customary fee charged for such services, and the results obtained" (*Matter of Dessauer*, 96 AD3d 1560, 1561 [4th Dept 2012] [internal quotation marks omitted]). Here, plaintiff established the reasonableness of its application through the detailed affirmation of counsel. We reject the guarantor defendants' contention that plaintiff was required to "tender contemporaneously-maintained time records" in support of its application for attorneys' fees (*Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d 63, 75 [2d Dept 2006]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

544
CA 21-01766
PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, CURRAN, AND WINSLOW, JJ.

MCLEAREN SQUARE SHOPPING CENTER HERNDON, VA.
LIMITED PARTNERSHIP, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BADANARA, LLC, HAE-CHAN PARK AND KYUNGHWA PARK,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

YOON LLP, NEW YORK CITY (CHARLES M. YOON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (KYLE D. GOOCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered June 25, 2021. The order granted plaintiff's application for attorneys' fees.

It is hereby ORDERED that said appeal insofar as taken by defendant BadaNara, LLC is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *McLearen Sq. Shopping Ctr. Herndon, Va. LP v BadaNara, LLC* ([appeal No. 1] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

545

CA 21-00799

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

JOHN M. BRAXTON, AS ADMINISTRATOR OF THE ESTATE OF
SHEILA M. BRAXTON, DECEASED, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION, ET AL.,
DEFENDANTS,
AND KALEIDA HEALTH, DOING BUSINESS AS BUFFALO
GENERAL HOSPITAL, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN PATRICK DANIEU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 13, 2021. The order granted in part the motion of defendant Kaleida Health, doing business as Buffalo General Hospital, for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendant Kaleida Health, doing business as Buffalo General Hospital, with respect to the claims and cross claims against it based on the alleged failure of defendant Andrew Poreda, M.D. to document the medical record of plaintiff’s decedent, request a neurological consult, order appropriate lab studies, properly monitor decedent’s symptoms, and appropriately respond to decedent’s complaints, signs, and symptoms; based on the alleged failure of defendant Joseph Riedy Jr., D.O. to document the medical record, consult with decedent’s primary care physician, order diagnostic films earlier, request a neurological or other consult earlier, and order appropriate lab work; and based on the alleged negligence of Kaleida Health’s other staff members, excluding Andrew Poreda, M.D., Joseph Riedy Jr., D.O., Samir A. Bute, M.D., and Nida Arabi, M.D., and reinstating those claims and cross claims to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff’s decedent commenced this action seeking damages for injuries that she allegedly sustained as a result of defendants’ negligence in failing to diagnose and treat a cervical abscess. Thereafter, defendants Kaleida Health, doing business as Buffalo General Hospital (Kaleida), Andrew Poreda, M.D. and University

Emergency Medical Services, Inc. (UEMS), and Erie County Medical Center Corporation (ECMC) filed motions for summary judgment dismissing the amended complaint and cross claims against them. Defendant Joseph Riedy Jr., D.O. moved for summary judgment dismissing the amended complaint against him.

In appeal No. 1, plaintiff appeals from an order that, inter alia, granted the motion of Kaleida with respect to the claims and cross claims against it based on Poreda's alleged failure to document decedent's medical record, request a neurological consult, order appropriate lab studies, properly monitor decedent's symptoms, and appropriately respond to decedent's complaints, signs, and symptoms (Kaleida-Poreda claims); and based on Riedy's alleged failure to document the medical record, consult with decedent's primary care physician, order diagnostic films earlier, request a neurological or other consult earlier, and order appropriate lab work (Kaleida-Riedy claims). The order also granted the motion with respect to the claims and cross claims against Kaleida based upon the alleged negligence of Samir A. Bute, M.D. and Nida Arabi, M.D., inasmuch as those doctors never treated decedent (Bute-Arabi claims), and based upon the alleged negligence of Kaleida's other staff, excluding Bute, Arabi, Poreda and Riedy (Kaleida staff claims). In appeal No. 2, plaintiff appeals from an order that, inter alia, granted the motion of Poreda and UEMS with respect to those claims and cross claims against them related to Poreda's alleged failure to consult with decedent's family members, because that contention was not contained within the bill of particulars and amended complaint; and Poreda's alleged failure to review a report of November 18, 2013, order a neurological consult, order appropriate lab studies, and monitor decedent's vitals, because plaintiff's experts failed to address those allegations, which were set forth in the bill of particulars (UEMS-Poreda claims). The order also granted that motion with respect to claims and cross claims against UEMS based upon the actions of Riedy inasmuch as Riedy was not employed by UEMS (UEMS-Riedy claims). The order further granted the motion with respect to claims and cross claims against UEMS based on the alleged negligence of its other staff members (i.e., those other than Poreda and Riedy) related to decedent's care in November 2013 because, inter alia, plaintiff failed to connect the alleged negligent acts to a specific employee in the bill of particulars and the amended complaint, and because the allegations made by plaintiff's emergency medicine expert regarding the negligent acts of unnamed actors—such as the failure to read decedent's CT scan of November 13 and to order a urinalysis or ultrasound on November 15—were not contained within the bill of particulars and the amended complaint (UEMS staff claims). In appeal No. 3, plaintiff appeals from an order that denied Riedy's motion and, in appeal No. 4, plaintiff appeals from an order that granted ECMC's motion.

Inasmuch as the order in appeal No. 3 denied Riedy's motion, plaintiff is not aggrieved by that order (*see Benedetti v Erie County Med. Ctr. Corp.*, 126 AD3d 1322, 1323 [4th Dept 2015]), and the appeal from that order must therefore be dismissed (*see Kavanaugh v Kavanaugh*, 200 AD3d 1568, 1571 [4th Dept 2021]; *Caffrey v Morse Diesel Intl.*, 279 AD2d 494, 494 [2d Dept 2001]).

Regarding appeal No. 1, we agree with plaintiff that Supreme Court erred in granting Kaleida's motion with respect to the Kaleida-Poreda claims, the Kaleida-Riedy claims, and the Kaleida staff claims. We therefore modify the order in appeal No. 1 accordingly. Even assuming, arguendo, that Kaleida met its initial burden on the motion with respect to those claims, we conclude that plaintiff raised triable issues of fact by submitting the affirmations of his medical experts (*see Haas v F.F. Thompson Hosp., Inc.*, 86 AD3d 913, 914 [4th Dept 2011]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, we conclude that "[t]he conflicting opinions of the experts for plaintiff and [Kaleida] with respect to causation and [the] alleged deviation[s] [of Kaleida's staff] from the accepted standard of medical care present credibility issues that cannot be resolved on a motion for summary judgment" (*Ferlito v Dara*, 306 AD2d 874, 874 [4th Dept 2003]; *see Cooke v Corning Hosp.*, 198 AD3d 1382, 1383 [4th Dept 2021]). We note that plaintiff does not challenge that part of the order granting Kaleida's motion with respect to the Bute-Arabi claims, and plaintiff has therefore abandoned any contention with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

In appeal No. 2, we agree with plaintiff that the court erred in granting the motion of UEMS and Poreda with respect to the UEMS staff claims and the UEMS-Poreda claims, and we therefore modify the order in appeal No. 2 accordingly. Even assuming, arguendo, that UEMS and Poreda met their initial burden on the motion with respect to those claims, we conclude that plaintiff raised triable issues of fact by submitting the affirmations of his medical experts (*see Haas*, 86 AD3d at 914; *see generally Zuckerman*, 49 NY2d at 562). Contrary to the court's determination, plaintiff did not improperly raise new theories of liability regarding those claims in the affirmations of his experts submitted in opposition to the motion of UEMS and Poreda. In determining whether a new theory of liability has been alleged by a plaintiff in opposition to a defendant's motion for summary judgment, we must initially focus on the allegations in the complaint (*see generally Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]). The amended complaint here is especially detailed, setting forth specific dates, times, medical providers, and treatment that was, and was not, provided. Further, in a medical malpractice action, a plaintiff's bill of particulars need only make a "reasonable attempt to amplify the pleading, limit the proof and prevent surprise at trial" (*Randall v Pech*, 51 AD2d 864, 865 [4th Dept 1976] [internal quotation marks omitted]). Here, plaintiff's bills of particulars to UEMS and Poreda make a reasonable attempt to amplify the allegations in the amended complaint. To the extent that the court relied on *Walker v Caruana* (175 AD3d 1807 [4th Dept 2019]) in determining that plaintiff improperly alleged new theories of liability in opposition to the motion of UEMS and Poreda, *Walker* is distinguishable. Unlike in *Walker*, here there has been no change in theory of liability, and it has consistently been plaintiff's theory that defendants failed to properly diagnose and treat decedent's cervical abscess (*see Jeannette S. v Williot*, 179 AD3d 1479, 1481 [4th Dept 2020]). We note that plaintiff does not challenge that part of the order granting the motion of UEMS and Poreda with respect to the UEMS-Riedy claims, and plaintiff has

therefore abandoned any contention with respect thereto (*see Ciesinski*, 202 AD2d at 984).

In appeal No. 4, we agree with plaintiff that the court erred in granting the motion of ECMC, and we therefore reverse the order in that appeal. Even assuming, arguendo, that ECMC met its initial burden on the motion, we conclude that plaintiff raised triable issues of fact by submitting the affirmations of his medical experts (*see Haas*, 86 AD3d at 914; *see generally Zuckerman*, 49 NY2d at 562). Contrary to the court's determination, plaintiff was not required to provide the name of every allegedly negligent actor engaging in conduct within the scope of employment for ECMC (*see generally Goodwin v Pretorius*, 105 AD3d 207, 216 [4th Dept 2013]) inasmuch as ECMC was on notice of the claims against it based on the allegations in the amended complaint, as amplified by plaintiff's bill of particulars to ECMC, noting failures and omissions by ECMC's employees. Indeed, ECMC is in the best position to identify its own employees and contractors and, as the creator of decedent's medical records, ECMC had notice of who treated decedent and of any allegations of negligence by its nursing staff.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

546

CA 21-00800

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

JOHN M. BRAXTON, AS ADMINISTRATOR OF THE ESTATE OF
SHEILA M. BRAXTON, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION, ET AL.,
DEFENDANTS,
UNIVERSITY EMERGENCY MEDICAL SERVICES, INC., AND
ANDREW POREDA, M.D., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

EAGAN & HEIMER, PLLC, BUFFALO (JAMES E. EAGAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 13, 2021. The order granted in part the motion of defendants University Emergency Medical Services, Inc. and Andrew Poreda, M.D., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendants University Emergency Medical Services, Inc. and Andrew Poreda, M.D. with respect to the claims and cross claims against those defendants related to the alleged failure of Andrew Poreda, M.D. to consult with the family members of plaintiff’s decedent and to review a report of November 18, 2013, order a neurological consult, order appropriate lab studies, and monitor decedent’s vitals; and with respect to the claims and cross claims against University Emergency Medical Services, Inc. based on the alleged negligence of its staff (other than Andrew Poreda, M.D. and defendant Joseph Riedy, D.O.) related to decedent’s care in November 2013, and reinstating those claims and cross claims to that extent and as modified the order is affirmed without costs. Same memorandum as in *Braxton v Erie County Med. Ctr. Corp.* ([appeal No. 1] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

547

CA 21-00801

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

JOHN M. BRAXTON, AS ADMINISTRATOR OF THE ESTATE OF
SHEILA M. BRAXTON, DECEASED, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION, ET AL.,
DEFENDANTS,
AND JOSEPH RIEDY, JR., D.O., DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE TARANTINO LAW FIRM, LLP, BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 20, 2021. The order denied the motion of defendant Joseph Riedy, Jr., D.O., for summary judgment dismissing the amended complaint against him.

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

Same memorandum as in *Braxton v Erie County Med. Ctr. Corp.* ([appeal No. 1] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

548

CA 21-00802

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

JOHN M. BRAXTON, AS ADMINISTRATOR OF THE ESTATE OF
SHEILA M. BRAXTON, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 4.)

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RICOTTA MATTREY CALLOCCHIA MARKEL & CASSERT, BUFFALO (BRYAN J. DANIELS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 20, 2021. The order granted the motion of defendant Erie County Medical Center Corporation for summary judgment dismissing the amended complaint and all cross claims against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendant Erie County Medical Center Corporation is denied, and the amended complaint and cross claims against that defendant are reinstated.

Same memorandum as in *Braxton v Erie County Med. Ctr. Corp.* ([appeal No. 1] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

558

CA 21-00921

PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

KRISTIE R. TOUSANT, INDIVIDUALLY AND AS LEGAL
GUARDIAN OF ANTHONY J. FARRELL,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN M. ARAGONA AND CENTRAL SQUARE CENTRAL
SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

THE LONG LAW FIRM, PLLC, SYRACUSE (JAMES AUSTIN LONG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered January 27, 2020. The order, insofar as appealed from, denied the motion of defendants insofar as it sought to compel production of the cell phone of Anthony J. Farrell.

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

Same memorandum as in *Tousant v Aragona* ([appeal No. 2] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

559

CA 21-00922

PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

KRISTIE R. TOUSANT, INDIVIDUALLY AND AS LEGAL GUARDIAN OF ANTHONY J. FARRELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN M. ARAGONA AND CENTRAL SQUARE CENTRAL SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

THE LONG LAW FIRM, PLLC, SYRACUSE (JAMES AUSTIN LONG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered June 11, 2021. The order, insofar as appealed from, denied the motion of defendants to compel production of the cell phone of Anthony J. Farrell.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted, and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this negligence action, individually and on behalf of her son, Anthony J. Farrell, seeking damages for injuries sustained by Farrell when the vehicle he was operating collided with a school bus operated by defendant John M. Aragona and owned by defendant Central Square Central School District. The accident left Farrell in a vegetative state.

During discovery, defendants moved for production of and information from Farrell’s cell phone, seeking to determine whether he was using the phone at or near the time of the accident. Supreme Court denied the motion insofar as it sought production of the phone, but granted the motion to the extent it sought cell phone records from Farrell’s service provider. Defendants appeal, in appeal No. 1, from the order insofar as it denied their request to compel production of the cell phone. We affirm the order in that appeal for reasons stated in the December 6, 2019 bench decision at Supreme Court.

Although the cell phone records subsequently obtained from the service provider established that Farrell was not talking on his phone

at the time of the accident, they did not indicate whether he opened or sent text messages during the relevant time period. On the phone used by Farrell, texts were sent as encrypted "iMessages" that do not show up on phone records. Moreover, the phone records did not indicate whether Farrell was using any applications on his phone, such as Snapchat or Facebook.

Defendants thereafter filed a second motion, once again seeking production of and access to Farrell's cell phone, asserting that examination of the device is necessary to establish whether Farrell was using it at the time of the accident for purposes other than verbal communication. Defendants appeal, in appeal No. 2, from an order denying their motion. In ruling for a second time that plaintiff did not have to produce Farrell's cell phone for examination, the court reasoned that "[n]o factual basis has been presented [by defendants] to suggest that the cell phone [was] being used for texting and this is reasonably to be required before any further discovery concerning the cell phone" is ordered.

As a preliminary matter, we reject any contention that our determination is preordained by the law of the case doctrine (*see Smalley v Harley-Davidson Motor Co. Group LLC*, 134 AD3d 1490, 1492 [4th Dept 2015]; *see generally Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]) and, therefore, we address the merits of defendants' contentions.

Although "[m]odern cell phones . . . hold for many Americans 'the privacies of life' " (*Riley v California*, 573 US 373, 403 [2014]), New York has a liberal disclosure statute, requiring "full disclosure of *all* matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a] [emphasis added]; *see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376 [1991]). As defendants correctly contend, "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks *actually exist*; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information" (*Forman v Henkin*, 30 NY3d 656, 664 [2018] [emphasis added]).

Defendants "satisf[ied] the threshold requirement that the[ir] request [was] reasonably calculated to yield information that [was] 'material and necessary'—i.e., relevant—" to issues involved in the action (*id.* at 661). "The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). In support of the motion in appeal No. 2, defendants submitted evidence that Farrell was traveling at close to 80 miles per hour seconds before the accident, which occurred on a residential road near an elementary school. Defendants also submitted evidence that Farrell did not brake before colliding with the school bus. Evidence concerning whether Farrell was distracted before the collision is relevant to the issues involved in this negligence action, and defendants' request for production of or access to his cellular phone is reasonably calculated to yield relevant information (*see Forman*, 30

NY3d at 664), especially considering that Farrell is unable, due to his injuries, to provide any information regarding his activities in the moments before the accident (*cf. Detraglia v Grant*, 68 AD3d 1307, 1307 [3d Dept 2009]).

Whether Farrell was using his cellular phone at the time of his accident constitutes information that will certainly "lead to the discovery of information bearing on the claims" (*Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]; *see Vyas v Campbell*, 4 AD3d 417, 418 [2d Dept 2004]). Indeed, "[i]f there is *any* possibility that the information is sought in good faith for possible use as evidence-in-chief or for cross-examination or in rebuttal, it should be considered [matter] material in the action" (*Vargas v Lee*, 170 AD3d 1073, 1075 [2d Dept 2019] [emphasis added and internal quotation marks omitted]).

As defendants contend, their motion papers in appeal No. 2 "adequately demonstrated that the issue of whether [Farrell] was using [his] cellular telephone at the time of the accident was relevant to the . . . contention that [Farrell] was negligent in the operation of [his] motor vehicle" (*D'Alessandro v Nassau Health Care Corp.*, 137 AD3d 1195, 1196 [2d Dept 2016]; *cf. Evans v Roman*, 172 AD3d 501, 502 [1st Dept 2019]). We therefore reverse the order in appeal No. 2 insofar as appealed from, grant the motion, and remit the matter to Supreme Court to fashion "an order tailored to [this] controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials" (*Forman*, 30 NY3d at 665; *see generally Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 747 [2000]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

560
CA 21-01255
PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

MICHAEL PERRI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARK CASE, DOING BUSINESS AS CASE'S MINI STORAGE,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

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

SANTIAGO BURGER LLP, ROCHESTER (FERNANDO SANTIAGO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered August 10, 2021. The order and judgment, among other things, granted in part the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff entered into a lease agreement with defendant Mark Case, doing business as Case's Mini Storage (Case), in which plaintiff held a right of first refusal to purchase the leased premises. Under the terms of that lease provision, Case was obligated to notify plaintiff in writing of the terms of any bona fide offer Case received for the property. Plaintiff thereafter had 10 business days to purchase the property on terms identical to those offered by the third party. Plaintiff commenced this action to enforce that contractual right after Case allegedly entered into a purchase agreement for the property with defendants Brian and Jeffrey Cook (Cook defendants) without notifying plaintiff of the terms of that agreement and without offering plaintiff the right of first refusal. In appeal No. 1, Case appeals from an order and judgment that, inter alia, granted plaintiff's motion for summary judgment on his causes of action for breach of contract and declaratory judgment and on his cause of action for specific performance to the extent that it sought to compel Case to convey a purchase offer to him. In appeal No. 2, Case and the Cook defendants (collectively, defendants) separately appeal from an order denying Case's motion, joined by the Cook defendants, for "leave to reargue and/or renew" their opposition to plaintiff's motion. In appeal No. 3, defendants separately appeal

from an order that, inter alia, granted in part plaintiff's motion seeking to hold Case in contempt—i.e., for failing to comply with the order and judgment in appeal No. 1—by granting that motion to the extent that it sought to hold Case in civil contempt.

Addressing first appeal No. 1, we note as an initial matter that the record does not contain a notice of appeal from the order and judgment with respect to the Cook defendants and, thus, the Cook defendants' contentions pertaining to the order and judgment are not properly before us (*see GRJH, Inc. v 3680 Props., Inc.*, 179 AD3d 1177, 1178 [3d Dept 2020]; *Hageman v Santasiero*, 277 AD2d 1049, 1049-1050 [4th Dept 2000]; *see also Gassab v R.T.R.L.L.C.*, 69 AD3d 511, 512 [1st Dept 2010]; *see generally* 22 NYCRR 1250.7 [b] [4]).

We reject Case's contention that Supreme Court erred in granting plaintiff's motion for summary judgment on his breach of contract and declaratory judgment causes of action against Case and on the specific performance cause of action to the extent that it sought to compel Case to convey a purchase offer to him. "A right of first refusal is a right to receive an offer, and the grantor's failure or refusal to extend the holder the opportunity to exercise the right constitutes a breach" (*Cipriano v Glen Cove Lodge #1458, B.P.O.E.*, 1 NY3d 53, 60 [2003]). "A rightholder may be familiar with the broad contours of the grantor's transaction with a third party, but may nevertheless be handicapped in exercising the right when there is no specific offer from the grantor" (*id.*). Here, plaintiff submitted in the support of his motion the lease agreement containing the right of first refusal provision requiring Case to give plaintiff the right of first refusal in the event of a sale of the property. Moreover, it is undisputed that, prior to the prospective sale to the Cook defendants, Case failed to notify plaintiff of the prospective sale as required under the agreement, including its specific terms, and thus failed to extend to plaintiff the opportunity to exercise his right of first refusal. Thus, we conclude that, contrary to Case's contention, plaintiff met his initial burden on his motion of establishing that Case breached the terms of the right of first refusal of the lease agreement (*see generally id.*; *Amalfi, Inc. v 428 Co., Inc.*, 153 AD3d 1610, 1611 [4th Dept 2017]; *Alford v Estate of Wrench*, 172 AD2d 965, 966 [3d Dept 1991], *lv denied* 78 NY2d 858 [1991]). In opposition, Case failed to raise a triable issue of fact. To the extent that Case contends that he raised triable issues of fact whether plaintiff waived the right of first refusal by sending a nonconforming offer after he apparently learned of the Cook defendants' purchase offer and whether plaintiff was ready, willing and able to perform, we reject those contentions. Inasmuch as plaintiff was not afforded the notice and offer as required from Case in the first instance, Case's submissions do not raise a triable issue of fact in those respects (*see generally Horst v City of Syracuse*, 191 AD3d 1297, 1301 [4th Dept 2021]).

Case also failed to raise a triable issue of fact whether the right of first refusal is void for lack of consideration or ambiguity in its terms. A right of first refusal is subject to the statute of frauds, which provides that "[a] contract . . . for the sale . . . of any real property, or an interest therein, is void unless the contract

or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged" (General Obligations Law § 5-703 [2]). Contrary to Case's contention, the lease agreement's preamble recited the consideration to be given by plaintiff, which covered the right of first refusal clause (*see generally Martin v Seeley*, 191 AD3d 1335, 1337-1338 [4th Dept 2021]; *Loika v Howard*, 103 AD2d 874, 875 [3d Dept 1984]), and the right of first refusal was unambiguous as to Case's obligation to provide the written offer (*see generally First Am. Commercial Bancorp, Inc. v Saatchi & Saatchi Rowland, Inc.*, 55 AD3d 1264, 1266 [4th Dept 2008], *lv denied in part and dismissed in part* 12 NY3d 829 [2009]).

We conclude that appeal No. 2 must be dismissed (*see Angelhow v Chahfe*, 174 AD3d 1285, 1288 [4th Dept 2019]). Although the motion at issue in that appeal sought "leave to reargue and/or renew" with respect to plaintiff's prior motion for summary judgment, defendants failed to offer new facts that were unavailable at the time of plaintiff's prior motion. Thus, the motion for "leave to reargue and/or renew" was actually one for leave to reargue only, and no appeal lies from an order denying such a motion (*see id.*; *Hill v Milan*, 89 AD3d 1458, 1458 [4th Dept 2011]).

Finally, in appeal No. 3, the Cook defendants' appeal must be dismissed inasmuch as they are not aggrieved by the order in that appeal (*see* CPLR 5511; *Matter of Guck v Prinzing*, 100 AD3d 1507, 1508 [4th Dept 2012], *lv denied* 21 NY3d 851 [2013]). We reject Case's contention that the court erred in granting plaintiff's motion to the extent that it sought to hold Case in civil contempt. Plaintiff established by clear and convincing evidence that there was a lawful and unequivocal court order that required Case to extend plaintiff an offer to purchase the property; that Case disobeyed the order; that Case had knowledge of the order; and that plaintiff was prejudiced by Case's failure to comply with the order (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; *Riccelli Enters., Inc. v State of N.Y. Workers' Compensation Bd.*, 142 AD3d 1352, 1353-1354 [4th Dept 2016]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

561

CA 21-01631

PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

MICHAEL PERRI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARK CASE, DOING BUSINESS AS CASE'S MINI STORAGE,
BRIAN COOK AND JEFFREY COOK, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

REFERMAT HURWITZ & DANIEL PLLC, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR DEFENDANT-APPELLANT MARK CASE, DOING BUSINESS AS CASE'S MINI STORAGE.

NIXON PEABODY LLP, ROCHESTER (ZACHARY C. OSINSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS BRIAN COOK AND JEFFREY COOK.

SANTIAGO BURGER LLP, ROCHESTER (FERNANDO SANTIAGO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered October 7, 2021. The order denied the motion of defendant Mark Case, doing business as Case's Mini Storage for leave to reargue and renew the opposition to plaintiff's motion for summary judgment.

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

Same memorandum as in *Perri v Case* ([appeal No. 1] — AD3d — [Aug. 4, 2022] [4th Dept 2022]).

Entered: August 4, 2022 Ann Dillon Flynn
Clerk of the Court

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

562

CA 22-00035

PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

MICHAEL PERRI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARK CASE, DOING BUSINESS AS CASE'S MINI STORAGE,
BRIAN COOK AND JEFFREY COOK, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

REFERMAT HURWITZ & DANIEL PLLC, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR DEFENDANT-APPELLANT MARK CASE, DOING BUSINESS AS CASE'S MINI STORAGE.

NIXON PEABODY LLP, ROCHESTER (ZACHARY C. OSINSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS BRIAN COOK AND JEFFREY COOK.

SANTIAGO BURGER LLP, ROCHESTER (FERNANDO SANTIAGO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered December 30, 2021. The order, among other things, granted in part the motion of plaintiff to hold defendant Mark Case, doing business as Case's Mini Storage, in contempt.

It is hereby ORDERED that said appeal by defendants Brian Cook and Jeffrey Cook is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Perri v Case* ([appeal No. 1] — AD3d — [Aug. 4, 2002] [4th Dept 2022]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

563
CA 21-01114
PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

KEITH A. CAMPBELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JULIE A. CAMPBELL, DEFENDANT-APPELLANT.

TABANO & ASSOCIATES, PLLC, LATHAM (MARIA C. TEBANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHARLES W. ENGELBRECHT, ROME, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (John H. Crandall, A.J.), entered June 22, 2021 in a divorce action. The order determined that the parties' August 31, 2017 postnuptial agreement was invalid and unenforceable as a matter of law.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the counterclaim in the second amended answer is granted insofar as it seeks a determination that the August 31, 2017 postnuptial agreement is valid and enforceable as a matter of law.

Memorandum: The parties were married in June 1989 and entered into a postnuptial agreement on August 31, 2017 (2017 agreement). They had entered into two prior postnuptial agreements in 2010 and 2013, which, like the 2017 agreement, set forth the financial separation of their assets and obligations in the event of divorce. Unlike the 2017 agreement, however, the prior agreements were never properly acknowledged pursuant to Domestic Relations Law § 236 (B) (3). In July 2019, plaintiff commenced this action for divorce. Defendant served a second amended answer with a counterclaim seeking, inter alia, to incorporate but not merge into the judgment of divorce the 2017 agreement. In reply, plaintiff asserted affirmative defenses alleging that the 2017 agreement should be found null and void or set aside on the grounds that, inter alia, he signed the 2017 agreement under duress and that the 2017 agreement was unconscionable. Thereafter, defendant moved for summary judgment seeking, inter alia, an order dismissing plaintiff's affirmative defenses and determining that the 2017 agreement is valid and enforceable. Following a hearing, Supreme Court concluded that, based on the totality of the circumstances, including plaintiff's allegations of emotional abuse in connection with the execution of the 2017 agreement, the 2017 agreement was unconscionable and manifestly unfair. Thus, the court determined that the 2017 agreement was invalid and unenforceable as a

matter of law. Defendant appeals, and we reverse.

In general, postnuptial agreements are subject to ordinary principles of contract law (*see Levine v Levine*, 56 NY2d 42, 47 [1982]; *O'Malley v O'Malley*, 41 AD3d 449, 451 [2d Dept 2007]). New York has a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements" (*Matter of Greiff*, 92 NY2d 341, 344 [1998]; *see Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001]). Thus, "there is a heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties" (*Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986] [internal quotation marks omitted]). However, an agreement between spouses may nevertheless be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct (*see Christian v Christian*, 42 NY2d 63, 73 [1977]; *Skotnicki v Skotnicki*, 237 AD2d 974, 974-975 [4th Dept 1997]; *see generally Tuzzolino v Tuzzolino*, 156 AD3d 1402, 1403 [4th Dept 2017]).

Initially, we conclude that the court erred insofar as it held that plaintiff signed the 2017 agreement under duress as a result of defendant's emotional abuse. An agreement is voidable on the ground of duress "when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his [or her] free will" (*Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 [1971], *rearg denied* 29 NY2d 749 [1971]). Generally, "the aggrieved party must demonstrate that threats of an unlawful act compelled his or her performance of an act which he or she had the legal right to abstain from performing" (*Polito v Polito*, 121 AD2d 614, 614-615 [2d Dept 1986], *lv dismissed* 68 NY2d 981 [1986]). "[T]he threat must be such as to deprive the party of the exercise of free will" (*id.* at 615). Here, even accepting as true plaintiff's allegations that defendant persistently urged him to sign the 2017 agreement and threatened to tell the parties' children of plaintiff's wrongful actions in the past, such conduct did not amount to any unlawful acts on the part of defendant sufficient to constitute duress (*see generally Dawes v Dawes*, 110 AD3d 1450, 1451 [4th Dept 2013]).

We further conclude that, contrary to the court's determination, plaintiff failed to sustain his burden of establishing that the 2017 agreement was unconscionable. "An agreement is unconscionable if it is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" (*Sanfilippo v Sanfilippo*, 137 AD3d 773, 774 [2d Dept 2016] [internal quotation marks omitted]; *see Christian*, 42 NY2d at 71; *Skotnicki*, 237 AD2d at 975). The fact that defendant was represented by counsel but plaintiff was not is a factor for the court to consider, but is not dispositive (*see Tuzzolino*, 156 AD3d at 1403). As relevant here, in the 2017 agreement each party waived his or her rights in the other party's separate property, which was defined in that agreement. Included in defendant's separate property was any property acquired in her name alone, as well as her checking account,

the marital residence, which she purchased from the proceeds of a home she previously owned, her 401k account, her retirement pension and other assets. Included in plaintiff's separate property was any property acquired in his name alone, as well his checking accounts, his two 401k accounts, and other assets. Additionally, the parties waived any right to receive maintenance. Plaintiff does not dispute that he signed the three postnuptial agreements during the course of the marriage, and the testimony of both parties revealed that the parties conducted their finances in accordance with the terms of the agreements. Thus, it cannot be said that the 2017 agreement was such that it would "shock the conscience and confound the judgment of any [person] of common sense" (*Christian*, 42 NY2d at 71; *cf. Dawes*, 110 AD3d at 1451). We therefore conclude that the 2017 agreement is not unconscionable, nor was it the product of overreaching by defendant and, thus, the court erred in determining that the 2017 agreement is invalid and unenforceable as a matter of law.

Entered: August 4, 2022 Ann Dillon Flynn
Clerk of the Court

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

564
CA 21-00563
PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

FIKA MIDWIFERY PLLC, AND MAURA WINKLER, CNM,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

INDEPENDENT HEALTH ASSOCIATION, INC.,
DEFENDANT-RESPONDENT.

SCHRODER, JOSEPH & ASSOCIATES, LLP, BUFFALO (JENNIFER L. FRIEDMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

NIXON PEABODY LLP, BUFFALO (SUSAN C. RONEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 26, 2021. The order and judgment granted defendant's motion to dismiss the complaint in its entirety with prejudice.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first, second, and third causes of action and by providing that the seventh cause of action is dismissed without prejudice and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs, providers of midwifery services, commenced this action against defendant, a health care benefits provider, asserting eight causes of action related to, inter alia, defendant's alleged tortious interference with plaintiffs' business relations with patients, denial or underpayment of claims related to services provided by plaintiffs, and defamatory statements about plaintiffs. Defendant moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint in its entirety with prejudice, and Supreme Court granted that motion. We agree with plaintiffs that the court erred in granting the motion insofar as it sought dismissal of plaintiffs' first, second, and third causes of action, for tortious interference with business relations, defamation, and an injunction, and we modify the order accordingly. We also conclude that dismissal of the seventh cause of action, alleging a violation of Insurance Law § 3224-a, should have been without prejudice, and we further modify the order accordingly.

"In assessing 'a motion to dismiss pursuant to CPLR 3211, the

pleading is to be afforded a liberal construction . . . We 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' (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). 'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss' (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005])" (*Pottorff v Centra Fin. Group*, *Inc.*, 192 AD3d 1552, 1553 [4th Dept 2021]; *see J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013]).

With respect to the first cause of action, for tortious interference with business relations, the party asserting such a claim must allege "(1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part and denied in part* 14 NY3d 736 [2010]; *see Conklin v Laxen*, 180 AD3d 1358, 1359 [4th Dept 2020]; *see generally Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 [2004]).

Here, plaintiffs alleged that they had business relationships with third parties, i.e., patients, and that defendant knew of and intentionally interfered with those relationships. Additionally, plaintiffs alleged that defendant acted solely out of malice or used improper means (defamation) that could amount to an independent tort. Finally, plaintiffs alleged that defendant's interference caused injury to their relationships with their patients. Viewing the complaint liberally and accepting the facts as alleged as true (*see Pottorff*, 192 AD3d at 1553), we conclude that the complaint states a cause of action for tortious interference with business relations.

The second cause of action is for defamation, the elements of which are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se . . . A plaintiff in a defamation action must allege that he or she suffered special damages—the loss of something having economic or pecuniary value . . . , unless the defamatory statement falls within one of the four per se exceptions, which consist of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman" (*Conklin*, 180 AD3d at 1360 [internal quotation marks omitted]; *see Spring v County of Monroe*, 151 AD3d 1694, 1696-1697 [4th Dept 2017]). In addition, a plaintiff must "set forth in the complaint the particular words complained of, as required by CPLR 3016 (a)," and must "state the time, place, and manner of the allegedly false statements and to whom such statements were made" (*Wegner v Town of Cheektowaga*, 159 AD3d 1348, 1349 [4th Dept 2018] [internal quotation marks omitted]; *see Nesathurai v University at*

Buffalo, State Univ. of N.Y., 23 AD3d 1070, 1072 [4th Dept 2005]).

Where, as here, a plaintiff alleges that the defamatory statements were made by the employees of a defendant, the "employer may be held liable under a theory of respondeat superior for the intentional torts of its employees when done within the scope of employment" (*Votsis v ADP, LLC*, 187 AD3d 1490, 1491 [4th Dept 2020]; *see Buck v Zwelling*, 272 AD2d 895, 896 [4th Dept 2000]; *see generally Riviello v Waldron*, 47 NY2d 297, 302-303 [1979]). "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his [or her] employer, or if his [or her] act may be reasonably said to be necessary or incidental to such employment" (*Votsis*, 187 AD3d at 1491 [internal quotation marks omitted]). "[T]he issue whether an employee is acting within the scope of his or her employment is ordinarily for jury resolution" (*Buck*, 272 AD2d at 896).

Here, plaintiffs specified the words that were allegedly defamatory and generally identified the time, place, and manner of those statements as well as to whom those statements were made. Some of the alleged defamatory statements could be interpreted as charging plaintiffs with a serious crime and, at the very least, tended to injure them in their trade or profession. Plaintiffs further alleged that the challenged statements were false and defamatory; were made without privilege and with actual knowledge that they were false; and were made with actual malice and with a wrongful and willful intent to injure plaintiffs' professional reputation.

Even if the complaint does not specifically state that the employees were acting on behalf of defendant at the moment of their statements, we are to afford the complaint "every possible favorable inference" (*Leon*, 84 NY2d at 87), and we can reasonably infer here that the employees' comments and actions were "incidental" to their employment (*Votsis*, 187 AD3d at 1491). We thus conclude that the complaint alleges facts sufficient to state a cause of action for defamation.

With respect to the third cause of action, for an injunction, it is well settled that, "[t]o sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a violation of a right presently occurring, or threatened and imminent, that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor . . . However, injunctive relief is simply not available when the plaintiff does not have any . . . substantive cause of action against [the] defendants . . . Although it is permissible to plead a cause of action for a permanent injunction, permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted" (*Hogue v Village of Dering Harbor*, 199 AD3d 900, 902-903 [2d Dept 2021] [internal quotation marks omitted]).

Here, plaintiffs have alleged a violation of their rights, that they have no adequate remedy at law, and that irreparable harm will

befall them absent an injunction. Inasmuch as we have concluded that the complaint sufficiently alleges two potential substantive torts, we further conclude that the complaint states a cause of action for an injunction.

With respect to the seventh cause of action, for a violation of Insurance Law § 3224-a, also known as the Prompt Pay Law, that law "imposes standards upon insurers for the 'prompt, fair and equitable' payment of claims for health care services. The statute sets forth time frames within which an insurer must either pay a claim, notify the claimant of the reason for denying a claim, or request additional information. An insurer that fails to comply with the provisions of the Prompt Pay Law is obligated to pay the full amount of the claim, with interest" (*Maimonides Med. Ctr. v First United Am. Life Ins. Co.*, 116 AD3d 207, 208 [2d Dept 2014]). In its seminal decision on the issue, the Second Department held that the statute provides for an implied private right of action for health care providers, such as plaintiffs, against health insurers (*see id.* at 208-209; *cf. Medical Socy. of State of N.Y. v Oxford Health Plans, Inc.*, 15 AD3d 206, 206 [1st Dept 2005], *abrogated on other grounds by Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169 [2021]; *see generally Carrier v Salvation Army*, 88 NY2d 298, 302 [1996]).

In support of the seventh cause of action, plaintiffs alleged that defendant failed to fully reimburse them for claims within 45 days and that there was no evidence that plaintiffs' claims were improper. Plaintiffs did not, however, specify the claims that were unpaid or underpaid (*cf. Maimonides Med. Ctr.*, 116 AD3d at 209-210). Although the complaint here is to be afforded a liberal construction (*see Leon*, 84 NY2d at 87), "the favorable treatment accorded to a . . . complaint is not limitless and, as [a result], conclusory allegations—*claims consisting of bare legal conclusions with no factual specificity*—are insufficient to survive a motion to dismiss" (*F.F. v State of New York*, 194 AD3d 80, 83-84 [3d Dept 2021], *appeal dismissed and lv denied* 37 NY3d 1040 [2021], *cert denied* — US —, 142 S Ct 2738 [2022] [emphasis added and internal quotation marks omitted]; *see Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Medical Care of W.N.Y. v Allstate Ins. Co.*, 175 AD3d 878, 879 [4th Dept 2019]). Even if we were to consider affidavits of plaintiff Maura Winkler, CNM in an effort to remedy the defect in the complaint (*see Leon*, 84 NY2d at 88), there is nothing in any affidavit that provides the requisite factual details. Rather, plaintiffs merely contend that defendant knows which claims it denied or underpaid. We thus conclude that the court did not err in granting the motion insofar as it sought dismissal of the seventh cause of action. Nevertheless, we agree with plaintiffs that the dismissal of that cause of action should have been without prejudice (*see Spine Surgery of Buffalo Niagara v GEICO Cas. Co.*, 179 AD3d 1547, 1547 [4th Dept 2020]; *Clark v New York State Off. of Parks, Recreation & Historic Preserv.*, 288 AD2d 934, 935 [4th Dept 2001]).

We reject plaintiffs' contention that the court erred in dismissing the remaining four causes of action. With respect to the

fourth cause of action, for a violation of Education Law article 140, the statutory provisions at issue do not explicitly provide for a private cause of action and, as a result, “recovery may be had under the statute[s] only if a legislative intent to create such a right of action is ‘fairly implied’ in the statutory provisions and their legislative history” (*Brian Hoxie’s Painting Co. v Cato-Meridian Cent. School Dist.*, 76 NY2d 207, 211 [1990], quoting *Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 [1989]; *see Ader v Guzman*, 135 AD3d 671, 672 [2d Dept 2016]). Here, plaintiffs failed to establish that a right to a private cause of action can be inferred from the provisions of Education Law article 140 (*see Carrier*, 88 NY2d at 302; *Sheehy*, 73 NY2d at 633; *Ader*, 135 AD3d at 672-673).

With respect to the fifth cause of action, for a violation of General Business Law § 349, we conclude that plaintiffs’ allegations do not “fall within the ambit of the statute” (*Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]; *see JD&K Assoc., LLC v Selective Ins. Group, Inc.*, 143 AD3d 1232, 1233 [4th Dept 2016]) inasmuch as “[t]he gravamen of the complaint is not consumer injury or harm to the public interest but, rather, harm to plaintiff[s’] business” (*Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1661 [4th Dept 2009]; *see Ideal You Weight Loss Ctr., LLC v Zillioux*, 174 AD3d 1473, 1475 [4th Dept 2019]).

Inasmuch as New York does not recognize civil conspiracy to commit a tort as an independent cause of action (*see Cohen & Lombardo, P.C. v Connors*, 169 AD3d 1399, 1402 [4th Dept 2019]), we further conclude that the court properly dismissed the sixth cause of action, for civil conspiracy.

With respect to the eighth cause of action, for breach of the covenant of good faith and fair dealing, we conclude that the court properly dismissed that cause of action. It is well settled that, “in the absence of a valid contract, dismissal of [a] cause of action to recover damages for breach of the implied covenant of good faith and fair dealing [is] warranted” (*Meyer v New York-Presbyterian Hosp. Queens*, 167 AD3d 996, 997 [2d Dept 2018], *lv denied* 33 NY3d 908 [2019]; *see Randall’s Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 463-464 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]). Here, plaintiffs failed to allege any facts that would establish a contractual relationship with defendant. Indeed, plaintiffs alleged in their complaint that they sought a contractual relationship with defendant but were denied that relationship.

Contrary to plaintiffs’ contention, we conclude that the court did not err in failing to grant plaintiffs leave to replead the fourth, fifth, sixth, and eighth causes of action. “ ‘[T]he decision whether to grant leave to amend pleadings rests within the court’s sound discretion and will not be disturbed absent a clear abuse of that discretion’ ” (*Sherman v St. Elizabeth Med. Ctr.*, 145 AD3d 1461, 1462 [4th Dept 2016]).

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

567

KA 16-01636

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEKSANDRA SUPRUNCHIK, DEFENDANT-APPELLANT.

LELAND D. MCCORMAC, III, PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 20, 2016. The judgment convicted defendant, upon a plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of eight years, and as modified the judgment is affirmed and the matter is remitted to Oneida County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). We agree with defendant that the record does not establish that she validly waived her right to appeal. County Court's "oral waiver colloquy and the written waiver signed by defendant together 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, . . . and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Shanks*, 37 NY3d 244, 253 [2021]; *People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant failed to preserve for our review her conclusory contention that the sentence constitutes cruel and unusual punishment (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v Archibald*, 148 AD3d 1794, 1795 [4th Dept 2017], *lv denied* 29 NY3d 1075 [2017]), 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]).

However, we agree with defendant that the sentence is unduly harsh and severe. "The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*People v Farrar*, 52 NY2d 302, 305 [1981]). Under the particular circumstances of this case, we conclude that a determinate term of imprisonment of eight years, to be followed by the five-year period of postrelease supervision previously imposed by the court, is an appropriate sanction for the crime committed, and we therefore modify the judgment accordingly.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

584

KA 19-00697

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH CRUZ-OCASIO, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 22, 2018. The judgment convicted defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree (four counts) and criminal possession of a controlled substance in the third degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of four counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and three counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We agree with defendant that County Court improperly sentenced him as a second felony offender. Inasmuch as the error "affects the legality of his sentence, the issue is reviewable irrespective of the validity of the waiver of his right to appeal" (*People v Joseph*, 167 AD3d 776, 777 [2d Dept 2018]; *see People v Seaberg*, 74 NY2d 1, 9 [1989]; *People v Rodgers*, 162 AD3d 1500, 1501 [4th Dept 2018], *lv denied* 32 NY3d 940 [2018]). Further, we may "address the illegality of the sentence despite . . . defendant's failure to raise the issue in the trial court" (*People v Mattice*, 152 AD3d 1240, 1240 [4th Dept 2017] [internal quotation marks omitted]). We conclude that defendant should have been sentenced as a second felony drug offender previously convicted of a violent felony (*see* Penal Law § 70.70 [1] [a], [b], [c]; *see generally People v Yusuf*, 19 NY3d 314, 318-319 [2012]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing.

In light of our determination, defendant's remaining contentions

are academic.

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

811/20
CA 19-02266
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF JANE DOE, JOHN DOE,
INDIVIDUALLY AND ON BEHALF OF THEIR SON,
ANONYMOUS, PETITIONERS-RESPONDENTS,

V ORDER

HILTON CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR RESPONDENT-APPELLANT.

HASHMI LAW FIRM, ROCHESTER (KAMRAN F. HASHMI OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered June 19, 2019. The order granted petitioners' motion seeking, inter alia, leave to serve a late notice of claim upon respondent.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 13, 2022, and July 20, 2022,

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

Entered: August 4, 2022 Ann Dillon Flynn

Clerk of the Court

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

888/21
CAF 21-00264
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF DIANNE CLARK AND DAVID CLARK,
PETITIONERS-RESPONDENTS,

V   ORDER

DEXTER D. CLARK, RESPONDENT,
AND CYNTHIA CLIFFORD-CLARK, RESPONDENT-APPELLANT.

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

THERESA GIROUARD, ROME, FOR PETITIONERS-RESPONDENTS.

MARK MALAK, CLINTON, FOR RESPONDENT.

MICHAEL J. LAUCELLO, CLINTON, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered October 5, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioners visitation with the subject child.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 27 and August 1, 2022,

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

Entered: August 4, 2022   Ann Dillon Flynn

Clerk of the Court

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

1000/21
CAF 21-00263
PRESENT: CENTRA, J.P., PERADOTTO, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF DEXTER CLARK,
PETITIONER-RESPONDENT,

V ORDER

CYNTHIA CLIFFORD-CLARK, RESPONDENT-APPELLANT.

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

MARK MALAK, CLINTON, FOR PETITIONER-RESPONDENT.

MICHAEL J. LAUCELLO, CLINTON, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered October 5, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner supervised visitation with the subject child.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 27 and August 1, 2022,

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

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court

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

1065/20
CA 19-01805
PRESENT: PERADOTTO, J.P., NEMOYER, WINSLOW, AND BANNISTER, JJ.

VILLAGER CONSTRUCTION, INC., AND AMERICAN
ALTERNATIVE INSURANCE CORPORATION,
PLAINTIFFS-RESPONDENTS,

V ORDER

ERIE INSURANCE COMPANY, DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

NICOLETTI SPINNER RYAN GULINO PINTER LLP, NEW YORK CITY (EDWARD S. BENSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William K. Taylor, J.), entered September 20, 2019. The order and judgment, among other things, denied defendant’s motion for summary judgment and granted plaintiffs’ motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 4, 2022,

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

Entered: August 4, 2022

Ann Dillon Flynn
Clerk of the Court